

Addressing the Legacy of Northern Ireland's Past



Response to NIO Public Consultation
by
Model Bill Team



**QUEEN'S
UNIVERSITY
BELFAST**



TJI
Transitional
Justice Institute

RESPONSE TO NIO LEGACY CONSULTATION BY MODEL BILL TEAM

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Abbreviations

CAJ	Committee on the Administration of Justice
DoJ	Department of Justice
DPP	Director of Public Prosecutions
ECHR	European Court of Human Rights
FM/DFM	First Minister and deputy First Minister
HET	Historical Enquiries Team
HID	Historical Investigations Directorate (of the Police Ombudsman's Office)
HMIC	Her Majesty's Inspectorate of Constabulary
HIU	Historical Investigations Unit
ICIR	Independent Commission on Information Retrieval
ICLVR	Independent Commission on the Location of Victims' Remains
IRG	Implementation and Reconciliation Group
LIU	Legacy Inquests Unit
NIO	Northern Ireland Office
OHA	Oral History Archive
OPONI	Office of the Police Ombudsman of Northern Ireland
PRONI	Public Records Office of Northern Ireland
PSNI	Police Service of Northern Ireland
RUC	Royal Ulster Constabulary
SHA	Stormont House Agreement
UK	United Kingdom

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Note on Terminology

As ever in the Northern Ireland context, disputes on terminology can arise. Our focus is on providing accessible legal and policy analysis on the current NIO consultation and related work. As such, we have sought to use clear and unambiguous terms to help readers make up their own mind on these complex and sensitive matters from a position of maximum knowledge and information.

The '*draft Bill*' referred to herein is the Draft Northern Ireland (Stormont House Agreement) Bill.

The *conflict*, sometimes referred to as *the Troubles*, refers to actions concerning the constitutional status of Northern Ireland by republican paramilitaries, loyalist paramilitaries, the security forces (in Northern Ireland and the Republic of Ireland) and others from 1966 onwards.

At various points, we discuss *terrorism* and *counter-terrorism*. Terrorism in this context refers to 'the use of violence for political ends' (Emergency Provisions Act 1973, 28 (1) as subsequently amended) and counter-terrorism refers to the actions of the state to prevent, interrupt, and respond to such politically motivated violence.

Dealing with the past or *dealing with the legacy of the past* is a broad term that refers to efforts to address the specific rights and needs of victims, survivors and communities, and initiatives designed to help individuals and broader society to come to terms with the effects of past conflict-related abuses. Usually such efforts include a focus on such themes as truth, justice, reparations, storytelling, acknowledgement, memorialisation, and reconciliation.

The term *victims and survivors* referred to in this report are as defined in the Victims and Survivors (Northern Ireland) Order (2006).

At different junctures, in particular with regard to the debate on a statute of limitations, we refer to *state actors* and *non-state actors*. These terms have a particular meaning in international human rights and international humanitarian law. For current purposes, the term *state actors* refers to the British Army, Royal Ulster Constabulary, MI5 and others involved in counter-terrorist activities during the conflict. The term *non-state actors* refers to loyalist and republican paramilitaries.

As is discussed in the report itself, there have been significant legal and political wrangles concerning the definition of collusion and indeed, we believe that this legislation offers the opportunity to introduce some legal clarity to these debates. For current purposes, *collusion* refers to activities involving state actors in relation to loyalist or republican paramilitaries that may include state actors committing or conspiring to commit particular acts or being involved in omissions or failures to act on something that they ought morally, legally or officially to oppose.

Introduction

If there is consensus on anything in Northern Ireland today, it is that the current approach to ‘dealing with the past’ is not working. In particular, it is failing to deliver for victims and survivors, some of whom have been waiting forty years and more for truth, justice, reparations, and other needs to be addressed. The failure to address the past is placing huge pressure on the criminal justice system, is a constant source of tension on political relationships, and is undermining efforts to build reconciliation within and between communities. In short, the past needs to be addressed and the Stormont House Agreement (SHA) legacy mechanisms discussed herein are realistically the last holistic effort that is likely to be made towards that end. To quote one veteran victims’ advocate who spoke at one of our recent consultation events, the Northern Ireland (Stormont House Agreement) Bill represents ‘the last chance saloon’ for many victims and their families. If this overarching effort is not delivered upon, victims and survivors will have been cruelly failed again. Such an outcome would be unconscionable and a moral blight on our politics.

The Northern Ireland Office consultation that was launched in May 2018 provides detail on the proposed legislation designed to enact the series of mechanisms that were included in the Stormont House Agreement of December 2014. That Agreement was itself the culmination of lengthy negotiations by the five largest Northern Ireland political parties and the British and Irish governments. It retains many of the key features of preceding attempts to deal with the past. Although it is far from perfect, it represents what we believe to be the best possible opportunity to finally address the past.

Background to the Model Bill Process

The Stormont House Agreement proposed to establish four key mechanisms for dealing with the past:

- A Historical Investigations Unit (HIU)
- An Independent Commission for Information Retrieval (ICIR)
- An Oral History Archive (OHA)
- An Implementation and Reconciliation Group (IRG)

In the subsequent Queen’s speech, the UK government pledged to introduce legislation at Westminster to enact these commitments.¹ Given that the Agreement contained only ‘heads of agreement’, it was clear that much work remained to be done in order to create the necessary legislative framework. Drawing on the experience of previous rounds of negotiations, it was also clear that the ‘devil would be in the detail’.

¹ ‘Legislation will be Taken Forward Giving Effect to the Stormont House Agreement in Northern Ireland’, see Cabinet Office, ‘Queen’s Speech 2015’ (27 May 2015) <http://gov.uk/government/speeches/queens-speech-2015> accessed 14 August 2018.

It was in this context that a Model Bill team was established in 2014.² It comprised: Professor Kieran McEvoy and Dr Anna Bryson (Queen's University Belfast), Professor Louise Mallinder (Ulster University), Brian Gormally, Daniel Holder and Gemma McKeown (the Committee on the Administration of Justice). They were assisted by Jeremy Hill, a former Foreign and Commonwealth Office lawyer and advisor to the Consultative Group on the Past, and Daniel Greenberg, a senior barrister and experienced parliamentary draftsman.³

The agreed aims and objectives were to help ensure that:

- The debate on dealing with the past in Northern Ireland is informed by technically sound but accessible legal and policy commentary in order to help people make their own assessments from as informed a position as possible.
- Public discussions on legacy issues are informed by relevant international and comparative experiences, whilst seeking bespoke solutions appropriate to the local context.
- The proposed legislation is fully compliant with the UK's international obligations, particularly Articles 2 and 3 of the European Convention on Human Rights (ECHR 'right to life' and prohibition on torture).
- The proposed legislation remains faithful to the SHA, including its guiding principles.
- The proposed mechanisms are primed to deliver meaningful results for victims, survivors, and broader society harmed by the conflict.
- The overall end result is significantly better than the existing piecemeal approach to dealing with the past.

In order to highlight the full range of issues arising, the team set about developing a Model Bill. This included detailed clauses and explanatory notes that would, if implemented, give effect to the SHA legacy mechanisms. Throughout 2015, developing drafts were discussed with victims and survivors, politicians from across the political spectrum, a wide range of local civil society and NGO organisations, and British and Irish officials.

Once completed, the Model Bill was formally launched in October 2015 at an event at the House of Lords sponsored by former Northern Ireland Office Minister Lord

² All of the team have been working on Northern Ireland legacy issues for some years. The Committee on the Administration of Justice (CAJ) has a long-standing interest in this field culminating in the publication of *The Apparatus of Impunity* in 2015. Kieran McEvoy began working with colleagues at Healing Through Remembering (HTR) on legacy related issues in 2004. He authored their report *Making Peace with the Past: Options for Dealing with the Past in and about Northern Ireland* (Healing Through Remembering 2006). Together with Louise Mallinder, McEvoy established an AHRC funded project which explored the intersection between amnesties, prosecutions and truth recovery which produced several technical reports that fed into the work of the Consultative Group on the Past (2007-2009), Haass-O'Sullivan talks (2013) and Stormont House Agreement (2014) and subsequent debates. See further <http://amnesties-prosecution-public-interest.co.uk> accessed 20 August 2018. In 2014 Bryson, a historian who was previously involved in a number of major peace process related oral history projects joined the staff of QUB law. She also joined the Model Bill team to lead on the Oral History Archive.

³ The legal services engaged were funded by the Queen's University Business Alliance fund.

Dubs and addressed by the then Shadow Northern Ireland Secretary of State, Vernon Coaker, amongst others.

Our approach throughout was to be pragmatic, constructive and to work within the realm of what we considered legally and politically viable. We adhered closely to the text of the SHA and endeavoured to write each substantive clause in a manner that was consistent with both UK domestic law and the relevant international human rights standards. We also adhered to the guiding principles set out in the Stormont House Agreement. To recap these are:

- Promoting reconciliation;
- Upholding the rule of law;
- Acknowledging and addressing the suffering of victims and survivors;
- Facilitating the pursuit of justice and information recovery;
- Human rights compliance; and
- To be balanced, proportionate, transparent, fair and equitable.

As our work progressed, the Legacy Gender Integration Group developed a set of principles to better integrate gender into SHA legislation and implementation.⁴ These have also informed our work.

In the hope that our work might be of some practical and meaningful benefit to those most directly affected by past harms, we offered to provide accessible legal and policy advice (free of charge) to any civil society group interested in dealing with the legacy of the past.

The Current Consultation

Progress on legacy matters has been painfully slow. Further negotiations in 2015 broke down in large part because of a failure to agree an effective way to balance national security considerations on the part of the state and the right to information being sought by those family members who had lost loved ones during the conflict (discussed further below). The Fresh Start Agreement of November 2015⁵ failed to reach consensus on the legislative framework for dealing with the past but efforts continued (albeit on a stop-start basis) through 2016 and 2017. Finally the long-awaited public consultation was launched by the Northern Ireland Office (NIO) in May 2018.

In this public consultation exercise, the NIO produced the following key documents:

⁴ Legacy Gender Integration Group, *Workshops Report: Developing Gender Principles for Dealing with the Legacy of the Past*, Belfast, November 2015
https://www.ulster.ac.uk/_data/assets/pdf_file/0018/74070/Legacy-Gender-Integration-Group_Workshops-Report_Developing-Gender-Principles-for-Dealing-with-the-Legacy-of-the-Past_18-11-2015.pdf accessed 12 August 2018.

⁵ See *A Fresh Start: the Stormont Agreement and Implementation Plan*
<https://www.gov.uk/government/news/a-fresh-start-for-northern-ireland> accessed 12 August 2018.

- ‘Consultation Paper’ with an introduction by the Secretary of State for Northern Ireland
- Draft Northern Ireland (Stormont House Agreement) Bill
- Explanatory notes for the draft Bill
- Paper on the role and function of the independent academic report to be commissioned by the IRG
- Equality screening exercise

These were published alongside summary documents and the original Stormont House Agreement.⁶

Shortly after the launch of this consultation, five members of the original Model Bill team set about preparing this detailed response to these documents. They are:

- Professor Kieran McEvoy (QUB)
- Dr Anna Bryson (QUB)
- Professor Louise Mallinder (UU, now QUB)
- Mr Daniel Holder (CAJ)
- Mr Brian Gormally (CAJ)

This group offered a preliminary response to the NIO documents at a seminar held at QUB on 16 May 2018. At this event (attended by the NIO legacy team) some key concerns and potential ‘sticking points’ were identified. In the weeks that followed the team set about addressing those challenges and developed the following detailed response. Our efforts have continued to be guided by the principles above.

We have tried to be as constructive as possible - highlighting strengths and points that we welcome. For each weakness that we identify (breaches of human rights standards, elements that run contrary to the Stormont House Agreement, or proposals that we believe to be unworkable) we endeavour to offer a remedy.

We have included almost 50 substantive recommendations for changes that we believe are essential if this initiative to ‘deal with the past’ is to succeed. This may seem overwhelming but it is our firm belief that all of these obstacles can be overcome with legal imagination, political will and a moral commitment to deliver for victims and survivors. Standing back from the detail, it seems clear that if each of the mechanisms is:

- Placed on a suitably independent footing;
- given the necessary resources, powers and clarity of mandate;
- Staffed by the right people, who are appointed in line with clear and transparent criteria; and
- Protected from political interference

⁶ For the full range of documents see Northern Ireland Office, ‘Open Consultation, Addressing the Legacy of Northern Ireland’s Past’ (11 May 2018) <https://www.gov.uk/government/consultations/addressing-the-legacy-of-northern-irelands-past> accessed 12 August 2018.

the net result would be a significant advance on the prevailing fragmentary, under-resourced, and piecemeal approach to the past.

The format of this report is as follows. We begin with a comprehensive Executive Summary that summarises the strengths and weaknesses in each of the mechanisms and sets out our key recommendations. We then address some crosscutting challenges that underscore the entire legacy process. These include issues that we believe ought to be included in the Stormont House Agreement Bill (a pension for the severely injured) and those that should not (a statute of limitations for former members of the security forces). Given its central importance to public confidence in the SHA mechanisms as a whole, we also offer some very clear recommendations on the issue of information redaction on the grounds of national security.

In the main body of the report, we deal in turn with the Historical Investigations Unit, the Independent Commission on Information Retrieval, the Oral History Archive, and the Implementation and Reconciliation Group.

We include in an Appendix our proposed model for dealing with information redaction in light of national security concerns that was published in 2017, elements of which are summarised in the main text.

This public consultation is a vitally important element of the legacy process. However, it is also important thereafter that all concerned remain vigilant as the legislation passes through the Houses of Parliament, as the mechanisms are established, and as they commence their work.

In the aftermath of this consultation, we will continue to do what we can to help ensure that the legislation that transpires is human rights compliant and likely to deliver for victims and survivors. We remain open to providing briefings and advice to any interested parties and encourage you to get in touch if there are questions with which you think we may be able to assist. We hope that you will find this report helpful and encourage you to disseminate it amongst your networks.

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30 August 2018

Executive Summary

This report constitutes the response of the QUB/UU/CAJ Model Bill team to the Northern Ireland Office's consultation on 'Dealing with the Legacy of the Past' that opened on 11 May 2018. We welcome this long awaited consultation and hope that this report may help to ensure that the legacy mechanisms can proceed on a footing that is a) likely to garner the confidence and support of victims and survivors and b) human rights compliant.

Our response builds on more than a decade of work on legacy issues by some team members but we take as our starting point the 2014 Stormont House Agreement (SHA). In particular, we are guided by the commitment included in the SHA that the approach to dealing with the past will be consistent with the following principles:

- Promoting reconciliation;
- Upholding the rule of law;
- Acknowledging and addressing the suffering of victims and survivors;
- Facilitating the pursuit of justice and information recovery;
- Human rights compliance; and
- To be balanced, proportionate, transparent, fair and equitable.

In practice, adherence to these principles necessitates that all of the mechanisms are set up in such a way as to be, and be perceived to be, impartial and independent by all potential contributors and beneficiaries.

The commitments included in the SHA do not always chime with our preferred approach but, as with our deliberations on the Model Bill (the draft implementation legacy Bill that we published in September 2015), we have confined ourselves to recommendations that we believe to be legally and politically viable.

In the document that follows, we discuss some key issues that have come to light since the Stormont House Agreement, namely the provision of a pension for the severely injured, the prospect of a national security veto on information provided to families by the legacy mechanisms, and the calls for a statute of limitations for current and former members of the security forces.

This Executive Summary primarily focuses on the provisions contained within the 2018 draft Northern Ireland (Stormont House Agreement) Bill and related documentation (including the draft Treaty that would give effect to the Independent Commission on Information Retrieval). These are critiqued in detail in the main body of the report but here we summarise what we consider the key strengths and weaknesses of the proposals on: the Historical Investigations Unit (HIU); the Independent Commission on Information Retrieval (ICIR); the Oral History Archive (OHA); and the Implementation and Reconciliation Group. In keeping with our commitment to be pragmatic and constructive, we seek throughout to identify workable solutions. At the end of this Executive Summary, we set out some overarching recommendations that are relevant to all of the mechanisms.

The Historical Investigations Unit

The Stormont House Agreement provided for the creation of a Historical Investigations Unit (HIU) specifying that: ‘Legislation will establish a new independent body to take forward investigations into outstanding Troubles-related deaths.’ The HIU would be an independent body conducting police-type investigations and producing a family report in each case. Detailed provision is made for the HIU in the 2018 draft Northern Ireland (Stormont House Agreement) Bill (hereinafter ‘the draft Bill’).

Key Strengths in the Draft Bill

Statutory Basis

- The draft Bill would establish the HIU in statute as an independent body. The HIU Director would have a degree of operational discretion.

Content of HIU Reports

- The draft Bill includes detailed provisions regarding the reports the HIU would produce in relation to its investigations. It proposes that family reports ‘must be as comprehensive as possible’ and that (with some safeguards over content) these could be provided to persons injured in the same incident. It is also suggested that the reports include a statement about the cooperation of Irish authorities in disclosure to the HIU.
- The HIU could publish other reports but it is proposed to include a duty to consult with families prior to publication. Related to this, there is provision to remove information that could cause distress to victims.

Sequencing of Work

- The HIU would examine cases in chronological order but it would have discretion to vary this. This would help the HIU take into account family needs and could also assist with linked cases.

Compliance with European Convention on Human Rights

- The HIU would have to issue a formal statement on how its investigatory functions would comply with the European Convention on Human Rights (ECHR).

Conflict of Interest

- There are welcome provisions regarding the need for HIU officers to avoid conflicts of interest.

Consultation with and Support to Families

- There are provisions requiring the HIU Director to consult families and to provide support and assistance to family members of persons whose deaths the HIU is investigating.

Powers of HIU Officers

- The HIU officers would be able to exercise police powers in criminal investigations.

Disclosure by Public Authorities

- The draft Bill provides for full disclosure of records by relevant public authorities to the HIU.

Code of Ethics

- The proposals include provision for the Policing Board to issue a Code of Ethics relating to the standards and conduct of HIU officers and note the need to make officers aware of the relevant human rights and equality obligations.

Oversight

- There is provision for oversight and inspection arrangements to the Police Ombudsman, Policing Board, and others.

Key Weaknesses in the Draft Bill and Related Recommendations

There are a number of provisions in the draft Bill that are not ECHR compliant and that we believe should be amended or - where required - entirely withdrawn. We also have a number of other recommendations and requests for clarification.

HIU Caseload

Caseload 'Duplication' of Previous Investigations and Operational Independence

- The draft Bill proposes that the HIU Director would have to ensure that the HIU does not 'duplicate' any aspect of a previous investigation, unless the HIU Director considered such duplication necessary. There is a risk that this provision could be harnessed to seek to preclude re-investigations by the HIU of matters which have been subject to previous investigations that were not ECHR Article 2 compliant.
- The draft Bill proposes that cases that fall within the HIU remit are the only cases that the HIU would be permitted to investigate. The HIU remit as specified does not include completed HET cases, unless a number of criteria are met relating to new evidence and state involvement. Since the HET work was suspended, it has transpired that significant amounts of evidence were withheld from the HET and other legacy processes. Under these provisions, families might nonetheless face difficulties in establishing that such cases fall within the HIU's remit.

Recommendations: The provisions in the draft Bill constraining the operational independence of the HIU as regards which cases it investigates should be amended to afford greater discretion.

Explicit provision should be made for the inclusion of cases in the HIU remit where a previous investigation was not ECHR Article 2 compliant, including where evidence was withheld from the HET or the HET review was not effective.

Caseload Where Collusion is Suspected

- The draft Bill contains a provision allowing the PSNI to determine which cases previously reviewed by the HET should be reopened on grounds of potential collusion. Depending on interpretation, the definition of collusion proposed in the draft Bill risks excluding all cases where informants acted under the authorisation of a handler, even if the actions of the informant constituted human rights violations. There is also a potential conflict in vesting the decision-making power in the PSNI who retain legal liability for actions taken by the RUC.

Recommendations: The PSNI should not make decisions on *cases involving potential collusion*; instead, there should be *an independent decision maker*.

The definition of collusion should remove or strictly codify any circumstances where facilitating an offence or the avoidance of justice would not be ‘collusion’. As a first step, government should clarify the circumstances whereby it considers facilitating a criminal offence or the avoidance of justice relating to a murder should be considered ‘lawful’ and ‘proper’. In particular, it should be clarified whether there is an official government position that all acts by informants that were authorised by handlers are deemed ‘lawful’.

As a list of ‘collusion’ cases is required within 14 days of the HIU’s establishment, it should also be clarified whether or not such an exercise has yet been conducted.

Attempted Murder, Torture and Serious Injury: Gaps in Compliance with the UK’s Obligations under the European Convention on Human Rights

- The SHA remit of the HIU – and by extension the provisions included in the draft Bill - is restricted to conflict-related deaths and does not include other matters such as attempted murders, torture, or serious injuries. However, Articles 2 and 3 ECHR create duties to ensure that such matters are effectively and independently investigated.

Recommendation: Whilst these investigations would not necessarily have to be undertaken by the HIU, the current situation leaves a significant gap in such cases. The government should clarify how it intends to discharge its obligations in this area.

Technical issues with the Inclusion of Cases in the HIU Remit

- There are a number of technical questions regarding whether certain cases will fall within the HIU remit.

Recommendations: Clarification should be given as to whether the list of certified HET cases the PSNI would provide to the HIU would include information on whether the investigations were commenced.

Clarification should be given on whether families can still challenge HET reports, with which they are dissatisfied.

Clarification should be provided as to whether the 49 cases of RUC shootings that have not been re-examined by the HET or Ombudsman remain on their list and whether they fall within the HIU Remit. If not, amendment should be made to the draft Bill to include them.

Clarification should be given as to why the definition in the draft Bill of conflict-related incident differs from that in the Victims and Survivors (Northern Ireland) Order 2006, and as to whether or not this is likely to have any practical impact in the selection of cases.

Retention of Cases by the PSNI

- The PSNI would retain some cases; this may engage independence requirements under ECHR Article 2.

Recommendation: Regarding the retention of cases by the PSNI, further provision should be made to ensure compatibility with the independence requirements of ECHR Article 2.

Investigating Misconduct

- At present only police but not military/security service misconduct can be investigated.

Recommendation: The provisions on investigating potential misconduct should be extended to include all agencies rather than just applying to the police.

Role of the Director of Public Prosecutions

- Clause 1(5) of Schedule 6 obliges the Director of Public Prosecutions to take into account the SHA general principles on ‘balance’ and ‘proportionality’ when determining whether to refer a relevant death to the HIU based on new evidence.

Recommendations: Referrals by the DPP are a quasi-judicial function that should not be subjected to quotas for particular types of case. This provision should be amended as it could operate to prevent eligible cases being reinvestigated even where new evidence is available.

Clarification should be given as to whether the Director of Public Prosecutions could refer a case back to the HIU based on new evidence if the HIU has previously dealt with the case (and the DPP is not precluded by the technicality of the death already being in the HIU remit).

Disclosure Powers of the HIU

- The powers of disclosure to the HIU have no sanction for noncompliance. It is also not clear why the range of public authorities is restricted.

Recommendations: A sanction for non-compliance should be added to the HIU's powers to compel disclosure of records. Clarification should be given that the existing provisions would set aside all other obligations including those under the Official Secrets Act.

Clarification should be given as to the proposed powers of disclosure in relation to records in the Public Record Office of Northern Ireland and other public authorities.

Findings in HIU Reports

- The ability of the Police Ombudsman to make findings in reports is currently under challenge, and there are a number of other matters about the content of reports that could be clarified.

Recommendations: Consideration should be given as to whether explicit statutory powers on the HIU to make findings in its reports (which already must be as comprehensive as possible) are required to guard against any challenge that the HIU cannot make findings in its reports.

The stipulations for content in family reports should be reviewed to ensure compliance with the full range of matters that can be required by the ECHR, for example, including reference to sectarian motivation.

Clarification should be given as to the application of the 'Maxwellisation' process whereby an individual who may be criticised in the report (but not necessarily named) is given a prior right of reply, in relation to persons who are deceased or who cannot be located. It should also be clarified whether or not 'preventing or investigating' a death includes prosecutorial decisions.

Appointments, Staffing and Governance

Employment of Former Members of the Northern Ireland Security Forces as HIU Detectives

- The draft Bill would codify a HET-type structure within the HIU. This departs significantly from existing practice (and the previous leaked 2015 Bill) in that it includes provisions that would have the purpose and effect of, not just permitting, but requiring a quota of former RUC officers to work within the HIU. As well as engaging the independence requirements of ECHR Article 2, the lack of objective justification for such a measure engages requirements under anti-discrimination legislation.

Recommendations: The provision with the purpose or effect of requiring former RUC officers in the HIU is neither justifiable nor ECHR compliant. It should be removed and replaced with provisions to ensure Article 2 compliant staffing excluding those with past work-related conflicts of interest.

Consideration should be given to a process of seeking to train an additional pool of HIU detectives now.

Maximising the Independence of the HIU

- The HIU Appointments Panel currently has no international involvement. The HIU is also to be established as a multi-member commission.

Recommendations: The provisions for the Appointments Panel for the HIU Director should be amended to strengthen the independence of the process through the inclusion of international panel member(s) appointed through the UN or Council of Europe human rights mechanisms. Such international involvement in key appointments has been commonplace throughout the peace process.

Consideration should be given as to whether a ‘corporation sole’ model (whereby all power is vested in the HIU Director) would be a more appropriate means of maximising independence rather than the proposed multi-member commission model.

Funding

- Despite commitments in the SHA and the ECHR duties incumbent on the UK government, the draft Bill provides that the HIU would be funded from the Department of Justice’s budget without any provision for additional monies. This risks a replication of the existing problems of legacy inquests where further funding has been unlawfully blocked.

Recommendation: Payment should be made from the Consolidated Fund through the UK Treasury (as suggested in our Model Bill).

Extending the Timeframe

- Independent investigations into legacy deaths are an ECHR obligation, and any decision to end the HIUs work must comply with such obligations.

Recommendation: The powers to extend the timeframe of the HIU should be structured to ensure that the decision maker complies with the UK’s obligations under ECHR Article 2 and 3, should such obligations require the continuation of an independent mechanism.

The Independent Commission on Information Retrieval

The Stormont House Agreement (2014) called for the creation of an Independent Commission on Information Retrieval (ICIR) ‘to enable family members to seek and privately receive information about the Troubles-related deaths of their relatives’ as part of the proposed set of mechanisms to deal with the legacy of the past. Unlike the other parts of this package, the ICIR would be created by a treaty between the British and Irish governments.⁷ The two governments agreed the draft Treaty on 15 October 2015 but it has not yet entered force.⁸ The establishment of the ICIR would also necessitate legislation at Westminster and as such, the NIO draft Bill includes a range of provisions on this mechanism. In general, we welcome the proposals on the ICIR, as we believe that information retrieval will offer families the possibility to receive information that is not available from other sources. To assist the consultation we set out below some specific strengths and weaknesses in the proposals and suggest a number of recommendations that we believe would help to garner trust and support for the ICIR and ensure that it complies with international human rights standards.

Key Strengths in the Draft Bill and Draft Treaty

Voluntary Basis for Victim Engagement

- All engagement with the Commission by bereaved families would be voluntary. This would mean that the Commission would only proactively seek to retrieve information following a family request.

Information Remit

- In addition to proactively seeking to recover information through voluntary contributions, the ICIR would be able to receive and hold *unsolicited information*.

Credibility of the Information

- There would be a process to *test the credibility* of information before it is included in family reports. Clearly, the absence of such a process could have posed substantial risks for the Commission’s capacity to build legitimacy and trust among victims and the wider community. It is further positive that the ICIR proposals stipulate that all commissioners should have experience of handling sensitive information and making judgements about the credibility of information.

Incentives to Participation

- Multiple protections are built into the proposals to ensure confidentiality and encourage potential information providers to engage with the Commission. These protections include precluding the ICIR from naming anyone who provides

⁷ Legislation would be required in both jurisdictions to give effect to the treaty.

⁸ Agreement establishing the Independent Commission on Information Retrieval (ICIR) http://opac.oireachtas.ie/AWDData/Library3/FATRdocId210116_100026.pdf accessed 22 May 2018 and http://data.parliament.uk/DepositedPapers/Files/DEP2016-0057/Agreement_establishing_the_ICIR.pdf accessed 22 May 2018 (‘draft Treaty’).

information and persons alleged by contributors to be responsible for a death and from disclosing information to law enforcement or intelligence agencies, with penalties for ICIR personnel who make unauthorised disclosures. They also include a stipulation that information provided to the ICIR would be inadmissible in criminal, civil and inquest proceedings.

Report on Redactions

- The draft Bill requires that each annual report produced by the ICIR would state the number of notifications relating to disclosure of information that could pose a risk to life or national security that the Secretary of State has given to the Commission in the previous financial year. This is a welcome addition, as it would make public how often the Secretary of State uses these powers.

Timeframe

- The draft Bill includes provisions allowing the ICIR's term to be extended beyond five years. We anticipate that the ICIR would need to extend its operations beyond five years as the experience of the Independent Commission on the Location of Victims' Remains (ICLVR) indicates that it would take time for the ICIR to gain the confidence of families and information providers. In addition, where a family's case is eligible for review by the HIU and the family chooses to let that process run its course before requesting an information retrieval process, families could risk losing the opportunity for information retrieval, if the ICIR were to close after five years.

Key Weaknesses in the Draft Bill and Draft Treaty and Related Recommendations

To ensure the Commission's human rights compliance, practicability, and credibility among victims and information providers, several amendments to the draft Bill and Treaty are necessary.

Obligation to Conduct Outreach Activities

- The experience of the ICLVR indicates that its capacity to build trust with victims and information providers was pivotal to its success in developing productive relationships with those groups and over time being able to uncover the remains of some disappeared persons.⁹

Recommendation: Drawing on the ICLVR model, the functions of the ICIR set out in the draft Treaty and draft Bill should be expanded to require it to undertake outreach and other activities designed to publicise its work and give individuals and organisations the necessary confidence to approach the Commission to provide information or to request it. These outreach activities should begin during the preparatory phase and continue throughout the life of the Commission.

⁹ See Lauren Dempster, 'The "Disappeared", the ICLVR, and "Dealing with the Past" in Northern Ireland' (April 2018) http://www.niassembly.gov.uk/globalassets/documents/raise/knowledge_exchange/briefing_papers/series7/dempster180418.pdf accessed 22 August 2018.

Handling of Unsolicited Information

- We welcome the ability of the ICIR to receive and hold unsolicited information. However, the proposals do not specify whether the credibility of unsolicited information is to be subject to any level of testing in the absence of or prior to a family request.
- The draft Bill further does not specify whether unsolicited information could inform the identification of themes and patterns on which the ICIR is required to report to the Implementation and Reconciliation Group upon completion of its work.

Recommendation: While we believe that the Commission should only proactively seek to retrieve information and to produce family reports following a request from a bereaved family, we do not believe that the respecting the voluntary nature of victim engagement should preclude the ICIR from testing the credibility of unsolicited information. To enable such testing to take place would mean that, if a family decided towards the end of the ICIR's five-year period of operations to request information retrieval in relation to an incident for which unsolicited information had already been received, previous credibility testing of information could facilitate the Commission producing a family report more rapidly before its period of operations expires. In addition, credibility testing of unsolicited information could lead to the discovery of information that is relevant to incidents for which there has been a family request. It would also make the inclusion of unsolicited information in the identification of themes and patterns more reliable. We therefore recommend that the draft Bill be amended to specify that the ICIR would test the credibility of both solicited and unsolicited information.

Capacity of the Commission to Evaluate the Credibility of Information and Identify Themes and Patterns

- It is positive that the proposals include a provision to require the ICIR to evaluate the credibility of information that is to be included in reports to families but further information is necessary to ensure that the Commission has the capacity to conduct this process in a robust and rigorous manner.

Recommendations:

To enable the Commission to adequately test the credibility of information received and to identify themes and patterns, Article 6 of the draft Treaty should be amended to state that the staff of the Commission should include a multi-disciplinary research team.

The Annex to the draft Treaty should be amended to strengthen the powers of the Commission to compel public authorities in the UK and Ireland to disclose information to it. This power should also be inserted into the draft Bill. Language similar to Article 25 relating to the Full Disclosure to the HIU would be appropriate.

Preparatory Period

- The draft Treaty allows for a *preparatory period* before the Commission begins its work but this is not mentioned in the draft Bill.
- A preparatory period in which the Commission would seek to recruit staff and occupy premises before beginning its operations in earnest is essential given that under the current proposals the ICIR is intended to operate only for five years.

Recommendations:

The draft Bill should be amended to include provision for the preparatory period that is specified in the draft Treaty.

In addition, the Bill should be amended to make clear that references to obligations arising at the end of five years (ie to end the ICIR's operations and submit a report on themes and patterns to the IRG), should be based on five years from the end of the preparatory period (rather than five years from the entry into effect of the legislation).

Preservation of the ICIR Archive

- The draft Bill proposes that, on completion of its work, the ICIR would destroy the raw material and operating files that it holds relating to deaths within its remit. While we believe that confidentiality protections are essential for the ICIR to be able to fulfil its functions effectively, we consider that confidentiality can be ensured without destroying the archives after the ICIR ceases to operate.

Recommendation: We recommend that the archives are maintained and held confidentially for 50 years, and that law enforcement, intelligence agencies or other persons be precluded from accessing them during this period. This approach would balance the need to protect confidentiality and with the imperative to safeguard important material that may be useful for understanding Northern Ireland's history for generations to come.

Relationship between the ICIR and the HIU

- A major concern with the ICIR proposals emerged during the consultation process in relation to an *observation in the Explanatory Notes*. The relevant explanatory note suggests that, even though information provided to the ICIR would be inadmissible in legal proceedings, this would not prevent policing authorities or a coroner pursuing lines of inquiry based on information provided to families by the Commission. Where such inquiries, generated *new* evidence, the new evidence could be admissible. This observation highlights the possibility that where an individual provides information to the Commission, they could run the risk of providing information about their own actions or the actions of others that indirectly aids the work of criminal investigators and prosecutors. We believe that the risk of prosecutions resulting indirectly from information provided to the ICIR is extremely low, particularly since (former) paramilitaries may opt to engage with the Commission through interlocutors. Furthermore, if any such prosecutions

were undertaken, they could be met with abuse of process applications from defence lawyers that would challenge the admissibility of evidence that was uncovered because of information produced by the ICIR. However, we recognise that it may create a disincentive for information providers to engage with the Commission.

Recommendation: To address this challenge, we propose a multifaceted approach that could bolster the existing safeguards in the ICIR proposals:

Clause 3 of the Northern Ireland (Location of Victims' Remains) Act 1999 could provide a model for amending Article 9 of the draft Treaty. An amended version could read:

(1) The following shall not be admissible in evidence in any legal proceedings (including proceedings before a Coroner)—

(a) any information received by the Commission about deaths within its remit; and

(b) any evidence obtained (directly or indirectly) as a result of such information being so provided.

To reflect the above changes to the draft Treaty, Clause 45(3) of the Draft Bill could be amended to state:

The information received by the Commission about deaths within its remit or any evidence obtained (directly or indirectly) as a result of such information being so provided is not admissible in any legal proceedings.

The Explanatory Notes for Clause 45 of the draft Bill should make clear that private prosecutions are covered by the inadmissibility provisions (similar to the Explanatory Notes accompanying Clause 3 of the Northern Ireland (Location of Victims' Remains) Act 1999).

Clause 3(2) of the Northern Ireland (Location of Victims' Remains) Act 1999 states that the provisions on inadmissibility 'shall not apply to the admission of evidence adduced in criminal proceedings on behalf of the accused.' It may be useful to explore whether a similar provision should be added to the draft Bill.

Clause 42(2) of the draft Bill could be amended to place an obligation on the Independent Commission on Information Retrieval to seek to ensure that information is not disclosed in family reports that could expose information providers to risk of prosecution. Similar language could be added to Article 3(2) of the draft Treaty.

Article 3(1)(b) of the draft Treaty should be amended to create an obligation to ensure that families who request the opening of an information retrieval process do so on the basis of fully informed consent that includes discussion of the legal consequences of the information retrieval process.

Support to Families

The draft Treaty and draft Bill would commit the ICIR to keeping the families who have requested information retrieval informed about the progress in their process.¹⁰ However, the proposals do not contain any further provisions relating to engaging with families or providing them with support. We believe that the ICIR could do more to provide support to families and that the draft Treaty and draft Bill be amended to require this.

Recommendation: Our model treaty proposals stated that the functions of the Commission should include doing outreach with families, and organisations representing their interests, from the start of the Commission's work. Ideally, this would include enabling victims to inform the development of the Commission's procedures where relevant.¹¹ The model treaty also stipulated that the ICIR's functions should include providing appropriate support for those who engage with the Commission. Our proposals also contained commitments that in engaging with families, the Commission shall take all reasonable steps to ensure that victims and survivors understand that (1) their engagement is voluntary and that they may withdraw from the process at any time, and (2) that they appreciate in advance the potential legal consequences of engagement with the Commission. We further recommended that the support provided by the ICIR to families should occur both during the information retrieval process and in helping them to deal with the consequences of the process.

Appointment of Commissioners

- Given that safeguarding the **independence** of the Commission would be pivotal to its ability to carry out its functions, we feel that the draft Bill should be more specific about the measures that would be taken to maximise public confidence in the appointed Commissioners.

Recommendation: We recommend that the language on the appointment of Commissioners be amended to state that all Commissioners have no conflicts of interest. We further recommend that more detailed provisions be included relating to the security of tenure of the commissioners and the circumstances in which they could be replaced. The Model Bill sets out how this could be done.

¹⁰ Draft Treaty, art 3(1)(b) and draft Bill, cl 41(2).

¹¹ Draft Treaty, art 7(3)(a) gives the Commission the power to determine its own procedures.

The Oral History Archive

The Stormont House Agreement (2014) states that:

The Executive will, by 2016, establish an Oral History Archive to provide a central place for people from all backgrounds (and from throughout the UK and Ireland) to share experiences and narratives related to the Troubles. As well as collecting new material, this archive will attempt to draw together and work with existing oral history projects.¹²

We welcome the inclusion of an Oral History Archive (OHA) as one of the core legacy mechanisms and set out in some detail in the main body of this report the valuable contribution that we believe it could make to dealing with the legacy of the past.

Key Strengths in the draft Bill proposals

Geographic Reach of the Archive

- It would be possible for individuals across the UK and Ireland to contribute to the OHA.

Creation of a Steering Group

- The importance of appointing and drawing upon the expertise of a Steering Group who have (between them) experience of obtaining oral history records is acknowledged.

Inclusion of Ancillary Records

- It is recognised that oral history records may include ‘other relevant records’ and that these should be preserved alongside the primary interviews.

Inclusion of Existing Oral History Records

- The draft Bill specifies that arrangements must be made to identify other organisations that have made, or make, oral history records, and to inform them about the possibility of being included in the Archive.

Inclusion of Confidential Oral History Records

- Provision is made for the preservation of oral history records that are not suitable for immediate publication but which may be of significant value to future generations.

Timeframe

- One of the greatest strengths of the OHA is that (funding permitting) it is not time-bound. Archives are designed to last and the fact that accounts could be contributed for years to come facilitates important intergenerational work. More

¹² Stormont House Agreement (2014) (‘SHA’), para 22.

importantly, it means that victims and survivors could come forward to tell their story in full and in context, at a time and place that best suits *their* needs. It should also be possible to revisit their stories in light of changing circumstances and perspectives.

Key Weaknesses in the draft Bill Proposals and Related Recommendations

In order to ensure that the OHA garners the trust and co-operation of victims and survivors right across our society and that it functions optimally we believe that a number of fundamental weaknesses must be addressed. The key issues are summarised below.

Lack of Detail

- The NIO Consultation Paper proposes that those responding to the public consultation exercise consider the following two questions in relation to the OHA:

Do you think that the Oral History Archive proposals provide an appropriate method for people from all backgrounds to share their experiences of the Troubles in order to create a valuable resource for future generations? Yes/No

What steps could be taken to ensure that people who want to share their experiences of the Troubles know about the Archive and are encouraged to record their stories?¹³
- Attention is thus focused on the appropriateness of oral history as a methodology and the steps that might be taken to publicise the OHA. These questions sidestep a more fundamental issue which is whether or not the model being proposed for the Archive (whereby it is under the charge and superintendence of the Deputy Keeper of the Public Records Office of Northern Ireland) is an appropriate means of enabling people from all backgrounds to record and share their stories. They also gloss over the fact that very little detail has been offered as to how the proposed model would work in practice.

Recommendation: To adequately inform this consultation, the NIO should publish a detailed paper setting out how it envisages the OHA working in practice. This should include specific detail on: how individual interviews or stories would be selected and prioritised (specific criteria for inclusion and outreach and engagement policy); how interviewers would be appointed; a draft code of conduct; the policies and procedures governing access; whether or not there would be a ‘central’ space for members of the general public to visit; and how they propose to honour the SHA commitment to ‘draw together and work with existing oral history projects’.

¹³ Northern Ireland Office (NIO), *Consultation Paper: Addressing the Legacy of Northern Ireland’s Past* (2018), para 9.3 (‘NIO Consultation Paper’).

Independence

- The Stormont House Agreement clearly stipulates that: ‘The Archive will be **independent** and **free from political interference**.’ The importance of this guiding principle has since been underlined by the Northern Ireland Victims Commissioner.¹⁴ In our view, the model proposed for the OHA is fundamentally flawed, as it is not sufficiently ‘independent and free from political interference’.
- Although it was not mentioned in the SHA, the draft Bill, as noted, proposes to give the Public Record Office of Northern Ireland (PRONI) the function of organising the OHA. PRONI is a division of the Department for Communities and its Director (the Deputy Keeper) is a career civil servant, accountable to the Minister of that Department.
- The draft Bill provisions propose to address the issue of independence by placing the OHA under the ‘charge and superintendence’ of the Deputy Keeper of PRONI and ensuring that he/she has a degree of operational independence from the Minister for Communities in relation to ‘OHA duties’. These proposals would grant a senior civil servant at least five different means of controlling the flow of information into and out of the OHA. He or she would:
 - Determine the criteria for inclusion of oral history records in the Archive.
 - Identify (based on rules regarding consent set down by his/her Minister) those records that can be admitted and those that must be destroyed.
 - Adjudge which parts of records admitted to the OHA are suitable for publication and which should remain confidential.
 - Establish policies regarding the conditions and context in which records may be handed over to the authorities for legal or other reasons.
 - Review the records that have been accepted for publication and from these compile a report on patterns and themes for the Implementation and Reconciliation Group.

We consider that what is being proposed amounts to a ‘fig-leaf’ of independence and suggest that, at any rate, the key to establishing the independence of the OHA is not to increase the powers of the Deputy Keeper of PRONI.

Recommendation: It is essential that the OHA is placed on a suitably independent footing. We accept that there is now a degree of political consensus around the location of the OHA in PRONI but real and meaningful checks and balances must be placed on the powers of the Deputy Keeper if the OHA is to have any chance of securing widespread cross-community support.

¹⁴ In the course of a presentation at a public debate titled ‘Stuck in the Past’ at St Mary’s College Belfast on 7 August 2018 (organised by *Féile an Phobail*), the Commissioner for Victims and Survivors, Judith Thompson, outlined a set of principles that have been agreed by members of the Victims and Survivors Forum. Central to these is the stipulation that all of the legacy mechanisms should be independent and impartial, and that they should have ‘no political friends’.

Role of the Steering Group

- We welcome the proposal to establish a Steering Group but the draft Bill provisions stop short of granting it any real or meaningful powers.
- Granting extensive discretionary powers to the Deputy Keeper - with the proviso that he or she merely consults a steering group before taking key decisions - is not in our view the answer to securing the independence of the OHA and maximising public confidence in its work.

Recommendation: We propose to invert the proposed governance model so that the Steering Group takes ‘charge and superintendence’ of the OHA, making (by majority vote if necessary) key decisions. These would include: mapping out a vision for the Archive; establishing a comprehensive code of conduct and an interviewer training programme; agreeing the acquisitions and access policy; establishing a strategy of outreach and engagement to existing oral history organisations, archives and networks; building cross-community trust and support; and compiling a report on patterns and themes. Such a model we believe could succeed in curbing *both* potential political interference in the design and conduct of the archive and the bureaucratic impulses of a ‘top-down’ civil service model.

Appointments to the Steering Group

- The NIO draft Bill proposes that the Deputy Keeper
must make arrangements to appoint a group of at least five persons
(‘the steering group’) who, in the Deputy Keeper’s view, have (between
them) experience of obtaining oral history records in Northern Ireland
and experience of obtaining oral history records outside Northern
Ireland.

The proposals also state that it is for the Deputy Keeper to decide who has the necessary ‘experience of obtaining oral history records’ and thus qualified to serve on the Group.¹⁵

Recommendations: We propose to give the Steering Group more wide ranging and specific powers than proposed in the draft Bill and as such recognise the importance of ensuring that suitably qualified individuals are appointed to it. We see in the Steering Group an important opportunity to ensure representation from existing community oral history initiatives and networks and to bring to the fore relevant professional, practical, technical, and legal expertise. It is thus important that the criteria for appointments are clear, specific, and transparent. As with the appointment of academics to the IRG, it is vital to ensure that the OHA Steering Group is ‘recognised as being independent, rigorous and in line with best practice’ and we thus suggest that either the ESRC or its sister body – the Arts and Humanities Research Council – could be drawn upon to help establish and apply criteria for appointments to it. We accept that PRONI could provide the shell for the Archive and as such propose to give the Deputy Keeper an *ex officio* seat on the Steering Group.

¹⁵ Draft Northern Ireland (Stormont House Agreement) Bill (2018) (‘draft Bill’) cl 52(9).

Working With and Through Existing Groups

- The Stormont House Agreement states that the Oral History Archive ‘will attempt to draw together and work with existing oral history projects’.¹⁶ In the draft Bill, the nature of this cooperation is reduced to a commitment by PRONI to facilitate the inclusion of existing oral history records i.e. a commitment that the OHA may include existing oral history records ‘which have been made, or are, made (at any time) by other persons (whether received by the archive from the person who made them or from another person)’.¹⁷ A further section proposes that the Deputy Keeper must arrange for the Public Record Office ‘to identify other organisations which have made, or make, oral history records, and to inform those other organisations of the possibility of the oral history records made by them being included in the archive’.

Recommendation: Given the central importance of working with and through existing groups and thus building on the good work that has already been done, this approach is unduly passive. No organisation or group should be compelled to cooperate with the OHA but a concerted effort should be made to facilitate and enable the long-term preservation of existing collections. This necessitates updating and aggregating existing inventories of oral history collections, reaching out to archivists and project leaders (many of whom have retired or moved on to other projects), proposing sensible and workable accommodations with regard to the legal requirements for the deposit of collections at PRONI, and working in a spirit of partnership with existing groups to provide viable solutions for the digitisation and long-term preservation of their collections.

We see in the creation of the Steering Group an opportunity to enlist the support of existing oral history networks and organisations – to gain from their experience and expertise and to help garner widespread support for the archive. As noted in the Explanatory Notes to our Model Bill we believe that the relationship between the OHA and existing projects could be mutually beneficial. The OHA could, for example, provide the resources necessary to digitise and safeguard vulnerable collections into the future.

Policy for Inclusion of Records in the OHA

- The draft Bill simply states that the function of organising the OHA would include ‘inviting the contribution of oral history records, making oral history records of experiences recounted by other persons, and otherwise receiving oral history records and other relevant records’.
- Further clauses specify that the OHA would relate to ‘events that have the required connection with Northern Ireland and occurred in Northern Ireland or Ireland during the period beginning with 1 January 1966 and ending with 10 April 1998’ and ‘other significant events that have the required connection with

¹⁶ SHA, para 22.

¹⁷ Draft Bill, cl 51(5).

Northern Ireland’.¹⁸ The ‘required connection with Northern Ireland’ is defined as relating to ‘the constitutional status of Northern Ireland or sectarian or political hostility between persons in Northern Ireland’.¹⁹

- The NIO draft Bill proposals also define an ‘oral history archive’ as ‘a collection of records which recount personal experiences (“oral history records”) and which are of a lasting historical significance.’
- Whilst this acquisitions policy is in theory suitably broad, it would be in the gift of the Deputy Keeper to decide whether or not a given record had the ‘required connection’ and was likely to be of ‘lasting historical significance’.
- It would also be for the Deputy Keeper to decide whether or not ‘catalogues and indexes, and records which would or might be regarded in other contexts as ephemera’ are deemed ‘ancillary to oral history records in the archive’ and likely to ‘assist the orderly preservation of, and access to, the archive’ and can thus be included.
- There is no reference in the draft Bill provisions to the steps that would be taken to ensure that the OHA enlists the support of a broad range of contributors and can thus be considered a credible collective representation of accounts of the conflict. Instead, what seems to be proposed is an entirely passive policy whereby individuals are simply invited to come forward. Oral historians have long since cautioned about the dangers of a ‘lazy reliance’ on ‘voluntary self-selection’.²⁰ This tends to attract the ‘middle-groups’ in society and perpetuates the exclusion of marginalised groups and individuals.
- We welcome the fact that it would be possible for individuals right across the UK and Ireland to contribute to the OHA but note that the explanatory notes to the draft Bill state that ‘The majority of the provisions in the Bill extend to the whole of the UK, with the exception of Part 4 (the Oral History Archive)... which extend to Northern Ireland only.’²¹
- Whilst participation in the OHA is obviously voluntary, we feel that difficult and challenging questions concerning where efforts and resources are channelled should not be sidestepped.

¹⁸ Ibid cl 51(12).

¹⁹ This differs from the definition offered in the draft Bill in relation to the work of the Historical Investigations Unit where ‘the required connection with Northern Ireland’ relates to a) the constitutional status of Northern Ireland or to political or sectarian hostilities between persons there, or b) in connection with preventing, investigating, or otherwise dealing with the consequences of an act intended to be done, or done, for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between persons there.’ Draft Bill, cl 5(6).

²⁰ See e.g. Paul Thompson, ‘The Voice of the Past: Oral History’ in Alistair Thomson and Robert Perks (eds), *The Oral History Reader* (Routledge, 1988) 26.

²¹ Northern Ireland (Stormont House Agreement) Bill Explanatory Notes (2018) (‘draft Explanatory Notes’), para 10.

Recommendations:

There should be an open and transparent articulation of the aims and objectives of the OHA, and a corresponding five-year strategy for the prioritisation and acquisition of new and existing material. Again, this should be determined by a strong and diverse Steering Group, rather than the Deputy Keeper of PRONI.

It is vitally important that the OHA be poised to be outward facing and that all necessary steps are taken to facilitate contributions from victims and survivors right across the UK and Ireland. The NIO should explain why it is proposed that provisions on the OHA ‘extend to Northern Ireland only’. It should also clarify whether or not it is proposed to limit the remit of the OHA to ‘events that occurred in Northern Ireland or Ireland’.

Policy for Redaction and Destruction of Records

- It is curious that, although the draft Bill proposals contain hardly any detail about how individual contributors and existing oral history groups might be persuaded to engage with the Archive, there are no fewer than ten sub-sections on the procedure for disposing of records (by destruction or otherwise). It is notable that, although the Deputy Keeper is obliged to inform the Minister for Communities and politicians in the Northern Ireland Assembly about proposals to destroy records, there is no mention of any obligation to inform the individual human beings to whom the records relate, or to give them any say in what happens to their records. Whatever the specific detail of the proposals to destroy records, this type of approach tends to feed accusations of a ‘state-centric’ model that is more concerned with protecting the institution than the individuals it is designed to help.
- The proposed procedures to allow the Deputy Keeper to decide what records meet the criteria for inclusion in the Archive, and to empower the Department for Communities to make rules about the nature of consent required to admit records to the OHA, highlights the importance of balancing legal obligations with creativity, imagination, and common sense. It goes without saying that both archivists and oral history practitioners must be ever vigilant to matters of legal and ethical probity but there is currently a very lively and important debate in oral circles about the competing dangers of
 - a) insufficient regard for the letter of the law and
 - b) a disproportionately risk-averse and legalistic approach to the filleting and disposal of invaluable historical records.

Recommendation: Important and challenging deliberations about what to collect, how to collect it, who should access it and what should be redacted, withheld or destroyed should in our view be taken by a Steering Group comprising individuals with the necessary legal, practitioner and curatorial expertise rather than by the Deputy Keeper of PRONI and the Department for Communities.²²

Individual contributors should also have more of a say in what happens to their records. In the Model Bill, we included a series of clauses acknowledging the right of contributors to make requests regarding the publication of their story (or parts thereof) and to be consulted and fully informed regarding any decision taken to redact, withhold, or destroy their story.

Legal Liabilities

- At no stage has any form of amnesty or immunity from prosecution been part of the proposals for the OHA. It is thus clear in the draft Bill proposals that information provided to the OHA could be admissible in criminal, civil and inquest proceedings. The draft Bill also specifically addresses the issue of defamation, and proposes that, in relation to work carried out for the OHA, the Department, its staff, and agents would have limited protection from defamation claims in the courts. A further section stipulates that the Deputy Keeper would reserve the power to waive this immunity (in whole or to any extent) on any person.²³

Recommendation: Whilst we think it understandable for PRONI to seek to protect its staff against defamation and other claims with regard to the Archive, it is equally important to consider the rights and vulnerabilities of contributors. All interviewers should be fully trained on the relevant legal liabilities and these should be clearly explained to interviewees. Decisions regarding the disclosure of information contained within individual records or the need to exclude records (or parts thereof) from the Archive on legal grounds should be taken by the Steering Group in light of clear and transparent criteria. As noted above (and as stipulated in the Model Bill) the original contributor should also be granted the opportunity to make representations and should be fully informed about decisions affecting their story.²⁴

²² In para 20 of the 2013-14 PRONI Annual Report the Deputy Keeper stated that 'PRONI is risk-averse in its preservation of the archive'. See Department of Arts, Culture and Leisure, *Public Record Office of Northern Ireland: Report of the Deputy Keeper of the Records 2013-14*, <http://communities-ni.gov.uk/publications/proni-deputy-keepers-reports> (accessed 14 August 2018). At a recent workshop on the preservation, access, and engagement challenges associated with the Prison Memory Archive project, Professor Steven High, Director of the state-of-the-art Center for Oral History and Digital Storytelling at Concordia University in Canada expressed his belief that an unduly cautious application of data protection and other legislation amounted to 'an assault on the practice of oral history'. See Workshop on preservation, access and engagement at 'Dangerous Oral Histories' conference, Queen's University Belfast, 29 June 2018.

²³ Draft Bill, cl 57(3).

²⁴ Stormont House Agreement Model Implementation Bill (2015) ('Model Bill'), s 67.

Appointment of OHA Staff

- The NIO draft Bill proposes that the Deputy Keeper must superintend the persons employed in the Public Record Office in keeping the Archive and further notes that persons appointed under section 2(3) of the Public Records Act (Northern Ireland) 1923 are to assist in exercising the function of organising the Archive under the superintendence of the Deputy Keeper. The section of the Public Records Act referred to simply highlights the fact that such staff are appointed by and answerable to the Minister: ‘the persons so appointed shall assist in executing this Act under the superintendence of the Deputy Keeper of the Records of Northern Ireland in such manner as the Minister [of Finance] may direct.’ This does nothing to allay fears about the independence of the proposed model or to address the core challenge of securing the trust of those who may consider sharing their personal and private recollections with the OHA.

Recommendation: As in our Model Bill, we propose that a dedicated secretariat provide research, archival, interviewing, and other professional and administrative support to the OHA. Staff should have between them experience and knowledge of a) the potential for memory to provoke trauma b) gender sensitivity c) handling sensitive information and making judgments about its suitability for public release. Where relevant, the criteria for appointments to the Steering Group should be cross-referenced (e.g. the need to be impartial and to avoid conflicts of interest).

Appointment of Interviewers

- There is no detail in the draft Bill provisions about how interviewers would be appointed to collect oral history records for the OHA. Instead, we are invited to trust that the Deputy Keeper of PRONI would draw up appropriate policies. Given that PRONI is a division within a Department of State, we are concerned about the prospect of a business model that would seek to collect interviews based on tenders for set targets.

Recommendation: In our Model Bill, we included provision for a non-statutory Code of Practice and set out in some detail how the OHA might work in practice.²⁵ With regard to the appointment of interviewers to carry out the oral history interviews, we proposed a partnership model that was designed to work with and through existing oral history networks, organisations, and projects. This included a flexible ‘train the trainers’ scheme. The rationale for the latter was fourfold: a) many individuals only feel comfortable conducting an interview with a known and trusted interviewer b) it is nonetheless imperative that all interviews adhere to core ethical, technical and legal standards c) interviewees must be made fully aware of procedures regarding long-term access and storage to ensure that they are not lulled into a ‘false sense of security’ d) this scheme enables existing practitioners to secure a ‘license’ to point their collections in the direction of PRONI and provides them with the resources necessary to up-skill other members of their host organisation. This is proposed as a cost-effective means of maximising the reach and workability of the OHA.

²⁵ Model Bill, s 63 - ‘The Work of the OHA’.

Protections for Vulnerable and Traumatised Interviewees

- There is no information in the draft Bill and accompanying papers about the ways in which the Oral History Archive would work with and through existing organisations that represent victims and survivors such as the Victims and Survivors Service.

Recommendation: We propose that individuals with direct experience of working with victims be included on the Steering Group and that efforts are made via the ‘train the trainers’ model to capitalise on the knowledge and expertise of those who have specific experience of interviewing and supporting vulnerable and traumatised individuals. We further propose that an individual with professional training in trauma is included on the Steering Group and that every effort is made to ensure cross learning between oral historians and other professionals with relevant practical, academic, and legal training. In our Model Bill, we proposed that this should be reflected both in the interviewer training programme and in a comprehensive code of practice that includes a range of measures to facilitate contributions from victims and survivors.

Co-operation with Other Legacy Bodies

- The draft Bill states that the Deputy Keeper of PRONI must produce and publish an annual report on the exercise of the function of organising the Archive and that a copy must be given to the Historical Investigations Unit, the Independent Commission on Information Retrieval, and the Implementation and Reconciliation Group. It is, however, unclear how this report might influence the work of these bodies. For example, if gender-based violence were to emerge as a major theme, could this in any way affect the prioritisation of cases by the other mechanisms?

Recommendation: It is important to avoid fragmentation and to ensure that all of the legacy mechanisms are harnessed to pull together. As such, we suggest that the annual report relating to the OHA should include consideration as to how the patterns and themes emerging might inform wider legacy work.

Role of the Proposed Statistical Timeline

- The Stormont House Agreement included a paragraph which proposed that ‘A research project will be established as part of the Archive, led by academics to produce a factual historical timeline and statistical analysis of the Troubles, to report within 12 months.’²⁶ The draft Bill curiously does not include reference to this timeline in the section on the OHA, but it is referenced in a later section on ‘Reports to the IRG’ which refers to ‘a report provided to the IRG by any research project established as part of the oral history archive (see paragraph 25 of the Stormont House Agreement)’.²⁷ It is also referred to in the NIO’s Consultation Paper and summary documents. Here it is stated that, in addition to recording

²⁶ SHA, para 25.

²⁷ Draft Bill, cl 61(1)(e).

new stories and gathering information about existing projects, the OHA would ‘make a historical timeline of the Troubles’.

- This issue was addressed by a team of historians and social scientists from Northern Ireland, Ireland and Britain at a workshop on ‘Historians and the Stormont House Agreement’ led by Professor Ian McBride at Hertford College, Oxford, in October 2016. In their joint report, they noted that ‘the purpose of “a factual historical timeline” is unclear’. They note the existence of a plethora of excellent detailed chronologies and caution that greater clarity about the purpose of this timeline is necessary in order to avoid the ‘risk of creating misunderstandings among the wider public about the nature of academic research.’ The report goes on to acknowledge the need to get beyond ‘polemical arguments over “who fired the first shot” and instead to engage with more complex questions of causation and responsibility’.²⁸ As noted above, the purpose of this Archive in our view is indeed to get beyond the dehumanising and reductionist approach of a statistical timeline and instead to give space to individuals to tell their story in full, in context, and in all of its broader complexity.

Recommendation: Before asking members of the general public to comment on whether or not ‘the Oral History Archive proposals provide an appropriate method for people from all backgrounds to share their experiences of the Troubles’, it is imperative that more detail is provided on those proposals, including the role and function of the proposed historical timeline and any related ‘research projects’. In particular, the NIO should articulate clearly how and to what extent the timeline (and any related ‘research projects’) might influence the criteria for inclusion of stories to the OHA and the subsequent report on patterns and themes.

Report on Patterns and Themes

- There has been some debate about the procedures by which academics might be appointed to work on a report on patterns and themes for the Implementation and Reconciliation Group. Concerns have also been raised about the sources that the academics might draw upon to compile that report. Less attention has been paid to the processes by which evidence will accrue to the Oral History Archive. We regard this as a significant oversight because, regardless the other sources that the IRG appointed academics may or may not consult, the reports from the ICIR, HIU and OHA are clearly flagged as ‘the principal reports’.²⁹
- As currently crafted, the draft NIO bill proposes to give the Deputy Keeper the power to decide which stories meet the criteria for inclusion in the OHA. It furthermore proposes that: ‘The Deputy Keeper must provide the Implementation

²⁸ The contributors to this report were: Dr Huw Bennett (University of Cardiff), Dr Máire Braniff (Ulster University), Dr Anna Bryson (Queen’s University Belfast), Professor Ian McBride (University of Oxford), Professor Fearghal McGarry (Queen’s University Belfast), Dr Marc Mulholland (University of Oxford), Dr Niall Ó Dochartaigh (NUI Galway), Dr Simon Prince (Canterbury Christ Church), Professor Jennifer Todd (University College Dublin), Dr Tim Wilson (University of St Andrews). See *Historians and the Stormont House Agreement: Report of Workshop held at Hertford College, Oxford (2016)*, <http://irishhistoriansinbritain.org/?p=321> accessed 14 August 2018.

²⁹ Draft Bill, cl 61(4) on ‘Reports to the IRG’ notes that the duty to share a relevant report arises at the time when the ‘four principal reports’ have been provided to the IRG.

and Reconciliation Group with a report on patterns and themes *the Deputy Keeper has identified* from the exercise of the function of organising the archive'.³⁰

- The draft NIO bill proposes this report must be provided to the Implementation and Reconciliation Group exactly five years after the Northern Ireland (Stormont House Agreement) Bill comes into force.
- It is totally unacceptable, in our view, to grant a senior civil servant, accountable to the Minister for Communities, sole discretion to determine which stories can be admitted to the OHA, which should be redacted, withheld or destroyed, and which sections of the publicly available accounts should inform a report on patterns and themes.

Recommendation: The work on patterns and themes is a cornerstone of the legacy programme and as such, it is imperative that it should be guided and directed by an independent, diverse, and representative Steering Group.

Funding

- The OHA section in the NIO draft Bill does not have a specific section on 'funding'. However, the explanatory notes suggest under 'Financial Implications of the Bill' that it is to be funded out of the £150 million (£30 million per annum for 5 years) to be contributed by the UK Government. Given that the Public Record Office, which is a division of the NI Department for Communities, is assigned the function of organising it, we presume that the NIO is proposing that the Department of Communities should decide the amount necessary to set up and run the OHA and to duly pay the expenses via PRONI. The OHA would thus be paid from the Department for Communities budget and there would be no obligation on the UK centrally to resource it.

Recommendation: In our Model Bill, we proposed payment from the Consolidated Fund through the UK Treasury. We also noted in our explanatory notes to the Model Bill the vital importance of ensuring funding beyond the five-year window proposed for the other mechanisms.³¹

Timeframe

- Unlike the Historical Investigations Unit and the Independent Commission on Information Retrieval, the work of the Oral History Archive (subject to available funding) is not time-bound. As noted above, we consider this one of its greatest strengths.
- The read across to the work of the Implementation and Reconciliation Group does, however, introduce an important caveat with regard to the proposed timeframe. As noted below the stories admitted to the OHA are destined to be a central source of information for the identification of patterns and themes. This

³⁰ Draft Bill, cl 54(1) (emphasis added).

³¹ Stormont House Agreement Model Implementation Bill Explanatory Notes (2015) ('Model Explanatory Notes'), para 164.

work is due to commence five years after the mechanisms get up and running. As things stand, it is unclear whether stories that are admitted to the OHA after this period can be considered.

Recommendation: The NIO should clarify that funding would be provided for the OHA beyond the initial five-year period, and that stories admitted after this period can be considered for the IRG report on patterns and themes.

The Implementation and Reconciliation Group

The Stormont House Agreement also provided for the creation of an Implementation and Reconciliation Group (IRG). The purpose of this mechanism would be to oversee themes, archives, and information retrieval. Paragraph 51 of the SHA provides that, after five years of the operation of the other legacy mechanisms, a report on such themes should be commissioned by the IRG from ‘independent academic experts’. It also stipulates that ‘any potential evidence base for patterns and themes should be referred to the IRG from any of the legacy mechanisms, who may comment on the level of cooperation received’. Finally, it declares that ‘this process should be conducted with sensitivity and rigorous intellectual integrity, devoid of any political interference’. Paragraph 52 states ‘Promoting reconciliation will underlie all of the work of the IRG. It will encourage and support other initiatives that contribute to reconciliation, better understanding of the past and reducing sectarianism.’ Paragraph 54 deals with the make-up of the IRG. It states that the IRG will consist of political appointees (DUP 3, Sinn Féin 2, one each from SDLP, UUP, Alliance, UK, and Irish government).

The leaked version of the 2015 Stormont House Agreement Bill did not contain any provisions relating to the IRG. However, the 2018 draft Bill and related consultation documents contain provisions on the functions of the IRG - how it would operate, how its members would be appointed and the proposed governance structures with regard to the work of the academics involved in the preparation of the report on themes and patterns.

Key Strengths in the Draft Bill

Statutory Basis

- We welcome the inclusion of the IRG in the draft Bill. As noted in the Explanatory Notes to our Model Bill, we believe that a statutory footing is required to ensure that the IRG fulfils its mandate both in terms of its work on themes and patterns, which emerge from the other mechanisms, and as a central vehicle for the promotion of reconciliation.³²

Establishment as a Body Corporate

- The draft Bill stipulates (as did our Model Bill) that the IRG should be established as a body corporate, similar to the HIU and ICIR. Again, this is to be broadly welcomed as a required step to better protect the independence of the IRG.

Nature of Political Appointments to IRG

- The draft Bill makes it clear that while those appointed to the IRG are political appointees, they cannot simultaneously hold a relevant public elected position. Relevant public elected positions include being a member of the Northern Ireland Legislative Assembly, a councillor, a Member of Parliament, a member of the

³² Ibid, para 104.

House of Lord, a member of Dáil Éireann, a member of Seanad Éireann, or a member of the European Parliament from any member state.

Independence of Academic Experts Appointed to IRG

- An NIO Consultation paper that accompanies the draft Bill stresses that ‘it would be vital that the work of the academics is recognised as being independent, rigorous and in line with best practice’. It also suggests that it may be valuable for the academic report to use a multi-disciplinary approach and to work with organisations such as the Economic and Social Research Council. As is discussed further below, the importance of protecting the independence of the academics involved in this work as well as ensuring that this work is conducted with due rigour and professionalism is indeed essential and such an emphasis is again to be welcomed.

Process for Appointments to IRG

- The draft Bill proposes that the IRG would be chaired by a person ‘of international standing’ to be appointed by the First and deputy First Minister. As noted above, the SHA stipulates that one member would be appointed by the UK government, the other by the Irish government and the remainder nominated by the five largest political parties in Northern Ireland according to the formula agreed in the Stormont House Agreement. The draft Bill lays out the process for nomination to these positions.

Key Weaknesses in the Draft Bill and Related Recommendations

Dismissal of IRG Members for Failure to ‘Take the Party Line’

- Schedule 17 the draft Bill contains details of the process for dismissal of an IRG member if the IRG is satisfied that the member has disclosed the contents of any relevant report without the permission of the Chair or before the academic report has been produced. There are quite serious implications for the workability of the IRG contained within these provisions. Clause 2(2) of Schedule 17 states that the relevant ‘appointing authority’ may remove a member of the IRG from office simply by giving him or her ‘written notice of removal’. This would appear to present the obvious risk that once nominated onto the IRG, unless a person rigidly followed the positions of the different political parties (or indeed the two governments), they could be summarily removed from the IRG and presumably be replaced by someone more pliant who would not deviate from party political positions. For the IRG to function properly and fulfil its mandate with regard to promoting reconciliation it would require those appointed to act in the public interest and to do so without fear that they could be summarily removed for party political reasons.

Recommendation: The solution to the risk of IRG members being dismissed for party political reasons could be found in Schedule 17, Clause 2(6) of the draft Bill. It provides that IRG members would hold office subject to the terms and conditions to be determined by the First and deputy First Minister and that any additional provision for their removal from office could be contained therein. The current *carte blanche*

provisions in Schedule 17, Clause 2(2) of the draft Bill should be removed and replaced by an agreed protocol from the FM/DFM detailing the responsibilities of the IRG members as office holders. This protocol could include how they are to abide by the principles outlined in the SHA and Clause 1 of the draft Bill and stipulate the precise grounds by which any IRG member could be removed by the IRG itself rather than by the nominating parties. Removal for party political reasons should not be one of those grounds. These grounds, including those relating to confidentiality, should also make clear how the terms of appointment of IRG members would square with current protections for whistle-blowers who become aware of human rights abuses or other illegal activities.

Potential for a Unionist Veto Regarding any ‘Decision’ of the IRG

- With regards its practical working arrangements, Schedule 17 makes clear that for the IRG to be quorate 7 members must be present including the Chair, the UK Government nominee, and the Government of Ireland nominee.
- It also stipulates that decisions must be agreed by at least two-thirds of members participating.³³ This requirement, which is not contained in the Stormont House Agreement, in effect offers the combined voting of the Democratic Unionist Party (3 nominees) and the Ulster Unionist Party (1 nominee) a *de facto* veto over any decision made by the IRG. The two nationalist parties (Sinn Féin, 2 nominees and SDLP 1 nominee) could not exercise any such veto without the support of the Irish government or the Alliance Party (which have 1 nominee each). As above, if the current formula were retained, the combined votes of the DUP and UUP would not require the support of the British government to exercise any such veto. The key issue in judging the impact of that veto is what are the ‘decisions’ which are likely to be made by the IRG which could be blocked by any such veto?
- Other decisions to be made by the IRG would include those related to the promotion of reconciliation (Clause 60(1)) and the role of the IRG in reviewing and assessing implementation of the other legacy mechanisms of the Stormont House Agreement (Clause 60(3)). In addition, it is the latter function of the IRG which will inform the commitment contained in the Stormont House Agreement (SHA para 53) that the UK and Irish Governments will consider ‘statements of acknowledgement’ and would expect others to do the same (discussed further below).

Recommendation: To avoid the risk of the credibility of the IRG being undermined by the appearance that the political representatives of one section of the community could operate a *de facto* blocking veto over the decision-making process with the IRG, a simple majority of 6 from 11 (or equivalent if fewer members are present) should be adopted.

³³ Draft Bill, sch 17, cl 6(2).

Political Configuration of the IRG

- The other obvious point to make with regard to the proposed nomination formula for the IRG is that it reflects the political configuration in 2014 when the Stormont House Agreement was concluded. Presumably, those negotiating this formula in the SHA assumed that the enabling legislation would be introduced either in 2015, or at least before the next Assembly elections. However, this did not happen. The work of the IRG would be largely determined by the reports emerging from the other mechanisms envisaged in the Stormont House Agreement.

Recommendation: Regardless the political arithmetic, given the long delay, the configuration of political nominees to the IRG should be based on the most recent Northern Ireland Assembly election results prior to the IRG's establishment rather than 'frozen' in 2014. The legislation should be amended accordingly.³⁴

Ensuring the Independence, Professionalism and Rigour of the Academic Work

- Given that the IRG would be made up of political appointees, we believe that the independence, professionalism, and integrity of the work of the academic report on themes and patterns will be central to the credibility of the work of the IRG and indeed the SHA legacy mechanisms in general. In the absence of such a report on themes and patterns, the work of the OHA, HIU, and ICIR would be, by nature largely individualistic and 'case by case' focused. The IRG, through the academic report, would produce an account that assesses the themes and patterns or 'bigger picture of the conflict.' This work would in turn be central to the efforts of the IRG to challenge sectarianism and promote reconciliation.
- Clause 62(4) of the draft Bill proposes that 'the academic experts must be independent, free from political influence and act in way which can secure public confidence'. An NIO paper on commissioning the independent academic report, which accompanies the consultation documents, considers how the academic expert work could be commissioned, 'taking into account issues of independence and impartiality; good governance and ethics; and ownership of research'.³⁵ That report refers to existing mechanisms, which fund high quality research and provide an architecture for the commissioning, governance, peer review, independence and ethics of that research. The paper refers specifically to the Economic and Social Research Council (which governs social science research including sociology, politics, law, elements of psychology etc.), the Arts and Humanities Research Council (which governs arts subjects such as history, languages, religious studies, aspects of law etc.). The paper also refers to the

³⁴ By way of illustration, in the Assembly elections (2011) preceding the SHA being concluded, the DUP secured 38 seats, Sinn Féin 28 seats, the UUP 18 seats, SDLP 14 seats, and Alliance secured 8 seats. In the 2017 Assembly elections, the DUP won 28 seats, Sinn Féin 27 seats, the SDLP 12 seats, the UUP 10 seats, and the Alliance Party 8 seats. Although these elections results would not have altered the allocation of ministerial seats in the Northern Ireland Executive, relative minor shifts from this position could.

³⁵ NIO Consultation Paper (n 13) 1.

Irish Research Council which covers both social science and arts subjects and provides a similar architecture for research governance, independence and rigour. It correctly notes the strong emphasis on multi-disciplinary research across all of these bodies and that the ESRC (and AHRC) regularly ‘provide advice and support’ to those seeking to benefit from their expertise and connections to academic networks. The NIO paper thus states that ‘A research council approach could be adopted by the IRG in the way that it commissions research’.

Recommendations:

The ESRC and AHRC should be engaged explicitly to commission the academic work on patterns and themes to ensure independence, impartiality, and best practice in the academic research. The reason for engaging both the ESRC and AHRC (who work collaboratively on a regular basis) is to ensure that those involved in preparing the academic report encompass both social science and arts disciplines. Placing the ESRC and AHRC at centre of this process, rather than simply advising the political appointees who make up the IRG is a fundamental prerequisite to the credibility of this work.

In addition, a new provision should be inserted into the relevant clause of the legislation making it clear that any attempt by any member of the IRG to unduly influence or otherwise interfere with the work of the independent academics involved in producing the academic report may be viewed as a breach of duty and that individual may be excluded from the IRG. If the power to suspend a nominating authority’s ability to replace someone who has been so excluded (either a political party or one of the two governments) for up to six months is retained in the final version of the legislation as a sanction for breach of the duty on the IRG, interference with the work of the academics involved in producing the academic reports should be one of the specified grounds for such a sanction.

Sources that will inform the Work of the Independent Academic Experts

- It is clear from the NIO draft Bill and Explanatory Notes that the academics’ report would not be commissioned until the IRG has received what are referred to as ‘the four principal reports’ from the HIU, ICIR, OHA, and the Coroners’ Courts of Northern Ireland.
- To assist the academic experts in writing their report on the patterns and themes, the draft Bill further specifies in Clause 62(2)(a) that the academic experts *may* (to the extent, if any, that the academic experts think it appropriate to do so) take account of information from a range of specified sources providing these have been lawfully made available to them. Clause 62(2)(b) states academic experts *may not take account of such information unless it has lawfully been made available in the way referred to in subclause (3)*.
- The sources referred to in subclause 3:
 - HIU reports;

- HET reports that are publicly available or made available to the academic experts by the family concerned;
 - ICIR reports that are publicly available or made available to the academic experts by the family concerned;
 - ICIR Annual reports;
 - Police Ombudsman reports that are publicly available, or in the case of family reports that are made available to the academic experts by the family concerned;
 - OHA records that are publicly available;
 - OHA reports that are produced by the Deputy Keeper (annual reports relating to the oral history archive);
 - Criminal Court Decisions in the United Kingdom and Ireland;
 - Judgments of civil courts and tribunals in the United Kingdom and Ireland that are made publicly available;
 - Coroner Court proceedings in the UK and Ireland;
 - Inquiries under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2015, that are made publicly available.
- The NIO Consultation Paper that accompanies the legislation appears in paragraph 10.3 more explicitly to limit the information that the academics could access to the four ‘principal reports’ and ‘other *specified* sources’ (emphasis added).
 - The Stormont House Agreement states that ‘any potential evidence base for patterns and themes should be referred to the IRG from any of the legacy mechanisms’.³⁶ As noted above, it further states that ‘this process should be conducted with sensitivity and rigorous intellectual integrity, devoid of political interference.’ This makes clear that the evidence base for the examination of themes and patterns should emerge from the other SHA mechanisms. However once a possible theme or pattern emerges from those mechanisms, it is difficult to see how the academics appointed could assess the validity of any such potential theme or pattern with the required level of ‘sensitivity and rigorous intellectual integrity’ by *only* researching its merits from the list of sources in subclause 3. The word ‘may’ in Clause 62(2)(a) would seem to suggest that the academics may give whatever weight they wish to the information provided by the list of sources detailed in subclause 3. However, it does not provide the independent academic experts with an express freedom to consult sources beyond this list and weigh up the relevance or otherwise of those other sources in assessing the veracity of any suggested theme or pattern. Common sense would suggest that they should have such authority but that authority is not express in the legislation.
 - If the independent academic experts were not to be permitted to read beyond the list of sources in subclause 3, they would not (for example) be able to consult the widely used CAIN website,³⁷ the extensive Linenhall Library Northern Ireland

³⁶ SHA, para 51.

³⁷ Conflict Archive on the Internet (CAIN), <http://www.cain.ulst.ac.uk/> accessed 20 August 2018.

Political Collection,³⁸ the numerous official reports into key events in Northern Ireland³⁹ or authoritative academic or historical reference points such as the *Lost Lives* book.⁴⁰

- This would seem a perverse act of anti-intellectualism and run contrary to the statutory obligation placed upon the independent academic experts for ‘rigorous intellectual integrity’ and operating ‘in such a way as to secure public confidence in the reports’. Moreover, it would run contrary to the professional standards that govern academic research across all social science and arts disciplines and would almost certainly mean that academics with the required professional profile would not be willing to undertake the work.
- In 2016, a group of distinguished academics led by Professor Ian McBride (Foster Professor of Irish History at Oxford) held a workshop at the University of Oxford on the role of historians with regard to the implementation of the Stormont House Agree mechanisms.⁴¹ Although it is envisaged that the independent academic experts working with the IRG on themes and patterns would be drawn from a range of backgrounds (not just history), their conclusions have obvious read-across for other disciplines. They argued that the academics involved in work associated with the IRG ‘should have access to a wider range of archival sources’ beyond those available in the UK national archives and the Public Records Office of Northern Ireland (p.10). They argued that the SHA should result in greater access amongst the academics appointed to relevant records held by the Northern Ireland Office, Ministry of Defence, Foreign and Commonwealth Office and Cabinet Office archives – all of which ‘hold thousands of files relevant to the writing of the thematic reports’ (p.11). They further argue that

The opening up of government records will not inevitably lead to one-sided accounts concentrating exclusively on the security forces. Official records also contain extensive information on paramilitary organisation and activities, because they were a central focus for the state.

They also suggested that the records of various churches, peace campaigners, political parties, and international organisations such as Amnesty International could be drawn upon when the thematic reports are being written.

³⁸ Linenhall Library, Collections, NI Political Collection and Divided Society: Northern Ireland 1990 – 1998, <https://www.linenhall.com/pages/ni-political-collection-and-divided-society-northern-ireland-1990-1998> accessed 22 August 2018.

³⁹ E.g. Lord Cameron, *Disturbances in Northern Ireland: Report of the Commission appointed by the Government of Northern Ireland* (1969) Cmnd 532; Lord Diplock *Report of the Commission to consider legal procedures to deal with Terrorist activities in Northern Ireland* (1972) Cmnd 5185; Lord Gardiner, *Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland* Cmnd (1975) 5847; Desmond de Silva, *The Report of the Patrick Finucane Review* (2012) HC 802 2012-13.

⁴⁰ David McKetterick, Seamus Kelters, Brian Feeney, Chris Thornton and David McVea, *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles* (Mainstream Publishing 2007).

⁴¹ *Historians and the Stormont House Agreement Report* (n 28).

Recommendation: The power of the independent academic experts to review, evaluate and determine the relevance of all open access materials in assessing themes and patterns emerging from the SHA legacy mechanisms should be made explicit in the legislation. Moreover, as recommended by Professor McBride and his colleagues, with regard to archives that are not currently available, compromises must be reached on releasing as much material as possible to aid understanding without endangering people's lives.

Publication of the Academic Report

- A key concern for academics involved in the writing of the report on themes and patterns would be to ensure that once all necessary legal and quality controls have been written, the report would actually be published. Clause 62(6) of the draft Bill stipulates that the IRG must give copies of any academic report that is produced to (a) the First Minister and deputy First Minister; (b) the Secretary of State, and (c) the Government of Ireland at the same time. Since the term used is 'must', it would appear that there is no 'decision' on the part of the IRG regarding the passing on of the academic reports.
- Clause 62(8) states that the First Minister and deputy First Minister acting jointly must (a) lay the copy of the academic report given to them before the Northern Ireland Assembly, and (b) publish that copy of the report in the manner that the First Minister and deputy First Minister acting jointly consider appropriate. Again, this appears to be a straightforward statutory obligation to lay the academic report before the Assembly and to publish it.
- The obligation to lay a copy of the academic report before the Assembly appears absolute and, if the report is laid before the Assembly, it is to all intents and purposes in the public domain. Given past experiences with regard to legacy related matters, however, concerns have been expressed to us during the consultation that the requirement to 'act jointly' in publishing the report 'in a manner that the OFM/DFM jointly consider appropriate' could be used to unreasonably delay publication.

Recommendation: To allay fears about the prospect of publication being unduly delayed, additional wording could be added to Clause 62(8) stating that that the requirement to act jointly could not be utilised to unreasonably delay the publication of the academic report on themes and patterns or in laying it before the Assembly. In the event of the FM/DFM failing to agree an appropriate format for the publication of the academic report within a reasonable time, it would be published in the manner it is received.

Statements of Acknowledgment

- The Stormont House Agreement states that ‘In the context of the work of the IRG, the UK and Irish Governments will consider statements of acknowledgement and would expect others to do the same.’⁴² However, in the draft Bill, the link between the work of the IRG and these proposed statements of acknowledgement are not mentioned. In order to assist the two governments in the preparing their statements of acknowledgement, either the IRG or the independent academic experts could be tasked with preparatory work as part of their broader focus on reconciliation, the work of the other SHA mechanisms and the report on themes and patterns.

Recommendation: Consideration should be given to the placing a statutory duty on the IRG to conduct such work as it deems necessary in preparing materials that would be useful for two governments and others to considering the issuing of statements of acknowledgement as mandated in the Stormont House Agreement.

⁴² SHA, para 53.

Overarching Recommendations

National Security

Defining ‘Keeping People Safe and Security’

Recommendation: Our preferred option is that the term national security be removed and replaced with the language of the SHA ‘keeping people safe and secure.’ ‘Keeping people safe and secure’ should be defined for the purposes of decisions on information redaction with regard to the SHA mechanisms. It would require the decision maker to determine that information redaction was necessary and proportionate and consistent with human rights principles with due regard to:

(a) **Duty to Protect Life** (Article 2, ECHR) No ‘sensitive information’ shall be provided which might present a real and immediate threat to the life of an identified individual or individuals from the criminal acts of a third party

(b) **Duty to Prevent Harm to Individuals** (Article 3, ECHR) No ‘sensitive information’ shall be provided which might present a real and immediate risk of harm to an identified individual or individuals, not a class of persons. There must be a direct, foreseeable, and describable link between the proposed disclosure and the anticipated harm. This means that the risk must be imminent or in the foreseeable future and wholly created or materially enhanced by the proposed disclosure

(c) **The source of the threat** – There must be an identifiable threat to carry out harm as defined above through criminal acts.

(d) **Protection of operational counter-terrorist methodologies and effectiveness which are *in current use* and which are *lawful*** - i.e. obsolete or ‘arguably illegitimate’⁴³ methods cannot be concealed by restrictions on disclosure. Information about contemporary, legitimate, operational methods already in the public domain must not qualify for redaction. In general, the reasons for restricting disclosure under this criterion must be, as the courts have held, ‘particularly convincing and weighty’.⁴⁴

Nature of Legal Proceedings on Information Redaction

- As is detailed further in the Appendix, we also provided further detailed provisions on the nature of the legal proceedings in which any appeal on an information redaction would take place, the ways in which the rights of the families and others would be protected in such hearings (including in any closed proceedings) and guidance on the extent of the proposed disclosure.

Recommendation: If the term national security is to be retained in the Bill, it should be made clear (e.g. in Clause 39 regarding interpretation) that it refers to **current** or **contemporary** rather than **historical** national security concerns. It should also be

⁴³ *Dil and Others v Commissioner of Police* [2014] EWHC 2184 (QB), para 42

⁴⁴ *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493

specified that information could not be redacted for historical national security concerns.

National Security and the HIU

National Security Veto over Disclosure

- The provisions in the draft Bill to identify ‘sensitive’ information and to bestow ministerial power to redact reports on national security grounds are neither ECHR nor SHA compliant.

Recommendation: The proposals should be amended to ensure the HIU Director is the decision maker on redactions and that these decisions are based on clearly defined and legitimate criteria, as set out in the Appendix. The proposed ten-day prohibition on HIU disclosure to the Director of Public Prosecutions (DPP), Chief Constable of the Police Service of Northern Ireland or Coroners, for which there is no explanation, should also be addressed.

National Security Veto over ‘Any Action’ of HIU

- The draft Bill would place an overarching duty on the HIU to ‘not do anything’ that might ‘prejudice’ the undefined ‘national security interests of the United Kingdom’.

Recommendation: This unnecessary provision should be removed. The UK government has a long track record of stretching the concept of national security beyond credible interpretation in Northern Ireland legacy cases and as such there is a legitimate concern that the provision could be used to conceal evidence of human rights violations.

Role of the Irish Government in restricting Disclosure to the HIU

Recommendation: The Irish authorities should set out explicit grounds on which they will restrict disclosure, and adopt clearly defined criteria (similar to what the Model Bill group have previously detailed in the Appendix with regard to redactions based on national security). As above, this should also detail the relevant appeal process for any information redactions determined in the Republic of Ireland.

The Principles and Rules to be Applied in any Appeal on Information Redaction

Recommendation: The appeal mechanism on information redaction on the grounds of national security should also apply to the ICIR and OHA. In addition, Clause 21(5) should make clear that the appeal mechanism would take into account all relevant human rights considerations in line with current judicial review decision making. Thus, the phrase ‘including all relevant human rights principles’ should be added to the end of the current Clause 21(5). This should now read ‘In determining an appeal under this section, the court must apply the principles applicable on an application for judicial review including all relevant human rights principles.’ In addition, given the public importance of the proposed appeal mechanism, the legislation should stipulate that a no fee process will be applied and provision to preclude adverse

costs being awarded against families or the SHA mechanism that instigates the appeal. Finally, as is detailed in Appendix 1 of this report, the government should make clear its proposed arrangements for ensuring that families' interests are represented by lawyers whom families trust and have confidence in during any closed element of the appeal mechanism.

The Remedy Available Should Be that the Information Not be Redacted

Recommendation: Clause 21(6) provides that the court would have the power to quash the Secretary of State's decision and that if it does so it must direct that the Secretary of State should remake the decision within 60 days or a reasonable longer period which the court specifies. This provision should be amended. Instead, this provision should state that the court should direct that the relevant information should not be redacted. The Secretary of State would of course have the right to appeal that determination under Clause 21(8) if the relevant threshold for appeals was reached.

Policing Board

- Under Schedule 15, Clause 11 of the draft Bill, which deals with the oversight of the work of the Historical Investigations Unit, the Policing Board would have the power to establish an Inquiry on any matter disclosed in a HIU report due to the gravity of matter or exceptional circumstances. However, in the draft Bill, Schedule 15, Clause 11(3), the Secretary of State may overrule the Policing Board if he/she determines that an inquiry should not be held in the interests of national security.

Recommendation: This proposed National Security constraint on the role of the Policing Board is not provided for in the SHA and should be removed.

National Security and the ICIR

- Clause 43(2)(a) of the draft Bill provides that the ICIR must not do anything which would prejudice the national security interests of Ireland or the United Kingdom. Clause 46 would require that the Secretary of State be given a draft of all ICIR reports before they are given to a family and it would give the Secretary of State the power to (1) identify elements of a report that could prejudice the national security interests of the UK and (2) require that they be excluded. These are deeply concerning provisions that could undermine the legitimacy of the institutions in the eyes of families and would risk the ICIR not being Article 2 compliant.

Recommendations: Given its likely 'chill factor' on those who have information which might be of use to families, this provision needs to be re-examined and assessed in terms of its effect on the workability of the ICIR and alternatives explored that might address legitimate national security concerns on the part of the two governments. One solution might be to place the responsibility for determining national security concerns on the ICIR itself with an agreed protocol on consulting with either of the relevant governments if national security issues were 'flagged' -

rather than have every single ICIR family report read and approved by the UK and Irish government before it is released.

At the very least, in keeping with our previously published model for information redaction, we recommend that the ICIR Chair or family members have the power to appeal any proposed redaction by the Secretary of State to an independent judicial authority.

As above, any family member or the ICIR Chair who wishes to challenge information being redacted from an ICIR report on the grounds of national security should be able to appeal that decision through the agreed appeal mechanism. If accepted, this would require the establishment of an analogous appeal process in the Republic of Ireland.

National Security and the Oral History Archive

- The Oral History Archive is not designed to attract information about unlawful activity or secrets of the state but it is nonetheless possible that information included in an individual testimony could be deemed harmful to national security and, on that account, redacted or destroyed.

Recommendations: We propose that decisions on redaction and closure should be taken by the Steering Group in line with clear and transparent criteria.

In the (albeit unlikely) event that it is proposed to redact or destroy an account because the information contained within it is deemed harmful to national security, we recommend that the individual who contributed the information should (if they are unhappy with the decision of the Steering Group) have recourse to the agreed appeal mechanism for national security redactions arising in the context of the HIU and the ICIR.

Restrictions on Legacy Inquests

- Despite the SHA explicitly stating that ‘Legacy inquests will continue as a separate process to the HIU’ and the requirement and commitment to discharge ECHR Article 2 obligations, the draft Bill would prevent a Coroner from holding a legacy inquest until the HIU has completed a HIU investigation into the death (or until the HIU closes) and would only then allow the inquest to proceed if there are ‘compelling reasons’.
- The ‘section 14’ powers of the Attorney General for Northern Ireland to reopen legacy inquests would also be suspended entirely whilst the HIU is running and permanently unless there are ‘compelling reasons’ (the current threshold is where it is ‘advisable’).

Recommendation: The NIO proposals should honour the Stormont House Agreement by explicitly stating that legacy inquests will continue as a separate process to the HIU.

Principle of Complying with Human Rights

The SHA set out a number of general principles to govern the work of the legacy institutions. Clause 1 of the draft Bill replicates this list. The General Principles include the principle that ‘human rights obligations be complied with’. Clause 67 (interpretation) states that human rights obligations should be interpreted as referring to the ‘obligations under the Human Rights Act 1998’. Whilst the Human Rights Act (HRA) gives further effect to ECHR rights in domestic law, there have also been domestic judicial decisions that limit the temporal jurisdiction and scope of the Act. As a result, under this interpretation, the obligation on the legacy institutions to comply with human rights could be deemed to apply only to with respect to issues that arose after the HRA came into effect. This could constitute a significant limitation in the interpretation of the HIU’s human rights obligations.

The restriction of human rights obligations to the HRA in any case limits the scope of this principle to the rights contained in this instrument and excludes other human rights obligations, for example, UN human rights standards relating to eliminating discrimination against women and other standards relating to peace building.

Recommendation: This should be amended to explicitly reference the ECHR and other international human rights standards in the UN and Council of Europe systems.

The Secretary of State’s Power to Make Regulations

Clause 65 of the draft Bill vests powers to make ‘incidental, supplementary or consequential provision by regulations’ in the Secretary of State and Northern Ireland departments. The Secretary of State’s powers are explicitly qualified under Clause 65(3), as far as they relate to devolved matters, to requiring the consent of the Northern Ireland Assembly. This places the ‘Sewel’ convention⁴⁵ on a statutory basis for NI, albeit only for secondary regulations and without stipulating the consent process (i.e. whether this would require a formal Legislative Consent Motion- LCM) or merely a straight vote on a motion.

Recommendation: The Secretary of States powers to make regulations should be scrutinised and qualified to preclude any provisions that may impinge on the HIU’s independence.

Changes to the Early Release Scheme

The 2018 draft Bill would amend the legislation for the Early Release Scheme (the Northern Ireland (Sentences) Act 1998, which provides for a maximum of two years in prison for conflict-related offences committed before the Good Friday Agreement). The Act would be amended to treat conflict-related offences committed between 1968 and 1973 as qualifying offences for the early release scheme. Such cases are currently excluded due to the technicality of ‘scheduled offences’ on which the Act

⁴⁵ The convention whereby Westminster will not normally legislate on devolved matters without the consent of the respective devolved institution.

relies not existing until 1973. The timeframe and formulation is different to the definition of a conflict-related incident in the 2006 Victims and Survivors (Northern Ireland) Order.⁴⁶ The cut-off date for the scheme remains the time of the Good Friday Agreement in April 1998. As in the existing Act, this provision would apply retrospectively – i.e. if sentences were passed now for offences that were committed pre-1973 provision is made for accelerated release.

Recommendation: The changes should be implemented to remove the anomalies of the early release scheme.

⁴⁶ Victims and Survivors (Northern Ireland) Order 2006, Art 2 (Interpretation): “‘conflict-related incident’ means an incident appearing to the [Victims and Survivors Commission] to be a violent incident occurring in or after 1966 in connection with the affairs of Northern Ireland’.

I. Key Challenges

Challenge 1: Pension for the Severely Injured

A key omission from the current consultation relates to the question of a pension for the severely injured. Paragraph 28 of the Stormont House Agreement states that 'Further work will be undertaken to seek an acceptable way forward on the proposal for a pension for severely physically injured victims in Northern Ireland'. Although further work has been done, this issue remains unresolved.

There is a widely acknowledged moral compulsion to resolve this issue. A pension for those who were severely injured would return some dignity to a group of people who have been poorly treated, who often received derisory compensation in the past, and who have ongoing health-related needs which remain unmet by their current welfare provision.

While the government have continued to insist that 'this is a devolved matter', this is no longer an acceptable response to the needs of the injured.

Recommendations:

We believe that the Northern Ireland (Stormont House Agreement) Bill is an appropriate vehicle to resolve the political standoff on the issue of a pension for the severely injured. The legislation should include provision for the issuance of a pension and related care packages for all of those severely injured as a result of the conflict based on an objective assessment of the needs of the injured and their carers.

If this requires bespoke mechanisms to address the needs of civilians, former paramilitaries and part-time members of the security forces, then such a solution can and should be incorporated into the legislation.

Challenge 2: National Security

Given the importance of this challenge, we have provided below:

- a) Some historical context on the issue in terms of the Stormont House Agreement;
- b) An overview of the relevant clauses in the current draft Bill as well as some comparative illustrations of its potential effects using previous reports by the Office of the Police Ombudsman;
- c) An overview of the proposed appeal mechanism in the draft Bill;
- d) A discussion on how to resolve the competing priorities regarding information redaction drawing upon elements of a previous model developed by the authors and others (provided in Appendix 1) as well as detailed recommendations designed to improve the current draft Bill.

Onward Disclosure, Redaction and National Security in the 2015 Leaked Bill

In 2015, following resumed political negotiations, which culminated in the Fresh Start Agreement, the local political parties and the two governments failed to reach agreement on implementing the legacy component of the Stormont House Agreement. That failure was due in large part to the introduction of a provision allowing a UK government minister to redact, on national security grounds, information being passed from SHA mechanisms (particularly the Historical Investigations Unit)⁴⁷ onwards to families – a process referred to as ‘onward disclosure’.

The SHA did not refer to national security. Instead, paragraph 37 of the SHA states:

The UK Government makes clear that it will make full disclosure to the HIU. In order to ensure that no individuals are put at risk, and that the Government’s duty to keep people safe and secure is upheld, Westminster legislation will provide for equivalent measures to those that currently apply to existing bodies so as to prevent any damaging onward disclosure of information by the HIU.

During the negotiations in 2015, a leaked version of the government’s draft legislation on the legacy mechanisms came into the public arena. Amongst the most notable elements of that leaked draft were the provisions relating to onward disclosure and the HIU. While the powers of disclosure of information including intelligence to the HIU to assist it in conducting investigations were stronger, the HIU’s ability to provide ‘onward disclosure’ of such information to families was significantly curtailed by numerous references to powers that the Secretary of State could exercise to redact information on ‘the grounds of national security’.

Sinn Féin, the SDLP, the Irish government, the Alliance Party as well as human rights groups and victims’ organisations affected by state violence and collusion in particular were all highly critical of the British government for attempting to use a ‘national security veto’ to undermine the truth recovery functions of the HIU.⁴⁸ In

⁴⁷ The impact of national security considerations on the Independent Commission on Information Retrieval and the Oral History Archive are discussed below.

⁴⁸ ‘Sinn Féin Criticise Leaked Draft Westminster Bill Dealing With Legacy of The Troubles’ *BBC News* (6 October 2015) <https://www.bbc.co.uk/news/uk-northern-ireland-34460936> accessed 23 August 2018; Eamon Sweeney, ‘Stormont House Agreement: SDLP State Opposition to Victims Bill’ *Derry Journal* (14 October 2015) <https://www.derryjournal.com/news/stormont-house-agreement-sdlp-state-opposition-to-victims-legislation-1-7002475> accessed 23 August 2018; John Manley ‘Charlie Flanagan Critical of National Security “Smothering Blanket”’, *Irish News* (27 November 2015) <http://www.irishnews.com/news/2015/11/27/news/flanagan-critical-of-national-security-smothering-blanket--334991/> accessed 23 August 2018. The former Alliance Party leader and Justice Minister David Ford is quoted as ‘sharing the concerns of nationalist and the Irish government’ over the national security clauses in the leaked bill. He told the Irish News, ‘Clearly every government has national security issues but the concerns we expressed on seeing the draft Bill was that there seemed to be about four layers of that – which gave an indication of an unwillingness to be opened. If I thought there was an overlaying of national security it’s not surprising other people rejected it completely’ in ‘David Ford Upbeat for Alliance Ahead of Stormont Election’ *Irish News* (4 March 2016)

addition, Pablo de Greiff, former UN Special Rapporteur on Transitional Justice referred to the ‘over-use of national security exemptions to avoid disclosure’ by the UK government in Northern Ireland and that ‘appeals to the ambiguous concept of national security invoked as a blanket term becoming a means to shield individuals or practices against open scrutiny, fuel mistrust and suspicion’ – a perception which is aggravated by ‘the fact that national security has no statutory definition in British law’ and by the fear that national security will be used to redact information that is politically embarrassing.⁴⁹

National Security and the HIU in the 2018 Draft Bill

In the current draft Bill, the power is vested in the Secretary of State to redact information from family reports on grounds of an undefined risk to the national security of the UK. The draft Bill also places duties on a range of security bodies to designate such information as ‘sensitive’ information. This concept of ‘sensitive information’ encompasses two categories of information, namely:

- Information which if disclosed generally ‘might’ prejudice the ‘national security’ interests of the UK
- Information originally ‘supplied by’ MI5, MI6, GCHQ, any intelligence unit of the Police or armed forces (i.e. including RUC Special Branch, or Force Research Unit-FRU)

There is also an overarching duty on the HIU to ‘not do anything’ that might ‘prejudice the national security interests of the United Kingdom’. National security is not defined in the draft Bill nor elsewhere in legislation. The Secretary of State may provide guidance as to the interpretation of this provision.⁵⁰ Any such guidance however may be varied or revoked by further guidance and may make different provisions for different cases.⁵¹

The second limb of the definition of ‘sensitive’ information (defined by the source of the information) therefore places all information regarding matters such as informants and covert operations within this category. The grounds on which the Secretary of State can direct redaction of such information are slightly narrower, being information that, in her view, would, or would be likely to, prejudice the national security interests of the UK.

<http://www.irishnews.com/paywall/tsb/irishnews/irishnews/irishnews//news/politicalnews/2016/03/04/news/david-ford-upbeat-for-alliance-ahead-of-stormont-election-438605/content.html> accessed 23 August 2018. The position taken by the DUP and the Ulster Unionist Party was broadly that the issue of national security was one to be resolved between nationalists and the British government.

⁴⁹ UN Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland (17 November 2016) UN Doc A/HRC/34/62/Add.1

<http://www.refworld.org/docid/58b9583b4.html> accessed 23 August 2018.

⁵⁰ Draft Bill, cl 34(2).

⁵¹ Ibid, cl 34(5).

There is also a new provision whereby any disclosure by the HIU of 'sensitive' information to other criminal justice agencies (i.e. the PSNI, Director of Public Prosecutions, Coroner, Inspectorate of Constabulary or Chief Inspector of Criminal Justice) can only be made if the Secretary of State is given ten working days' notice. There is no explanation as to why this provision has been added.

By way of illustration, it is notable that much of the contents of reports such as the Police Ombudsman's investigation into the Loughinisland massacre or the Operation Ballast report into the circumstances surrounding the murder of Raymond McCord Junior would consist of 'sensitive' information.⁵² Had the Secretary of State had the powers now proposed for the HIU, such reports could have been redacted beyond recognition before publication.

Again, by way of illustration, in the two pages below we have shown what the 2016 Police Ombudsman's report into the Loughinisland massacre might have looked like if 'sensitive information' had been excluded. Bearing in mind that a fundamental starting point for all the SHA mechanisms is that they are designed to provide a better product than the existing legacy facing mechanisms for victims and survivors (including the Police Ombudsman's Office), the risk of national security redactions representing a backward step in the disclosure of information remains.

⁵² Office of the Police Ombudsman (2016) *The Murder at the Heights Bar, Loughinisland 18 June 1994*. This latter report was amended slightly in March 2018 to make it clear that the determination of collusion did not apply to the former RUC Commander of its Downpatrick subdivision Ronald Hawthorne. A judicial review of the findings of this report taken by the Northern Ireland Retired Police Officers Association is ongoing at the time of writing. Office of the Police Ombudsman of Northern Ireland (2007) *Operation Ballast: Investigation into the Circumstances surrounding the murder of Raymond McCord Jr.*

Figure 1: Extract from Office of the Police Ombudsman, Report into Loughinisland Massacre (2016)
2



THE MURDERS AT THE HEIGHTS BAR, LOUGHINISLAND, 18 JUNE 1994

Background to the attack

Intelligence suggests that the attack at Loughinisland was carried out by a UVF (Ulster Volunteer Force) unit in reprisal for the killings on the Shankill Road of senior UVF figures on 16 June 1994. An order came from the top of the UVF for there to be "blood on the streets" as a response to the killings. A UVF unit, under the command of a senior UVF figure reporting to the top echelons of the UVF, was dispatched to undertake the murders. I have not been able to determine with any certainty why the Heights Bar at Loughinisland was chosen. We do know that the claim made by the UVF at the time that it was an attack on active republicans, was completely false. The attack on Loughinisland was sectarian as the targets were members of the Catholic community.

Importation of weapons in 1988

However, an understanding of what happened at Loughinisland begins with the importation of arms by loyalist paramilitaries in late 1987/early 1988. My investigation has found that the VZ58 rifle which was used in the Loughinisland attack was part of the shipment which entered Northern Ireland at that time. I examined intelligence which showed the passage of a VZ58 into the hands of those, who were suspected of undertaking the murders.

Events leading up to the Loughinisland attack

My investigation into the Loughinisland killings examined the events leading up to the murders. It found that Special Branch had reliable intelligence that there was to be an arms importation in 1987/1988. Moreover, reliable intelligence indicates that police informants were involved in the procurement, importation and distribution of these arms. The failure to stop or retrieve all the weapons, despite the involvement of informants in the arms importation was a significant intelligence failure.

This is particularly the case in relation to the failure to retrieve imported weapons from a farm owned by James Mitchell. The outcome of this failure was that not all the weapons were recovered by the police and many, including the VZ58 rifle used in Loughinisland, were subsequently used in a wide range of murders.

Incidents prior to Loughinisland murders

Prior to the Loughinisland murders there were a number of terrorist incidents, going back a number of years, which I believe are of relevance to the events at the Heights Bar on 18 June 1994. Available intelligence on these murders reflected the existence of an active UVF unit in the South Down area. There exists a clear linkage between those incidents in terms of suspects and method of operation. Intelligence suggests that this unit was involved in a number of murders and attempted murders prior to the Loughinisland attack, one of which was of a very similar nature involving the indiscriminate use of a weapon in a public bar. This UVF unit reported to an individual with connections to some of the men killed on the Shankill Road. The key individuals in the unit were suspects in the Loughinisland investigation.

A limited amount of this intelligence was passed to the investigators of the individual incidents. The UVF unit was not the subject of a policing response sufficient to disrupt their attacks. The failure to disseminate information to investigators was, in my view, an attempt to protect the sources of that information. This clearly undermined the investigations.

Figure 2: Illustrative Example of OPONI report on Loughinisland if Sensitive Information had been Redacted



THE MURDERS AT THE HEIGHTS BAR, LOUGHINISLAND, 18 JUNE 1994

Background to the attack

Intelligence suggests that the attack at Loughinisland was carried out by a UVF (Ulster Volunteer Force) unit in reprisal for the killings on the Shankill Road of senior UVF figures on 16 June 1994. An order came from the top of the UVF for there to be "blood on the streets" as a response to the killings. A UVF unit, under the command of a senior UVF figure reporting to the top echelons of the UVF, was dispatched to undertake the murders. I have not been able to determine with any certainty why the Heights Bar at Loughinisland was chosen. We do know that the claim made by the UVF at the time that it was an attack on active republicans, was completely false. The attack on Loughinisland was sectarian as the targets were members of the Catholic community.

Importation of weapons in 1988

However, an understanding of what happened at Loughinisland begins with the importation of arms by loyalist paramilitaries in late 1987/early 1988. My investigation has found that the VZ50 rifle which was used in the Loughinisland attack was part of the shipment which entered Northern Ireland at that time. I examined intelligence which showed the passage of a VZ50 into the hands of those who were suspected of undertaking the murders.

Events leading up to the Loughinisland attack

My investigation into the Loughinisland killings examined the events leading up to the murders. It found that Special Branch had reliable intelligence that there was to be an arms importation in 1987/1988. Moreover, reliable intelligence indicates that police informants were involved in the procurement, importation and distribution of these arms. The failure to stop or retrieve all the weapons, despite the involvement of informants in the arms importation was a significant intelligence failure.

This is particularly the case in relation to the failure to retrieve imported weapons from a farm owned by James Mitchell. The outcome of this failure was that not all the weapons were recovered by the police and many, including the VZ50 rifle used in Loughinisland, were subsequently used in a wide range of murders.

Incidents prior to Loughinisland murders

Prior to the Loughinisland murders there were a number of terrorist incidents, going back a number of years, which I believe are of relevance to the events at the Heights Bar on 18 June 1994. Available intelligence on these murders reflected the existence of an active UVF unit in the South Down area. There exists a clear linkage between those incidents in terms of suspects and method of operation. Intelligence suggests that this unit was involved in a number of murders and attempted murders prior to the Loughinisland attack, one of which was of a very similar nature involving the indiscriminate use of a weapon in a public bar. This UVF unit reported to an individual with connections to some of the men killed on the Shankill Road. The key individuals in the unit were suspects in the Loughinisland investigation.

A limited amount of this intelligence was passed to the investigators of the individual incidents. The UVF unit was not the subject of a policing response sufficient to disrupt their attacks. The failure to disseminate information to investigators was, in my view, an attempt to protect the sources of that information. This clearly undermined the investigations.

The concern regarding the provisions in the current draft Bill is that they provide a vehicle for the UK government to conceal and prevent exposure of and accountability for human rights violations, particularly in the area of covert policing and intelligence. Whilst there are existing non-disclosure duties on other office holders such as the Police Ombudsman and Chief Constable, *a key difference in the current draft Bill is that the Secretary of State herself is the decision-maker rather than the HIU Director.*

The proposals in the draft Bill therefore depart from the SHA commitment that the UK government 'will provide for equivalent measures to those that currently apply to existing bodies so as to prevent any damaging onward disclosure of information by the HIU'.⁵³

The Proposed Appeal Mechanism in Draft Bill Regarding Information Redacted on National Security Grounds

The draft Bill contains an appeal mechanism by way of an appeal to the High Court with regard to information redacted by the Secretary of State. This appeal mechanism could be activated by either the HIU Director or a family member in the relevant case where the Secretary of State has redacted information from a report which the family would otherwise have received from the HIU.

Of course, the right to seek a judicial review of a Secretary of State decision to redact information from a HIU report would have been open to family members or indeed the Director of the HIU regardless. However, according to the NIO consultation document, the fact that this appeal mechanism is now included in the draft Bill means that the family or HIU director would be able to skip the preliminary 'leave to appeal' stage.⁵⁴

Other important features of this appeal process include:

- Clause 21(4) makes clear that the function of the court under this appeal mechanism is to review the Secretary of State's decision not to permit disclosure.
- Clause 21(5) stipulates that the 'court must apply the principles applicable on an application for judicial review'.
- If the appeal is successful, the court has the power to quash the Secretary of State's decision and if it does, it must direct that the Secretary of State retakes the decision within 60 days or a longer period if specified by the court.⁵⁵
- There are also provisions for a further appeal against the determination of the court with the leave of the High Court or Court of Appeal if the proposed appeal

⁵³ SHA, para 37.

⁵⁴ The normal requirement to seek 'leave to appeal' in a judicial review is 'to eliminate at an early stage claims which are hopeless, frivolous, vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration.' *R. v Inland Revenue Commissioners Ex p. National Federation of Self-employed and Small Businesses Ltd* [1982] A.C. 617 at p.642 per Lord Diplock).

⁵⁵ Draft Bill, cl 25(6).

‘would raise some important point of principle or practice’ or there is ‘some other compelling reason’ (Clause 25(8) and (9)).

How Can the Provisions on National Security Redactions in the Current Draft Bill be Improved?

As noted above, the issue of information redaction on the grounds of national security is the prime reason for the collapse of the 2015 talks on legacy and the matter has remained unresolved ever since. It is a touchstone issue for public confidence in the investigative functions of the HIU in particular and the SHA more broadly. This is particularly true in cases that involve deaths at the hands of the state or cases involving allegations of state collusion with paramilitary organisations – since these are the cases where information redaction would seem more likely to occur - rather than in paramilitary cases with no state involvement. It is therefore crucial that the competing interests of the right of families to know the truth and the state’s responsibilities to keep people safe and secure are resolved satisfactorily.

Our recommendations below are designed to assist in that objective and come in two forms.

First, the authors have previously worked with other NGOs and spent considerable time and energy developing a model that we believe offers a way to take seriously the rights of families and the responsibilities of state organisations to keep people safe and secure.⁵⁶ That model was made public in 2017. We remain convinced that it represents the best way to meet the concerns of all parties on this issue. Some of its key elements are summarised below and it is outlined in full in Appendix One.

Second, as with the rest of this response to the draft Bill, we have also engaged in providing detailed commentary and recommendations designed to improve the existing draft provisions. Needless to say, even if our proposed model was not adopted in whole, elements of it would certainly strengthen the current draft Bill provisions as detailed below.

Our Model for Information Redaction

Key elements of the proposed model for information redaction were as follows:

- As in the current draft Bill, we proposed that any decision to redact information could be reviewed by a judicial figure of at least high court level.
- However, we proposed that the legislation should **either** define the term national security ‘for the purposes of the SHA legacy mechanisms on dealing with the legacy of the conflict in Northern Ireland’ (to avoid read across concerns for other aspects of UK public law) or excise the term national security, and instead include the actual criteria for information redaction in the draft Bill and use the

⁵⁶ See K. McEvoy et al, *Dealing with the Past in Northern Ireland: A Proposed Model for Information Redaction under the Stormont House Agreement* (QUB Human Rights Centre 2017).

term ‘keeping people safe and secure’ as a short hand for the relevant duties concerned – the term which is used in the SHA.

- We proposed that the relevant criteria for the redaction of information should be specified in the legislation as follows:
 - **Duty to Protect Life** (Article 2, ECHR) No ‘sensitive information’ shall be provided in a HIU report to a family which might present a real and immediate threat to the life of an identified individual or individuals from the criminal acts of a third party.
 - **Duty to Prevent Harm to Individuals** (Article 3, ECHR) No ‘sensitive information’ shall be provided in a HIU report to a family which might present a real and immediate risk of harm to an identified individual or individuals, not a class of persons. The harm to be prevented includes physical or specific psychological injury or harassment or intimidation likely to reach the threshold of inhuman or degrading treatment. There must be a direct, foreseeable, and describable link between the proposed disclosure and the anticipated harm. That means that the risk must be imminent or in the foreseeable future and wholly created or materially enhanced by the proposed disclosure.
 - **The source of the threat:** The threat must be to carry out harm as defined above through criminal acts. The source of the threat must be either an identified individual or individuals or a clearly definable group that in either case has demonstrated the willingness and capability to carry out threats as described to either the individual(s) concerned or to a defined class of persons to which the individual(s) arguably at risk belong.
 - **Protection of Operation Counter-Terrorist Methodologies and Effectiveness** On the basis that under Articles 2 and 3 ECHR it may be necessary and proportionate, some information may be redacted from HIU reports to protect the effectiveness of operational methods of the police and other security services **which are in current use and which are lawful** - i.e. obsolete or ‘arguably illegitimate’⁵⁷ methods cannot be concealed by restrictions on disclosure. Information about contemporary, legitimate operational methods must not already be in the public domain to qualify for redaction. It must also be demonstrated that the proposed disclosure would, in fact, in the foreseeable future, damage the operational effectiveness of the method in question in such a way as to place a person or persons at a real and immediate risk of serious harm. In general, the reasons for restricting disclosure under this criterion must be ‘particularly convincing and weighty’.⁵⁸
- As is detailed further in the Appendix, we also provided further detailed provisions on the nature of the legal proceedings in which these hearing would take place, the ways in which the rights of the families and others would be protected in such hearings (including in any closed proceedings) and guidance on the extent of the proposed disclosure.

⁵⁷ *Dil and Others v Commissioner of Police* [2014] EWHC 2184 (QB), para 42

⁵⁸ *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493

Detailed Recommendations on the Current Draft Bill Provisions on National Security

Define and restrict to Contemporary, Forward-facing not Historical National Security

Recommendation: If the term national security is to be retained in the Bill, it should be tightly defined (see below) and make clear (e.g. in Clause 39 regarding interpretation) that national security refers to *current* or *contemporary* national security rather than *historical* national security concerns. If necessary, this interpretative clause could also include the term future. Information cannot be redacted for historical national security concerns

National Security veto over disclosure

- The provisions in the draft Bill to identify ‘sensitive’ information and to bestow ministerial power to redact reports on national security grounds are neither ECHR nor SHA compliant.

Recommendation: The proposals should be amended to ensure the HIU Director is the decision maker on redactions and that these decisions are based on clearly defined criteria, as set out in Appendix 1. The ten-day prohibition on HIU disclosure to the DPP, PSNI Chief Constable, or Coroners, for which there is no explanation, should also be addressed.

National Security veto over ‘any action’ of HIU

- The draft Bill would place an overarching duty on the HIU to ‘not do anything’ that might ‘prejudice’ the undefined ‘national security interests of the United Kingdom’.

Recommendation: This unnecessary provision should be removed. The UK government has a long track record of stretching the concept of national security beyond credible interpretation in Northern Ireland legacy cases and as such there is a legitimate concern that the provision could be used to conceal evidence of human rights violations.

The Principles and Rules to be Applied in any Appeal on Information Redaction

- The draft legislation generally provides for the appeal mechanism, but further clarification is needed as to whether the mechanism would take into account all relevant human rights considerations, as well as rules on practical issues such as costs. The process of Closed Material Procedures (CMPs) has also been heavily criticised on due process grounds. Thus, particular attention will have to be paid to ensure that the interests of families are properly represented and that the families have full confidence in the lawyers representing their interests in any element of such appeals that are held in Closed Material Proceedings format.

Recommendation: Clause 21(5) should make clear that the appeal mechanism would take into account all relevant human rights considerations in line with current judicial review decision making. Thus, add the phrase ‘including all relevant human rights principles’ to the end of the current Clause 21(5). This should now read ‘In determining an appeal under this section, the court must apply the principles applicable on an application for judicial review including all relevant human rights principles.’ In addition, given the public importance of the proposed appeal mechanism, the legislation should stipulate that a no fee process would be applied and provision to preclude adverse costs being awarded against families or the HIU who take appeals. Finally, as detailed in Appendix 1 of this report, the government should make clear its proposed arrangements for ensuring that the interests of families are represented by lawyers in whom families have trust and confidence in any closed element of the appeal mechanism.

The Remedy Available Should Be the Information not be Redacted

- As noted above, Clause 21(6) provides that the court would have the power to quash the Secretary of State’s decision and that if it does so it must direct that the Secretary of State should remake the decision within 60 days or a reasonable longer period specified by the court.

Recommendation: This provision should be amended. Instead, this provision should state that the court would direct that the relevant information would not be redacted. The Secretary of State would of course have the right to appeal that determination under Clause 21(8) if the relevant threshold for appeals was reached.

Power to compel that a Policing Board Inquiry not be Established on the Grounds of National Security

- Under Schedule 15, Clause 11 of the draft Bill, which deals with the oversight of the work of the Historical Investigations Unit, the Policing Board would have the power to establish an Inquiry on any matter disclosed in a HIU report due to the gravity of matter or exceptional circumstances. However, in the draft Bill, Schedule 15, Clause 11(3), the Secretary of State may overrule the Policing Board if he/she determines that an inquiry should not be held in the interests of national security.

Recommendation: The ability of the Policing Board to establish an inquiry on matters of gravity revealed or exceptional matters revealed in a HIU report should not be capable of being over-ruled by the Secretary of State based on national security. This clause should be deleted.

Ability of the Secretary of State to redact information from an ICIR report on the grounds of National Security

- Clause 43(2)(a) of the draft Bill provides that the ICIR must not do anything which would prejudice the national security interests of Ireland or the United Kingdom. Clause 46 would require that the Secretary of State be given a draft of all ICIR reports before they are given to a family and it would give the Secretary of State the power to identify elements of a report that could prejudice the national security interests of the UK and require that they be excluded. These are deeply concerning provisions for a couple of reasons.
- First, the knowledge that all information given to the ICIR would be channelled through the UK (and Irish) government before it reaches family members is likely to be a significant disincentive for some of those with relevant information coming forward in the first place. Second, in effect, this provision allows government representatives to control the flow of information in cases concerning not only paramilitaries but also suspected crimes and violations committed by members of the security forces (or by paramilitaries suspected of colluding with the state). Such a measure could undermine the legitimacy of the institutions in the eyes of families and would risk not being Article 2 compliant.

Recommendation: Given its likely ‘chill factor’ on those who have information which might be of use to families, this provision needs to be re-examined and assessed in terms of its effect on the workability of the ICIR and alternatives explored that might address legitimate national security concerns on the part of the two governments. One solution might be to place the responsibility for determining national security concerns on the ICIR itself with an agreed protocol on consulting with either of the relevant governments if national security issues were ‘flagged’ - rather than have every single ICIR family report read and approved by the UK government before it is released. At the very least, the appeal mechanism agreed for information redaction on the grounds of national security should also be available to family members affected in ICIR reports and the ICIR Chair. An equivalent appeal mechanism, using the same criteria, should be created in the Republic of Ireland.

National Security and the Oral History Archive

- The Oral History Archive is not designed to attract information about unlawful activity or state secrets. Nonetheless, it is possible that some of the information included in individual testimonies could be deemed harmful to national security and closed on this account.

Recommendation: In the rare circumstances where in an Oral History Account is closed on the basis of national security, the person who deposited that account should also be able to avail of the proposed judicial appeal mechanism to handle such disputes if no alternative resolution of that dispute can be found.

Challenge 3: Statute of Limitations

One welcome omission from the draft Bill is a statute of limitations for members of the armed forces. Despite that omission, Question 14 of the NIO consultation paper asks the public ‘Do you have any views on different ways to address the legacy of Northern Ireland’s past not outlined in this consultation paper?’ Given the prominence of the issue of statute of limitations, the fact that some members of the public are likely to advocate for it in this consultation and our past work on the issue, the Model Bill team considered it important to discuss the issue in this response.

Neither the five local political parties nor the British or Irish governments argued in favour of a statute of limitations during negotiations that led to the Stormont House Agreement and no such measure is included in its provisions.

The suggestion emerged in particular from a House of Commons Defence Committee report in 2017.⁵⁹ Members of the Model Bill team made a detailed submission to that Committee and Professor Kieran McEvoy gave evidence in person. The Defence Select Committee recommended that a statute of limitations be enacted for former members of the Armed Forces to cover ‘all Troubles-related incidents, up to the signing of the 1998 Belfast Agreement’. It also recommended that this measure should be accompanied with ‘the continuation and development of a truth recovery mechanism’.⁶⁰ When asked in a subsequent media interview, if such a statute of limitations for armed forces could result in de facto amnesty for paramilitaries as well, the Chair of the Select Committee Dr Julian Lewis said ‘if the price of protecting our soldiers who are all that stood between Northern Ireland and complete bloody chaos’ is that paramilitaries go unpunished, ‘my personal view is we owe it to our soldiers to pay that price’. He added ‘I’d hope the families would be big-hearted enough to accept this is something they could agree to’.⁶¹

While the Defence Committee’s 2017 report related to an inquiry focused on Northern Ireland, the report referred to the prospect of British soldiers being held accountable for actions committed elsewhere and the wider commentary calling for a statute of limitations has increasingly called for it to apply to the actions of British soldiers in all theatres of conflict. This would, for example, include allegations of war crimes committed by British personnel in Iraq, which are currently the subject of a preliminary examination by the International Criminal Court. This broader approach is reflected in the Defence Committee’s second statute of limitations inquiry, which was launched on 12 June 2018 and has yet to report.

⁵⁹ House of Commons Defence Committee, *Investigations into Fatalities in Northern Ireland Involving British Military Personnel* (2017). 7th Report of Session 2016-17. The issue has also been the subject of a private members’ bill (10-minute rule) which is due for a second reading in November 2018, see Armed Forces Statute of Limitations Bill 2017-2019, <https://services.parliament.uk/bills/2017-19/armedforcesstatuteoflimitations.html> accessed 22 August 2018.

⁶⁰ Defence Committee (n 59) 17.

⁶¹ ‘Top Tory Call for End to Troubles Prosecutions “Gross Naivety”’, *Newsletter* (15 May 2017) <https://www.newsletter.co.uk/news/crime/top-tory-s-call-for-end-to-troubles-prosecutions-gross-naivety-1-7960754> accessed 22 August 2018.

While the Defence Committee did not provide any detail on what their proposed statute of limitations would look like, a cross-party private members' bill sets out one potential, albeit deeply problematic, model. The text of this bill, published on 13 June 2018, takes a wider approach by calling for the introduction of a statute of limitations to prevent legal proceedings being brought against current and former armed forces personnel accused of murder, manslaughter, or culpable homicide where ten years have elapsed since the alleged offence. These proposals would apply to any instance where UK troops were involved in an 'armed conflict or peacekeeping operation'. Where the alleged offence took place in the UK, the proposals require that alleged offences must have been subject to police or coronial investigation before a statute of limitations could apply. This is regardless as to whether the original investigation was Article 2 ECHR compliant or not.

If a proposal similar to the private members' bill were enacted, it would effectively prevent any further legal proceedings for Troubles-related killings in which armed forces personnel are allegedly involved. It would also prevent legal proceedings relating to allegations of war crimes and torture of detainees in Iraq and Afghanistan, which took place over ten years ago. These proposals would therefore in effect be an amnesty for these past offences. However, unlike most amnesties, this statute of limitations would not be an 'exceptional' measure addressing only past crimes. Instead, it would become an unprecedented and *permanent* part of the criminal justice system and could result in future impunity for serious offences in which UK armed forces personnel are implicated. As such, there are a number of fundamental legal and policy problems with the proposals for a statute of limitations, which the remainder of this section sets out.

Potential Breach of the United Kingdom's International Legal Obligations

Statutes of limitations are prohibited under international law for 'war crimes' and 'crimes against humanity'. In the case of Northern Ireland, it is commonly accepted that international crimes reaching this high threshold did not take place. In our context, the question is whether a possible statute of limitations could legally apply to unlawful killings or other serious offences for which UK armed forces personnel are allegedly responsible. As members of the Model Bill team have argued elsewhere,⁶² under the European Convention on Human Rights, amnesties may be permissible for violations of the right to life provided that they

- Do not interfere with the state's fulfilment of its duty to investigate;
- Are enacted as part of a genuine process of conflict resolution and reconciliation, particularly where it delivers reparations to victims; and
- Are necessary and proportionate.

⁶² See further Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing 2009); Louise Mallinder, Luke Moffett, Kieran McEvoy and Gordon Anthony, *Investigations, Prosecutions and Amnesties under Article 2 & 3 of the European Convention on Human Rights* (2015) <https://amnesties-prosecution-public-interest.co.uk/output-type/project-reports/> accessed 22 August 2018.

In addition, the European Court of Human Rights case law to date suggests that it will look more restrictively on amnesties for torture or unlawful killings by state agents.

Any attempt to use a statute of limitations to interfere with the rights of victims to an effective investigation of what happened to their loved ones under Article 2 of the European Convention of Human Rights would almost certainly fail a legal challenge.

Concerns posed by any statute of limitations regarding the UK's international human rights obligations would appear to be shared by the Secretary of State for Northern Ireland. In a recent letter to the Defence Select Committee Ms Karen Bradley stated:

it is my understanding that there may be considerable legal difficulties associated with pursuing a statute of limitations that would apply only to the prosecution of members of the armed forces. I know that your committee heard evidence that a statute of limitations applying only to members of the armed forces would be inconsistent with the UK's obligations under the European Convention of Human Rights and with other international obligations.⁶³

Ms Bradley's view is correct.

In addition to the legal obligations related to combatting impunity, the proposed statute of limitations could raise other legal difficulties. For example, a fundamental principle of the rule of law is equality before the law. Article 14 of the European Convention of Human Rights – which is binding in UK law – also contains a similar non-discrimination provision. A statute of limitations that sought to prevent prosecutions of one category of suspects (armed forces) while continuing to prosecute others (paramilitary suspects) would obviously be vulnerable to a legal challenge on the grounds of discrimination. These are discussed further below.

Potential Damage to the United Kingdom's International Reputation

As noted above, the statute of limitations proposed by the Defence Committee would in effect be an amnesty. Amnesties for international crimes and serious violations are usually viewed under the international human rights framework as efforts to secure impunity.⁶⁴ Impunity is defined by the United Nations as the impossibility of bringing the alleged perpetrators of human rights violations to account 'since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties'.⁶⁵ States have a legal obligation to

⁶³ Letter from Secretary of State for Northern Ireland to the Chairman of the Defence Select Committee relating to Legacy Consultation (4 July 2018) https://www.parliament.uk/documents/SofS_for_Northern_Ireland_to_Chairman_Legacy_Consultation.pdf accessed 22 August 2018.

⁶⁴ Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press 2009).

⁶⁵ United Nations, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005) UN Doc E/CN.4/2005/102/Add.1.

‘combat such impunity’.⁶⁶ Previous governments, which have introduced amnesties to cover serious violations committed by state actors, have included the military junta in Argentina, the dictatorship of Augusto Pinochet in Chile and Robert Mugabe’s Zanu PF government in Zimbabwe.

The UK government has long been a firm supporter of combatting impunity. As former NIO Minister Hugo Swire, told the UN Human Rights Council in 2014, ‘The UK strongly believes there should be no impunity for human rights violators’.⁶⁷ In 2011, the UK government representative was party to the Committee of Ministers of the Council of Europe’s decision, which adopted the ‘Guidelines on Eradicating Impunity for Serious Human Rights Violations’.⁶⁸ The latter states that

impunity is caused or facilitated notably by the lack of diligent reaction of institutions or state agents to serious human rights violations... States are to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system.

Any mismatch between the established view of the UK government with regard to impunity in its foreign policy and the way in which it treats security force personnel accused of serious human rights abuses in Northern Ireland and elsewhere would be likely to be viewed with suspicion as an act of political expediency rather than any effort to promote reconciliation.

A Statute of Limitations for the Armed Forces would Ultimately Apply to Paramilitaries

The view of the Secretary of State for Northern Ireland on this issue again chimes with our own. In the same letter to the Defence Select Committee, Ms Bradley notes:

Within Northern Ireland, there is a specific concern that a statute of limitations for members of the armed forces would inevitably be extended to terrorists. In other words, it would become in effect a general amnesty for Troubles-related incidents.⁶⁹

The domestic legal reasons why a state actor only amnesty would ‘inevitably’ extend to paramilitary suspects are as follows.

⁶⁶ Ibid. Principle 1 – ‘Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished.’

⁶⁷ Hugo Swire, Speech on Human Rights to UN Human Rights Council on Human Rights (3 March 2014) <http://www.ukpol.co.uk/hugo-swire-2014-speech-on-human-rights/> accessed 22 August 2018. Mr Swire moved from the NIO to the Foreign Office in 2012.

⁶⁸ Council of Europe, *Eradicating Impunity for Serious Human Rights Violations: Guidelines and Reference Texts* (2011) <https://rm.coe.int/1680695d6e> accessed 22 August 2018.

⁶⁹ Ibid.

Abuse of Process

The basic legal position in the UK is that it is for the prosecutorial authorities to determine when a prosecution should be commenced and if commenced whether it should continue. However, the courts have an overriding duty to promote justice and prevent injustice. From this duty arises an inherent power to stop a prosecution if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court. Abuse of process has been defined as something 'so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case'.⁷⁰ Abuse of process arguments would undoubtedly be raised by the defence in any attempt to prosecute a paramilitary suspect. It would of course be for the courts to decide whether a decision to prosecute someone for a particular offence based upon their employment status (i.e. whether or they were employed by the state) represented an abuse of process that was unfair and wrong.

Collusion

A further complication would arise in cases involving collusion between the State and Loyalists or Republicans. For example, we know that a small number of UDR and RUC personnel were members of loyalist paramilitary organisations or acted in tandem with such groups. Would an amnesty apply to such activities? Another illustration of the messiness of such a process is illustrated by the Stakeknife case. Chief Constable Jon Boutcher is currently heading up the investigation into the activities of the alleged former agent and senior member of the IRA internal security unit.⁷¹ Mr Boutcher's investigation explicitly includes members of the IRA, British Army, Security Services, and other Government agencies. One assumes that logically the statute of limitations applied to members of the British Army implicated in this case would also hamper efforts to prosecute former RUC and MI5 officers. If such an amnesty is introduced, any evidence amassed by Mr Boutcher could not be used in prosecutions against members of the armed forces and possible representatives of other agencies. Would it also extend to IRA members who were also British agents? Moreover, if Mr Boutcher produces evidence against former IRA members, their lawyers are likely to argue that the statute of limitations (which would inevitably obscure the involvement of agent handlers) would represent an abuse of process against their clients. In short, a statute of limitations for the security forces would mean that any collusive element to cases such as Kingsmill, Claudy, or Loughinisland would make prosecutions of the paramilitaries involved extremely difficult if not impossible.

⁷⁰ Hui Chi-Ming v R [1992] 1 A.C. 34, PC.

⁷¹ Operation Kenova: An Investigation in the Alleged Activities of the Person Known as Stakeknife. <https://www.opkenova.co.uk/> accessed 22 August 2018.

The Flimsiness of the Statute of Limitations as the 'Redressing the Balance' Arguments

Proponents of the statute of limitations have suggested that one of the reasons why they view an armed forces amnesty as necessary is to redress a perceived imbalance between the treatment of state actors and paramilitary prisoners or suspects after the Good Friday Agreement. However, the flimsiness of those arguments would inevitably be exposed in a court hearing to decide on whether a discriminatory prosecution policy was justifiable. This section reviews some of the problems with these arguments.

Unfairness of current investigations and prosecutions against the state

In May 2018, Prime Minister Teresa May told the House of Commons that the situation in Northern Ireland was 'patently unfair' in 'we have a ... situation at the moment ... that the only people being investigated for these issues that happened in the past are those in our armed forces or those who served in law enforcement in Northern Ireland'.⁷² In fact, the PNSI Legacy Investigations Branch confirmed in 2017 that they were investigating 1,118 killings, 530 of which are attributed to Republicans, 271 of which are attributed to Loyalists, 354 to the security forces and 33 unknown.⁷³

With regard to prosecutions, a similar charge has been laid at the office of the Public Prosecution Service in general and the former DPP Barra McGrory QC in particular. However, as Mr McGrory made clear in a response to these charges, between 2011-2017 seven republicans have been prosecuted, three loyalists, three soldiers and one police officer.⁷⁴

That soldiers or police officers would not qualify for early release under the terms of the Northern Ireland (Sentences) Act 1998 which facilitated the early release of paramilitary prisoners

Another argument raised was that the early release provisions of the Good Friday Agreement did not apply to soldiers or police officers. That legislation, the Northern Ireland (Sentences) Act 1998, means that no one convicted of a pre-1998 scheduled offence can serve more than two years. In fact, it is clear that there is no legal impediment to the soldiers or police officers benefitting from these early release provisions if convicted. It is true that anyone convicted of an offence committed before 1973 - when 'scheduling' was introduced - is still liable to serve his or her full

⁷² House of Commons Hansard, Oral Answers Col. 677 (8 May 2018) <https://hansard.parliament.uk/Commons/2018-05-09/debates/7CC8007E-2C84-452B-A33F-AFED43C57AA5/PrimeMinister> accessed 22 August 2018.

⁷³ Vincent Kearney, 'Troubles legacy cases bias disputed by figures', *BBC News* (2 February 2017) <https://www.bbc.co.uk/news/uk-northern-ireland-38844453> accessed 22 August 2018.

⁷⁴ David Young, "No bias displayed" in decision to prosecute British soldiers', *Belfast Telegraph* (30 January 2017) <https://www.irishnews.com/news/northernirelandnews/2017/01/30/news/-no-bias-displayed-in-decision-to-prosecute-british-soldiers-912523/> accessed 22 August 2018.

sentence under the Northern Ireland (Sentences) Act. However, Schedule 18 of the current draft Bill sets out amendments to rectify that anomaly.

That the on-the-run scheme was an amnesty for IRA suspects

The final important argument to justify the statute of limitations proposals was that republican suspects had benefited from the on-the-run (OTR) letters that amounted to a de facto amnesty. However, as Mr Justice Sweeney made clear in the failed Hyde Park bombing case against John Downey,⁷⁵ and was confirmed categorically by Lady Hallett in her review of the OTR scheme, these letters did not amount to an amnesty.⁷⁶ The effect of OTR letters was to tell their recipients that there were no current charges or evidence against them. However, unlike an amnesty, they did not rule out a future prosecution if evidence emerged.

The Potential Effect of a Statute of Limitations on the Historical Investigations Unit

All of the cases within the HIU's remit would be over ten years old, and all would have been subject to a police, or in the case of solidier shootings in the early 1970s, Royal Military Police investigation. If a statute of limitations were to become law, it would not preclude all HIU investigations *per se* as the HIU would still have the power to investigate conflict related killings. However, soldiers would be investigated knowing that they could not be prosecuted. Furthermore, if as discussed above, a statute of limitations was extended in practice to cover the actions of paramilitaries, it could also mean that they too would face investigations knowing that they could not be prosecuted. In effect, the purpose of the HIU would become exclusively focused on information recovery for families.

Conclusion

As noted above, a statute of limitations for security force personnel would probably be in breach of binding international human rights legal obligations including under the European Convention of Human Rights. It would also be a source of significant international embarrassment to the UK government to be likened to previous military dictatorships in Argentina and Chile or the Mugabe government in Zimbabwe and undermine the UK's credibility in the international struggle against impunity and the promotion of the rule of law. Finally, the shallowness of the arguments justifying a statute of limitations for State actors would all be exposed in court in any effort to prosecute a paramilitary suspect. The legal effect of such an amnesty would be to render any such prosecutions extremely difficult if not impossible.

⁷⁵ 'It followed that the letter sent could never amount to an amnesty of absolute and final promise not to prosecute. I believe that the limitations of the scheme were understood by all.' *The Queen v John Anthony Downey* (25 February 2014) Mr Justice Sweeney, at p 26. <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-downey-abuse-judgment.pdf> accessed 22 August 2018.

⁷⁶ Lady Hallett, *The Report of the Hallett Review: An Independent Review into the On the Runs Administrative Scheme* (2014) 137.

II. The Historical Investigations Unit

The Stormont House Agreement 2014 provided for the creation of a Historical Investigations Unit (HIU) specifying that: ‘Legislation will establish a new independent body to take forward investigations into outstanding Troubles-related deaths’.⁷⁷ The SHA set out a heads of agreement on the HIU in just ten paragraphs (30-40). The draft Bill contains the necessary detail and provision on the HIU in Clauses 2-39 and Schedules 1-16.

In 2015, a previous version of the draft Bill (‘the 2015 Bill’) was leaked in the media. The inclusion of a Ministerial ‘national security veto’ over the content of HIU reports in the 2015 Bill was central to the derailing of the then process. A further version of the bill was reportedly produced in Summer 2017 (‘the 2017 Bill’).

This section examines and critiques the HIU provisions in the 2018 draft Bill as to its compliance with human rights standards and the SHA. It examines some of the main changes since the 2015 bill, before providing a detailed examination of specific areas of the 2018 draft Bill.

How would the SHA General Principles Guide the Work of the HIU?

Clause 7(1) of the 2018 draft Bill stipulates that the HIU would have an obligation to exercise its functions in a manner that is consistent with the General Principles set out in the SHA and Clause 1, along with a number of other matters (fair and impartial; proportionate; effective and efficient) and in a manner calculated to secure independence and public confidence.

As indicated in the Executive Summary, we are concerned that the obligation in the General Principles to comply with human rights would be interpreted as being limited to the Human Rights Act 1998. We therefore recommend that the draft Bill be amended to refer to the ECHR and other international human rights instruments in the UN and Council of Europe systems. This would include UN human rights standards relating to eliminating discrimination against women (CEDAW) and other standards relating to peace building.

Clause 7(2) would place a number of restrictions on the HIU stating that it must not do ‘anything’ that might (in summary):

1. Prejudice the national security interests of the UK;
2. Put at risk the life or safety of any person; or
3. Prejudice current or potential criminal / disciplinary proceedings.

As discussed above, the national security provision in Clause 7(2) could prevent effective investigation of human rights violations. As such, its inclusion is both highly

⁷⁷ SHA para 30.

problematic but also likely to lead to significant legal challenges to aspects of the HIU's work.

Which Cases would be in the HIU's Remit?

The SHA provided that the HIU would take forward 'outstanding cases' from the PSNI Historical Enquiries Team (HET) -including HET cases already identified as requiring re-examination- and cases from the Police Ombudsman legacy caseload. The SHA also provides that other cases could be considered where there is 'new evidence'.

The draft Bill sets out the parameters for cases that would fall within the 'HIU Remit'. However, it is important to note that not all cases within the HIU remit would be investigated by the HIU. As discussed below, where a case is not investigated, the HIU would still conduct a review of evidence and produce a family report. This is due to provisions that both provide for and restrict the operational discretion of the HIU. This section addresses the question of which cases are in the 'HIU Remit'. The question of which cases would actually be investigated is addressed in a separate section below.

Clause 5 provides for which deaths would be within the HIU remit. Under Clause 5(2) within 90 days of establishment, the HIU is to publish a document that sets out the names of persons within its remit. The HIU must also periodically revise and publish this list. Three main categories of cases within the HIU remit are conflict-related deaths that are:

- a) **Outstanding** HET cases;
- b) **Outstanding** Police Ombudsman cases; or
- c) Occurred between 1998 - March 2004, and for which there is new evidence.

This table summarises categories and further information on each is provided in the sections below.

Death part of HIU Remit	
Category A) part of PSNI Historical Enquiries Team (HET) caseload (on the 23 December 2014, as certified by the Chief Constable) ⁷⁸	<p>AND 'requires further investigation' by the HIU meaning one of four conditions is met:⁷⁹</p> <p>Condition A: PSNI/Ombudsman certify they had not commenced their investigatory process;</p> <p>Condition B: PSNI/Ombudsman certify they commenced but did not complete their investigatory process;</p> <p>Condition C: PSNI/Ombudsman certify the investigatory process has been completed but there is either:</p>
Category B) Death part of Police Ombudsman and Historical Investigations Directorate (HID) (if before a	

⁷⁸ Draft Bill, sch 3, paras 1 and 8 (interpretation).

⁷⁹ Ibid, sch 3, para 3.

date specified by the Secretary of State, the Ombudsman certifies the death was in the HID remit further to a complaint, referral or own motion investigation) ⁸¹	<ul style="list-style-type: none"> new evidence, or 'conduct in respect of a death' (lethal force or collusion) -requiring further investigation (HET cases only); <p>Condition D: The DPP refers a death (not already in HIU Remit) to the HIU on grounds of new evidence.⁸⁰</p>
Category C) Death was wholly caused by physical injuries/illness that resulted from an act of violence or force that occurred <i>in Northern Ireland</i> from 11 April 1998 to 31 March 2004. ⁸²	<p>AND has a 'required connection with Northern Ireland' which is either that the violence/force was carried out:</p> <ul style="list-style-type: none"> for a reason related to the constitutional status of NI or to political or sectarian hostility between persons there; in connection with preventing, investigation or otherwise dealing with (a).⁸³ <p>AND – new evidence - HIU can only investigate if HIU Director has reasonable grounds for believing criminal offence/grave police misconduct for which a person could be identified or prosecuted/disciplined.⁸⁴</p>

Category A (the HET cases)

The Chief Constable would be required to provide the HIU with a list of certified HET cases, setting out:

- The names of persons on the HET case list;
- Whether the PSNI investigatory process had been *completed* by 23 December 2014 (but not whether it had begun); and
- Whether condition C (new evidence or conduct in respect of a death applies).⁸⁵

Condition A (HET investigation not commenced)

Inclusion in this category should be relatively straightforward as it refers to cases that the HET did not commence before it was closed, albeit this information is not included in the categories above. When it was functioning, the HET completed reviews of 1,625 cases, which related to 2,051 deaths.⁸⁶

⁸¹ Ibid, sch 3, paras 2 and 8 (interpretation), and cl 67.

⁸⁰ Ibid, sch 6, para 1.

⁸² Ibid, cl 5(1)(c).

⁸³ Ibid, cl 5(1)(c).

⁸⁴ Ibid, sch 5.

⁸⁵ Ibid, sch 3, cl 4.

⁸⁶ Kearney (n 73).

Condition B (HET cases, commenced but not completed)

Inclusion in this category would be more complex as it would include cases the HET opened but did not finish or for which the HET did not issue a report.

It would also include cases in which the HET finished its review and a family report was issued but the report was unsatisfactory, and hence the investigation is not considered 'completed'. This would cover cases where the PSNI had agreed, on the basis of written representations by families on the outcome of the HET process, to reconsider or reopen the process, and had written to the family to that end (and neither a revised report, nor confirmation an existing report was to stand was given to the family). This means the decision to re-open was at the PSNI's discretion. This would limit families who were dissatisfied but who did not correspond with the PSNI on the matter (including those who felt they could not due to the standing down of the HET), although there appears to be no cut off point for this correspondence in the draft Bill.

Condition C(a) 'new evidence'

Completed HET cases could also be within the HIU remit where the HIU considers it has 'new evidence' (the threshold for which is discussed below).

Condition C(b) 'conduct in respect of a death'

'Condition C' cases relating to 'conduct in respect of a death' appear to relate to 'state involvement' cases (although the draft Bill does not explicitly use that term), in the context of the HMIC's report to the HET which held that a range of state involvement cases had not been investigated lawfully. This category relates only to HET and not Ombudsman legacy cases.⁸⁷

In determining whether a case in this category should be included in the HIU remit, the draft Bill stipulates that the Chief Constable should have particular regard to the HMIC report into the HET. There are two subcategories:

- Ground C is where there was direct use of force by a person
- Ground D is where collusion is suspected (although this term is *not* used)

Ground C is relatively straightforward as it relates to those cases – within the HET's remit - where soldiers or police officers directly killed a person.

In relation to Ground D, the Chief Constable is to have 'reasonable grounds' for suspecting that a person was involved in what is often termed 'collusion' – this is defined as a person having:

⁸⁷ It does not apply to any case that falls into both categories HET and HID for which the HID has completed an investigation by a specified date.

- a) Facilitated (assisted or caused, or intended to assist or cause) an offence or avoidance of justice *relating to the death*;
- b) Did so with the intention of achieving an unlawful or improper purpose; and
- c) There are either reasonable grounds for suspecting a criminal offence was committed or the gravity or exceptional nature of the (mis)conduct merits investigation.

Whilst this definition in law of ‘collusion’ is less restrictive than one requiring evidence of a ‘conspiracy’, it requires the conduct to have been intended to achieve an unlawful and improper purpose’. This prompts the question as to when *facilitating a criminal offence or the avoidance of justice relating to murder is considered lawful and proper*. It also conditions the conduct to a requirement of intentionality – turning a blind eye that leading to a suspect evading justice, or ‘unintentionally’ acting unlawfully appears insufficient to meet this threshold.

This engages the matter of the ‘lawfulness’ of informant handling policy during the conflict. The current statutory basis for authorising the use of informants is found in the Regulation of Investigatory Powers Act 2000 (RIPA). This provides that where informant to engage in conduct consistent with the RIPA authorisation their conduct is then deemed ‘lawful for all purposes’.⁸⁸ This essentially provides that informant conduct authorised by a handler, regardless of what it is, is ‘lawful’ and hence would not meet the threshold for re-investigation proposed for these HIU cases. RIPA however post-dates all the HET cases, which are pre-1998. RIPA was the first statute to set informant handling on a statutory basis. It may however be argued by the police and security forces that RIPA essentially set on a formal footing an existing process, and hence informant actions, ‘authorised’ by handlers prior to this date, should be considered ‘lawful’ and hence out of bounds to HIU investigations. It is publicly known that the RUC at least for some time pre-1998 did have an ‘authorisation’ procedure whereby an Assistant Chief Constable would sign off on informant participation in a crime.⁸⁹ However, even official reports like the De Silva review take a different view arguing that in the absence of statutory framework for informant handling, handlers were asked to operate unlawfully.⁹⁰ In this instance, however, the decision as to whether the ‘intention’ was unlawful, is vested in the

⁸⁸ See Regulation of Investigatory Powers Act 2000, s 27 in relation to informants (Covert Human Intelligence Sources) providing that: ‘Lawful surveillance etc. (1) Conduct to which this Part applies shall be lawful for all purposes if— (a) an authorisation under this Part confers an entitlement to engage in that conduct on the person whose conduct it is; and (b) his conduct is in accordance with the authorisation.’

⁸⁹ See Police Ombudsman Public Statement, *The murders at the Heights Bar in Loughinisland* (revised March 2018), para 6.13: ‘In addition, the RUC had made the operational decision that the only other offence for which they may have been culpable, that of membership of a proscribed organisation, did not, of itself, require the usual authorisation from an Assistant Chief Constable for informant participation in crime.’

⁹⁰ De Silva (n 39) para 25: ‘The practical implications of the failure to provide policy direction on agent-handling were significant. It meant that agent-handlers and their superiors were expected to gather intelligence without clear guidance as to the extent to which their agents could become involved in criminal activity in order to achieve this objective. Intelligence officers were, in effect, being asked to perform a task that, in some cases, could not be achieved effectively in ways that were lawful.’

police service who ran many of the informants in question, which is unlikely to take a corporate position that RUC informant handling was routinely 'unlawful' given as the PSNI would consequently be civilly liable for such acts.

Condition D DPP Referrals to the HIU based on New Evidence

Condition D relates to cases referred to the HIU by the DPP that are not already in the HIU Remit.⁹¹ The draft Bill provides that the DPP could do this where he or she is aware of 'new evidence'. The DPP would be permitted to refer cases back to the HIU that the HIU has already investigated, where new evidence emerges.⁹² (Although in this instance, it is not clear if such a referral would be precluded by the technicality of the death already being in the HIU remit).

Category B (the Police Ombudsman Cases)

The Ombudsman would be required to issue a statement specifying the cases in the remit of the HID, which had been completed by the date specified by the Secretary of State.⁹³ Cases would be included if one of the following conditions are met:

- Condition A: Ombudsman cases when an investigation had not commenced
- Condition B: Ombudsman cases when an investigation had commenced but not finished
- Condition C: new evidence (as above for HET cases – but does not include the second category of completed cases that involved direct use of force/collusion)
- Condition D: referral to HIU of former Ombudsman cases by DPP on basis of new evidence

There are some areas of ambiguity as to cases in the HET and Office of the Police Ombudsman of Northern Ireland (OPONI) remit. Specifically, this includes the cases of 49 deaths caused directly by RUC shootings. These cases had originally been part of the HET caseload, but given the independence requirements (as the HET was part of the PSNI); the cases were transferred to the Police Ombudsman. However, the Ombudsman was largely precluded from re-examining the cases due to domestic law restrictions on re-examination of complaints already previously investigated by the police. Whether such cases were still on the HET list on the 23 December 2014, or on the Ombudsman's legacy list on the specified date, regardless of the interpretation they could not be investigated, would determine as the draft Bill stands whether they are included in the HIU Remit.

⁹¹ Draft Bill, sch 3, cl 3(5).

⁹² Ibid, sch 6, cl 1.

⁹³ Ibid, sch 3, cl 5.

Category C (1998-2004 cases)

Category C cases (1998-2004) are explicitly restricted to deaths that occurred in Northern Ireland. Other cases may examine deaths that occurred in the Republic, but which resulted from criminal offences/misconduct in NI.

In relation to new evidence in Category C, the HIU is to establish a process where families can bring new evidence to the attention of the HIU.

The ‘required connection’ criterion in these cases is aimed at distinguishing deaths that are conflict-related from those that are not. The definition (set out in the table above) is much more complex than the existing definition in the Victims and Survivors (Northern Ireland) Order 2006. The distinct language of ‘violence’ and ‘force’ appear aimed at differentiating the actions of state and non-state actors. It is not clear if this would have any practical impact in limiting this category.

The extension from 1998 to 2004 was not in the 2015 Bill. 2004 is the date when reforms were taken forward in the PSNI further to Ombudsman’s Omagh Bomb report, in relation to the manner in which murder investigations were conducted. The PSNI considers that it can stand over any murder investigations conducted after this date.

What would be the Threshold for ‘New Evidence’ sufficient to enable the Reopening of Cases?

The ‘new evidence’ criteria is based around the threshold established in *Brecknell v UK* – namely evidence that is capable of leading to the identification of a person and prosecution or disciplinary measures for grave and exceptional misconduct.

The HIU would be empowered to re-investigate HET, PSNI, or one of its own cases where there is new evidence. When taking decisions as to new evidence, the HIU Director would be required to take into account the credibility of the evidence but could disregard factors such as the death or absence from the jurisdiction of a suspect (which would affect the likelihood of prosecution/disciplinary sanctions). The evidence would be new if it was previously unknown to the HIU, or unknown to the previous PSNI/RUC/Ombudsman investigators, or the relevance of the evidence to the death was not known.⁹⁴

Schedule 6 contains further provisions for ‘new evidence’ cases. It vests a power in the Director of Public Prosecutions to refer a case (that would fall within its remit) to the HIU for investigation – or re-investigation – similar to the existing powers to refer cases vested in the PSNI. Curiously, the DPP would be required to exercise this power consistently with the SHA general principles. This may be straightforward around principles concerning the ‘rule of law’ or human rights compliance, given that there is a clear evidential threshold for the exercise of what is a quasi-judicial

⁹⁴ Ibid, sch 3, cl 6.

function. However, it is not clear how principles around ‘balance’ and ‘proportionality’ could be engineered (for example, the DPP could not set a ‘quota’ whereby he or she ceases to refer e.g. state involvement cases, until an equitable or proportionate balance is achieved with non-state cases).

What Challenges could arise in Gaining Access to ‘New Evidence’?

Whilst the proposals seek to explicitly deal with those HET cases that were considered as having been conducted unlawfully by the HMIC report, there is no specific process to assess the impact of significant evidence having been withheld or not available to the HET, which may have adversely influenced HET reviews which have been completed.

In 2013, it was revealed that the Ministry of Defence was unlawfully holding thousands of files that should have been processed for the National Archive in what had been a secret warehouse in southern Derbyshire. Among the 66,000 files were significant materials relating to the Northern Ireland conflict. These included ‘hundreds and hundreds of boxes’ each containing around 10 files relating to the 1970s and early 1980s, that had been transferred from the British Army’s Northern Ireland Headquarters when it closed in 2009. The existence of the archive had not been declared to the HET.⁹⁵

In 2017, it was revealed the PSNI had not disclosed material to the Coroner from a Ministry of Defence intelligence database they had held since 2007. The PSNI Disclosure Unit stated it had not known the database was held by the PSNI. It is not clear from this whether any of the materials withheld from the Coroner were also withheld from the HET and Ombudsman.⁹⁶

The question of how families could get former closed HET cases within the HIU Remit based on potential ‘new evidence’ in these Ministry of Defence archives or other withheld archives highlights gaps in the draft Bill. Families themselves clearly would have no access to the MoD archives and would not be aware whether there is relevant material. The HIU would be precluded from investigating deaths, and hence likely from using its powers of disclosure, for deaths not in the HIU remit. Families would therefore be dependent on the HIU happening to come across information relating to their loved one whilst investigating related matters.

The DPP’s powers of referral based on new evidence would only come into play where such evidence is in the possession of the DPP, who would likely be reliant on another agency having secured such disclosure. Given that the draft Bill would

⁹⁵ Ian Cobain, ‘Ministry of Defence holds 66,000 files in breach of 30-year rule’, *The Guardian* (6 October 2013) <https://www.theguardian.com/uk-news/2013/oct/06/ministry-of-defence-files-archive> accessed 22 August 2018.

⁹⁶ Alison Morris, ‘PSNI did not disclose military database files to Troubles inquests’, *Irish News* (31 January 2018) <http://www.irishnews.com/news/northernirelandnews/2018/01/31/military-intelligence-database-in-psni-possession-for-decade-was-not-searched-for-inquests-1246011/?ref=sh> accessed 22 August 2018.

preclude legacy inquests in the HIU's remit (and the Attorney General's powers to reopen such inquests), it would be increasingly unlikely that the DPP would gain access to new evidence.

HET investigations may have been conducted with significant evidence withheld from them, yet it may not be possible for such cases to be within the HIU remit on this basis.

Which Legacy Cases would continue to be Investigated by the PSNI or Police Ombudsman?

Provision is made in Schedule 4 for deaths in the HIU remit that the PSNI or Ombudsman would continue to investigate. Provision is also made in Schedule 5 for cases which are 'substantially complete' to remain with the PSNI or Ombudsman. Under these provisions, the PSNI would continue to investigate cases where a report may not have been finalised but the PSNI considers there are no further investigative steps that could be taken. In addition, the Ombudsman would continue to investigate cases where the Ombudsman considers cases to have been substantively completed but has decided not to publish a statement on them (or is yet to take a decision).

In relation to the Schedule 4 'Transitional Provisions' cases, the process would be:

Live Police Cases (PSNI or police force in Great Britain)⁹⁷

- If immediately before the specified HIU start date, the Police had a live investigation into a case that would be in the HIU remit (by being an HET or 1998-2004 case) and where the investigation was at an advanced stage but was not complete - the HIU and respective Chief Constable could agree it would be more appropriate for the police to continue their investigation;
- The HIU would need to consult family members and have regard to their views before making such an agreement. If the agreement was made the family would receive the same type of family report as proposed for the HIU in relation to the investigation;
- Where such an agreement would be made, the death would be placed outside the HIU remit until the end of a 'transitional period' agreed by the HIU and Police as necessary for the police to take further investigative steps. The HIU could not investigate after this period unless there were reasonable grounds for believing criminal offence/grave police misconduct for which a person could be identified or prosecuted/disciplined).

Live Police Ombudsman cases⁹⁸

⁹⁷ Draft Bill, sch 4, cl 1 and 3.

⁹⁸ Ibid, sch 4, cl 2 and 3.

- In terms of deaths (in the HID or 1998-2004 category) for which OPONI has a live investigation before the specified HIU start date, the HIU would be able to agree with the OPONI in an initial three-month period in which the case would stay with OPONI as it is at an advanced stage but not completed;
- Family members would be consulted;
- There would be restrictions on a subsequent HIU case similar to those above for police cases.

‘Substantively Complete’ and 1998-2004 cases

- Refers to HET or Ombudsman cases that are ‘substantively complete’ (i.e. there are no further investigative steps) – or *all* other cases in ‘category C’ (i.e. 1998-2004);
- HIU would not be permitted to investigate unless the HIU Director had reasonable grounds for to believe that there was criminal offence/grave police misconduct for which a person could be identified or prosecuted/disciplined;
- When cannot investigate for these reasons, the HIU must determine if additional information is available (from PSNI or OPONI), and use this information and any other information (from PSNI/OPONI) to produce a family report.

There is clearly a significant degree of practical sense to permitting the police or Ombudsman to retain cases that are already subject to a live investigation at an advanced stage and more so when the investigative steps have actually been completed. However, a question arises in relation to the PSNI as regards sufficient independence to investigate some such cases where there may be state involvement, given the requirement to comply with Article 2 ECHR.

In What Order would the HIU Investigate Cases Within its Remit?

Clause 8 stipulates that the HIU would prioritise its caseload in chronological order with older cases first.⁹⁹ However, this could exceptionally be varied when it would be more effective to do so. This would allow the HIU some flexibility in investigating cases that are linked together (e.g. by weapons or suspects) which will be more effective. Arguably, it would also permit a variation when dealing with family members nearing the likely end of their lives who may not be able to await a longer period.

⁹⁹ Ibid, cl 8(2) – defined as the time of the death occurred.

Which Cases in its Remit would the HIU Investigate?

Clause 9 would provide that the HIU Director would have operational control over decisions on whether a death within the HIU's remit should be investigated and the manner in which investigations would be conducted. The clause also places significant constraints on such operational control. These include the SHA stipulation that the HIU would aim to complete its caseload within five years. In addition, the HIU would be precluded from investigating deaths in its remit unless one of three conditions is met:

- a) There is new evidence (capable of leading to identification, prosecution or police misconduct proceedings;
- b) The HIU has reasonable grounds for believing a criminal offence has been committed and there are further investigative steps that could be taken (capable of leading to identification or prosecution); or
- c) HIU has reasonable grounds for believing investigative steps could be taken leading to grave or exceptional police misconduct proceedings.

The HIU may first – in relation to categories B and C seek information to ascertain if the thresholds are met.

In deciding whether it can investigate, the HIU would also be required to take into account previous investigations and refrain from unnecessarily duplicating them. This is not limited to Article 2 compliant investigations. Investigations that were not Article 2 compliant and hence unlawful could still preclude the HIU from investigating.

If the HIU were to be precluded from investigating a death within its remit by the above criteria, it would still be required to review existing (and any further) information and to produce a family report from the available material, including any additional material it would seek. The SHA explicitly states that 'a report will be produced in each case' in relation to its full caseload.¹⁰⁰ This essentially replicates the two stage 'review' and 'further investigate' model of the HET.

What Powers and Resources would the HIU have?

Disclosure to the HIU from UK Public Authorities

The SHA states that the UK would make 'full disclosure' of records to the HIU, and the HET and Ombudsman casefiles would be passed to the HIU.¹⁰¹ Clause 25 of the draft Bill would require 'relevant' public authorities to make information available to the HIU on request and sets out a number of practical provisions to this end. These include setting aside any obligation of confidence or 'any other restriction' on disclosure, which hopefully would preclude the invocation of the Official Secrets Act

¹⁰⁰ SHA, para 30.

¹⁰¹ Ibid, paras 36-37.

to deny disclosure. One weakness in the provision is that there is no sanction for non-compliance. It would be for the HIU to go through the complex and costly process of judicial review to ensure compliance.

Clause 39 (interpretation) defines relevant public authorities as the PSNI, Ombudsman, UK Minsters, MI5, MI6, CGHQ, any UK Department, NI departments and the armed forces. It does not appear to include the Public Records Office.

There is no 'national security' veto over supplying information to the HIU. However, relevant authorities would be under a duty to classify whether the information provided is 'sensitive' (namely, whether it is 'national security'/covert policing related). Disclosure from the HIU would be restricted by the national security veto, but this would not prevent the information being given to the HIU in the first place.

Whilst there is a popular critique that such provisions would be 'unfair' as only the state agencies and not paramilitaries keep records, this assertion appears to overlook that most state records, in particular, past investigation files and intelligence files, concern the activities of paramilitaries. Records regarding the actions of the state and particularly wrongdoing are often those more likely to have gone 'missing'. In any case, the relevant powers for obtaining information from paramilitary suspects and witnesses are the HIU's police type powers (arrest, search etc.).

Disclosure to the HIU from Irish Public Authorities

The SHA provides that 'Necessary arrangements will be made to ensure full co-operation of Irish authorities, including disclosure and justice cooperation'. Ireland committed to bringing forward any additional legislation required to ensure this.¹⁰²

The 2018 draft Bill, as UK legislation, could not bind Irish public authorities, and accordingly does not have 'disclosure powers' over Irish authorities. There is a duty on the HIU to implement any arrangements that would be reached by the UK and Ireland on cooperation between the HIU and the Garda Síochána.¹⁰³ The 2018 draft Bill, at the request of the Irish government also contains, at Clause 18(5), a provision that would require the HIU Director to include in reports information on the level of cooperation from Irish authorities.

The Irish government in its 2018 paper on cooperation with the SHA institutions set out cooperation that is already possible through Ireland's Criminal Justice (Mutual Assistance) Act 2008, as underpinned by an EU Framework and Council of Europe treaties. Brexit could of course affect such arrangements. The paper sets out that this allows, among other matters, the transmission of evidence and files. The paper reiterates that the Irish Government 'is committed to full cooperation with the HIU and its work, *including full disclosure*' (emphasis added). The commitment to full

¹⁰² Ibid, para 39.

¹⁰³ Draft Bill, sch 12, cl 6.

disclosure is then qualified to disclosure 'consistent with its constitutional obligations and in accordance with law'. The paper elaborates:

Some redactions may on rare occasions be required before material can be shared. If this occurs the rationale for the proposed redactions will be explained fully to the Director of the HIU.¹⁰⁴

An arrangement would be put into place to allow the HIU director a right to judicially review the Garda Commissioner in relation to such decisions. The Irish government has not sought nor would have a power to redact HIU family reports as is planned for UK ministers.¹⁰⁵ However, clearly redactions can take place before material is provided. Whilst assurances are given that this would be on rare occasions and subject to judicial review, this could be significantly strengthened by the defining of tight criteria, similar to how the Model Bill team sought to tighten the UK's concept of 'national security' in the context of the SHA institutions.

HIU's Powers to Investigate Crimes and Misconduct

The SHA provides that the HIU could conduct (1) criminal investigations for which it would have policing powers, and (2) non-criminal police misconduct investigations for which it would have the same powers as the Police Ombudsman. The SHA stated that appropriate governance arrangements would be created to ensure the operational independence of these two elements of its work.¹⁰⁶

Under Clause 6(3-6) and Clause 11, the HIU would be required to issue a statement, having consulted the Policing Board, of how it would exercise its investigatory function. This must in particular deal with ECHR Article 2 compliance and other obligations. The HIU Director would be required to keep the statement under review and revise it if appropriate. The Policing Board should be consulted on revisions to the statement.

Clause 8 provides that the HIU would conduct investigations into criminal offences and any 'grave or exceptional' *police* misconduct¹⁰⁷ in relation to a death in the HIU remit. The HIU could not investigate misconduct by any other agency such as the armed forces or security service. Currently, the Police Ombudsman has powers to investigate grave or exceptional police misconduct (a threshold that has been reached in relation to offences relating to a death), but there is no equivalent independent body to investigate other agencies. If the HIU did not have powers to investigate RUC misconduct, it would have less investigative power and scope than

¹⁰⁴ Department of Foreign Affairs and Trade (DFA), Information Note, *The Government of Ireland's role in and co-operation with Stormont House Agreement institutions and legacy inquests* (29 May 2018) <https://www.dfa.ie/media/dfa/alldfa-websites-media/newspress/publications/Information-Note-on-Government-cooperation-with-legacy-institutions.pdf> accessed 22 August 2018, 3.

¹⁰⁵ The Irish authorities have however sought such a power of redaction in relation to the ICIR, which will be an international body not based in UK jurisdiction.

¹⁰⁶ SHA para 32.

¹⁰⁷ This would relate largely to RUC cases. However, for category C cases, this could include PSNI misconduct after its creation.

the Police Ombudsman and hence would regress accountability. However, there is no justification for differentiation between agencies, whereby military and security service misconduct would be outside the scope of the HIU, and no seeming legitimate reason why the HIU should not be empowered to examine misconduct by all agencies.

In carrying out investigations, Clause 9 of the draft Bill provides that the HIU Director would have the power to decide whether an investigation is necessary and how the investigation would be conducted. Where necessary, the HIU Director would be able to decide that a death requires both a criminal investigation and a non-criminal misconduct investigation. Clause 12 sets out the process that the HIU would be required to follow to ensure that these investigations are carried out separately. This process would require the criminal investigation to be conducted *separately* and *before* the misconduct investigation. If there was an ongoing misconduct investigation, the HIU would be required to suspend it until the criminal investigation was concluded, and at which point the misconduct investigation could be resumed. The misconduct investigation could be resumed even if the DPP was considering bring charges resulting from the criminal offences. This process appears to be designed to ensure police powers would not be used in the case of police misconduct investigations and to replicate the current situation where there are no powers to compel retired RUC officers to cooperate with Ombudsman investigations (unless and until questions of criminal conduct come to light).

With respect to criminal investigations, under Clause 24 and Schedule 7 of the draft Bill, the HIU Director could designate HIU officers as having police powers ('powers of a constable') provided they would only be used for criminal and not police misconduct investigations. The types of police powers that would be most relevant will be those relating to arrest, searches etc. It would also be made an offence to obstruct, impede, or impersonate etc., an HIU officer.

For non-criminal police misconduct investigations, Clause 14 would require the HIU to establish, in consultation with the PSNI and Ombudsman, procedures for investigations that are consistent with PSNI and Police Ombudsman procedures. These procedures would be provided to any former RUC officer (or in the case of post-2000 cases, current or former PSNI officer) who is under investigation and requests to receive them. Under Clause 15, for officers who are still in the PSNI, processes would be established for the HIU to recommend, or direct, disciplinary proceedings. This clearly could not apply to retired officers.

Would the HIU have the Power to make Findings?

At the time of writing a challenge taken by retired RUC officers against the Police Ombudsman's Loughinisland report is still before the courts. An earlier ruling by Mr Justice Maguire in December 2017 is to be reconsidered further to the judge stepping aside after it was revealed he had acted on behalf of the retired officers in a similar challenge to an Ombudsman's report. Whilst a new Judge may take a different view, a central plank of the original ruling centres on the contention the

Police Ombudsman should not be making findings on matters such as collusion in the absence of an express statutory power to do so. Should this ruling stand it would have major implications for the HIU, which as the 2018 draft Bill stands, would not be able to make findings in its reports. A further secondary consideration would be that such a ruling could lead to actions rendering null and void all HET (and a range of other public authorities') reports on grounds of findings for which there was no express statutory power – significantly increasing the number of 'outstanding' HET cases that may have to be dealt with by the HIU. Consideration should therefore be given to this and whether the legislation should expressly reflect powers of findings.

What Information would be provided in the HIU's Interim and Family Reports?

The draft Bill provides that for each death investigated by the HIU, it would be required to produce a family report.¹⁰⁸ The draft Bill further stipulates that the family report must be 'as comprehensive as possible' as well as accessible to families.¹⁰⁹

With respect to the contents of family reports, the draft Bill provides that:

- The HIU would confirm and place a statement in the family report that the HIU investigation was compliant with Article 2 and other human rights obligations;¹¹⁰
- Any member of a deceased family could request a copy of the family report and the HIU would be required to provide it to defined close family members. It has discretion on whether to provide it to other family members;¹¹¹ (subject to the National Security and other caveats and qualifications), although if the 'national security' veto were apply, the HIU could produce an interim report. Reports to family members who are not close relatives could also have information removed that would cause distress to close family members.
- Family (or interim) reports could relate to a single death or to multiple deaths;¹¹²
- If a Secretary of State redacted family or interim reports on 'national security' grounds, the HIU would be required to include a statement in the report that this has happened and to state any reasons given for it.¹¹³
- The HIU would also be required to include a statement in family reports on the level of cooperation given by Irish authorities, or, in cases where the Irish government has provided information to the HIU, if any information that they provided was redacted.¹¹⁴
- Whilst family/interim reports can also be provided to persons injured in the same incident in which others lost their lives, reasonable steps are to be taken to consult with family members of the deceased, and material that may cause them distress can be removed.

¹⁰⁸ Draft Bill, cl 6(7).

¹⁰⁹ Ibid, cl 17.

¹¹⁰ Ibid, cl 17(3).

¹¹¹ Ibid, cl 17(4-11).

¹¹² Ibid, cl 17(11-12).

¹¹³ Ibid, cl 18(1-4).

¹¹⁴ Ibid, cl 18(5).

- The draft Bill would enable the HIU to publish a family or interim report, subject to the ‘national security’ vetoes, and following consultation with family members, provided that material that could cause distress to family members is removed.

‘Maxwellisation’¹¹⁵

When the HIU is including material in an interim or family report that in its view contains significant criticism of an individual ‘who was involved in preventing or investigating’ an event related to a death, the draft Bill would require the HIU to notify that person and have regard to any representations he or she makes within a 30-day period (or longer if the HIU decides that is necessary).¹¹⁶ The draft Bill and Explanatory notes should clarify whether ‘preventing and investigating’ an event relating to a death includes prosecutorial decisions.

This provision would codify a process whereby the ‘right to reply’ of, for example, former RUC officers, to criticism is afforded a process, but equally the process would be time bound to prevent the types of delays suffered by the Chilcott Inquiry into Iraq. The draft Bill does not address what would happen if the individual was deceased or could not be located (the language of ‘reasonable steps’ as regards reports to the injured is not replicated here). The existence of this process does not mean individuals would necessarily be named in reports.

Contextualisation

There is also a duty on the face of the draft Bill for the Family Reports to ‘take into account the context’ in which a previous PSNI/RUC or Ombudsman investigation took place, including the ‘procedures followed in police investigations at the time of the investigation’.¹¹⁷ This appears to reflect calls by former RUC officers that past investigations are not judged by today’s standards. Some former officers have also argued that reports should reflect the difficult circumstances in which policing operated in the past, with the HET, for example, providing a background narrative in its reports. Some families, however, were critical of this approach arguing that this embedded a partisan ‘security force narrative’ into the report. In the draft Bill proposals, it would be open to the HIU to interpret how it would contextualise past investigations.

¹¹⁵ ‘Maxwellisation is the process whereby those subject to criticism in a public report are given an opportunity to respond to such criticism prior to publication of the report.’ For definition, see House of Commons Treasury Committee, Maxwellisation Inquiry <https://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/inquiries1/parliament-2017/maxwellisation-17-19/> accessed 23 August 2018.

¹¹⁶ Draft Bill, cls 18(6-8).

¹¹⁷ Ibid, cl 17(2).

Could HIU Criminal Investigations lead to Prosecutions?

The draft Bill provides that when the HIU finishes a criminal investigation, the HIU officer responsible for the investigation would produce a report for the HIU Director with details of any criminal and/or police misconduct investigations. Investigation reports could relate to single or multiple deaths, and could include reports of multiple investigations.¹¹⁸ The HIU Director would be required to provide a copy of these reports to the DPP for Northern Ireland. This duty would apply irrespective of whether the HIU investigation concluded that criminal offences had been committed. However, if the HIU investigation concluded that crimes had taken place, the HIU Director would be required to provide the DPP with a statement of the offences, together with the report. The HIU would also be permitted to provide the DPP with a statement, while a criminal investigation was ongoing. Subsequent decisions on prosecutions would remain with the Public Prosecutions Service (PPS).

What Support and Assistance would the HIU Provide to Families?

The SHA provided that the HIU would have dedicated family support staff and involve next of kin.¹¹⁹ The 2018 draft Bill would place the HIU under a duty to provide support and assistance to the families of persons whose death is under investigation.¹²⁰ The HIU would produce, in consultation with the Commission for Victims and Survivors, a statement on how such support and assistance would be provided (and the HIU would be under a duty to pay regard to this statement). Clause 22 set out mandatory provisions including the nomination of an HIU officer to serve as point of contact and support close family members through the process of receiving a report.

What Information would the HIU Provide to the IRG?

Schedule 16, Clause 6 states that five years after the law enters into force, the HIU would be required to provide the IRG with a written report on (a) themes and patterns emerging from its work, and (b) the level of cooperation it has received. It would also be permitted to provide the IRG with interim reports on 'any of those matters'. Clause 1(4) of the same Schedule would require the HIU to share its annual reports with the IRG.

¹¹⁸ Ibid, cl 16.

¹¹⁹ SHA para 33.

¹²⁰ Draft Bill, cl 6(8) and cls 22 and 23.

How would the HIU be Structured?

Clause 2 of the Bill would set up the HIU as an independent public body under a 'body corporate' model. Under Clause 3, the HIU would be a multi-member commission (a similar model to the Equality and Human Rights Commissions) consisting of five members, including the HIU Director. Under Schedule 2, the HIU could also set up committees and subcommittees consisting of HIU members and other persons appointed by the HIU. Explicitly provided for is a power to establish a committee to deal with complaints about HIU officers.

The alternative model would be for the HIU to be a 'corporation sole' whereby the powers of the office are vested in one figurehead (similar to the Police Ombudsman and DPP), which arguably can achieve greater independence, provided the appointee does his or her job effectively. A multi-member Commission can bring a multitude of talents, but also runs the risk of the appointment of a 'wrecker' who can grind proceedings to a halt.

How would the HIU Chair and Commissioners be appointed?

In this instance, under Schedule 2, Clause 2, two of the four members would be appointed by the HIU Director ('executive members', who are also HIU officers), the other two would be appointed by the Department of Justice 'appointments panel' ('non-executive' members) which would also appoint the HIU Director.

Persons would be precluded from being HIU members if they had been sentenced to imprisonment or detention for three months or more, were insolvent, disqualified as a company director, or were a current elected representative. There would be no preclusion in relation to former employment, although there would be a permissive 'conflicts of interest' power.¹²¹ Under this power, the Minister of Justice (or HIU Director in the case of executive members) could require the Director or other HIU members or candidates to provide them with information on any matter that could reasonably be expected to give rise to a conflict of interest or effect their ability to carry out duties fairly and impartially. This information would be provided to the Appointments Panel, albeit there would be no duty on them beyond this to ensure the candidate would not risk rendering the HIU's work non-Article 2 compliant.

Previous proposals in the leaked 2015 draft Bill vested the appointment of the HIU Director in the First and deputy First Ministers, in consultation with the Justice Minister. This has been changed; with the 2018 draft Bill providing, at Schedule 2, that the Minister of Justice would make the appointment. In doing so, the Minister would act on the recommendation of an appointments panel consisting of the Attorney General for Northern Ireland, the Commissioner for Victims and Survivors, the Head of Civil Service, and a person with major criminal investigations experience nominated by the Minister of Justice. The notable gap here is that there is no

¹²¹ Ibid, sch 2, cl 8.

involvement of any international body in the process, which would enhance independence, such as the UN human rights agency (OHCHR), which has been involved in similar appointments in other jurisdictions.

Under Schedule 2, the Appointments Panel's decision would have to be unanimous, and would be binding on the Minister, subject to some safeguards. As a ministerial appointment, the panel would be required to pay regard to any code of practice of the Commissioner for Public Appointments for Northern Ireland.

How would the HIU be staffed?

One of the key human rights principles is that those involved in an investigation into a death must not have a connection with those implicated in the death. This is a key principle of Article 2 compliance.

Clause 10 of the draft Bill would oblige the HIU Director to organise the HIU into separate units. This includes at least one unit that does not include an HIU officer with a real or perceived work-related conflict of interest. This would replicate the HET model whereby there is a team without former RUC or military officers to deal with state involvement cases. In addition, the HIU Director would ensure that each HIU Officer involved in an investigation does not have, or could be reasonably perceived as having a work-related conflict of interest. The HIU Director would be required to have regard to the views of families in allocating a case to a particular unit.

The HET was closed as the HMIC found that under the model outlined above, the state involvement cases were not dealt with in an Article 2 compliant manner. HMIC concluded that the HET's work on 'state involvement' cases had given such preferential treatment to the suspects that the HET had been operating unlawfully. This largely related to military cases that had been dealt with by an independent team. Academic research found that even when these teams were in place that 'each phase of the HET process included the involvement of former long-serving local RUC officers, some of whom have from its inception held key positions in senior management'.¹²² Of particular concern was control over HET's access to intelligence data. The same researcher concluded that 'all aspects of intelligence are managed by former RUC and Special Branch officers' and further noted that 'intelligence is more often available for incidents carried out by paramilitary groups than for incidents attributed to the Security Forces'.¹²³ The concerns were echoed in the HMIC report, which stated

We consider that the independence necessary to satisfy Article 2 can only be guaranteed if former RUC officers are not involved in

¹²² Patricia Lundy, 'Exploring Home-Grown Transitional Justice and Its Dilemmas: A Case Study of the Historical Enquiries Team, Northern Ireland' (2009) 3 *International Journal of Transitional Justice*, 321-340, 335.

¹²³ Patricia Lundy, 'Can the Past Be Policed? Lessons from the Historical Enquiries Team Northern Ireland' (2009) 11 *Law and Social Challenges* 30-31.

investigating state involvement cases, and if processes designed to ensure this are, in fact, effective.¹²⁴

A second area of concern was the specific issue of control of intelligence material by persons who may have conflicts of interests:

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

The HMIC report goes on to advocate that it would be preferable

to institute some independent procedure for guaranteeing that all relevant intelligence in every case is made available for the purposes of review, to ensure compliance with the Article 2 standard.¹²⁵

As regards state involvement cases, it is difficult to ascertain which cases fall into this category before they have actually been investigated. This is particularly true in relation to cases involving informants, as it is usually (but not always) clear when a death is directly the result of use of force by the state. The PSNI's Legacy Investigations Branch has already been held by the courts and a UK Parliamentary Committee not to be Article 2 compliant.¹²⁶

Whilst there have been significant political asks that the HIU permit the employment of former RUC Officers, such a practice would be a significant departure from existing practice as well as the legal requirements of Article 2, a matter which has already been the subject of successful judicial reviews. In relation to current practice, the Police Ombudsman restricts such employment in its legacy team. Operation Kenova, led by Chief Constable Jon Boutcher of Bedfordshire Police, has also stipulated that its investigations team 'will not include personnel who are serving in or have previously served in the Royal Ulster Constabulary, Police Service of Northern Ireland, Ministry of Defence, or Security Services.'¹²⁷

Clause 3(5-7) of the draft Bill not only departs from this approach but by contrast would provide a statutory duty with the purpose or effect of compelling the HIU to employ significant numbers of former RUC officers. This is framed as a duty to ensure a balance of HIU officers who have previous Northern Ireland policing investigative experience with those who have such experience elsewhere. Almost

¹²⁴ HMIC, *Inspection of the Police Service of Northern Ireland Historical Enquiries Team* (2013) 92.

¹²⁵ Ibid.

¹²⁶ See Madden and Finucane Solicitors, 'Statement on behalf of Margaret McQuillan' (3 March 2017) <https://madden-finucane.com/2017/03/03/statement-on-behalf-of-margaret-mcquillan/> accessed 22 August 2018. This position had been taken by the Westminster Joint Committee on Human Rights.

¹²⁷ Operation Kenova, 'Investigation - Terms of Reference (TOR)' <https://www.opkenova.co.uk/investigation-terms-of-reference> accessed 22 August 2018.

tongue-in-cheek, the draft Bill links this duty to the SHA principle that the approach to dealing with the past be ‘balanced, proportionate, transparent, fair and equitable’.

HIU officers could also be seconded from the PSNI or Great Britain police forces, including the military police. Given the passage of time, it is not clear if there are sufficient numbers of former RUC officers with recent investigative experience who could even make up such a quota, raising additional practical questions. It would appear counterproductive to put forward a model that is both impractical and likely to be found unlawful. A more sensible approach at this juncture, given we are still likely to be some time away from the HIU becoming operational, would be to train further detectives now.

Would the HIU be Subject to Oversight and Complaints Procedures?

There are detailed arrangements for Oversight of the HIU in Clauses 31-33. Clause 30 would require the HIU to produce a Code of Ethics for consideration by the Policing Board, similar to the PSNI. This Code of Ethics would ‘guide’ HIU officers and would set out the HIU’s human rights and equality obligations under Section 75 of the Northern Ireland Act. The 2018 draft Bill would designate the HIU for the purposes of Section 75, but not apparently fair employment monitoring.¹²⁸ Provision is also made in Clause 31 for complaints and disciplinary procedures within the HIU. Schedule 13 provides for a procedure for the Police Ombudsman to investigate certain complaints.

Clause 32 sets out the terms of the Policing Board’s oversight of the HIU, along with arrangements for inspection by the Criminal Justice Inspection Northern Ireland (CJINI) and HMIC (the latter on the invitation of the Department of Justice or the Secretary of State, depending if HMIC are asked to look at devolved and non-devolved matters). Schedule 14 elaborates on these inspection arrangements, largely by granting powers to the Secretary of State to redact independent inspection reports on ‘national security’ type-grounds. The inability of the devolved department to call in HMIC on ‘non-devolved’ matters would risk the usurping of devolved power on any matter deemed to relate to ‘national security’ and hence be considered an ‘excepted’ matter.

The arrangements relating to the Policing Board are similarly qualified. Under Clause 32, the Board in its oversight of the HIU would be required to have regard to the HIU’s duties under Clause 7. This includes the provision for the HIU to refrain from any act that risks the UK’s ‘national security’. Under Clause 32(4), the Board would however not be bound by its usual duties under s 3(4) of the Police (Northern Ireland) Act 2000 to have regard to ‘the principle that the policing of Northern Ireland is to be conducted in an impartial manner’. The Policing Board would be duty bound to coordinate and cooperate with other statutory bodies in overseeing the HIU, in a similar manner to its oversight of the PSNI under the 2000 Act.

¹²⁸ Draft Bill, sch 19, cl 2.

Schedule 15 sets out more detailed provisions for oversight and performance monitoring by the Policing Board of the HIU. The Policing Board would be granted powers of inquiry into the HIU or any aspect of its work, in reference to grave or exceptional matters, however, the Secretary of State, who does not have an oversight role of the HIU under the SHA, would be granted powers to veto any inquiry on 'national security' grounds.

How would the HIU be Funded?

Clause 4 of the 2018 draft Bill provides that the NI Department of Justice (DoJ) would pay the expenses of the HIU, via the Policing Board. The DoJ would decide the amount required. Essentially the HIU would be paid from the DoJ's budget and the draft Bill creates no obligation for the UK centrally to provide the DoJ with even the initial resource package that the NIO has committed to providing in the SHA. By contrast, the Model Implementation Bill envisaged payment from the Consolidated Fund through the UK Treasury.

The model proposed in the draft Bill replicates the current funding models of the legacy inquests system and Police Ombudsman. In recent years, both of these institutions have had their work hampered by cuts and withholding of resources with the purpose or effect of preventing the taking forward of legacy work. The funding model in the draft Bill would allow any number of political parties to have opportunities to veto the provision of further resources to the HIU should they dislike the work it is delivering. This problem is highlighted by the current situation with the resourcing of the Legacy Inquests Unit (LIU) for which the High Court held in March 2018, that the former First Minister's decision to withhold consideration of a DoJ business case for the LIU had been unlawful. The court held that, in relation to the backlog of legacy inquests: 'The systemic delay is caused or significantly contributed to by a lack of adequate resources which are needed to speed up the process of carrying out the legacy inquests'.¹²⁹

How Long would the HIU Operate for?

SHA had originally provided that the HIU should aim to finish its work within five years.¹³⁰ There is however broad consensus that this timeframe is entirely unrealistic.

The 2018 draft Bill would require the Secretary of State to consult justice sector bodies (including the Policing Board and HIU itself), the IRG, and others before taking a decision as to whether to extend the timeframe of the HIU. This provision was not contained in the 2015 draft Bill.

¹²⁹ *Hughes (Brigid) Application* [2018] NIQB 30.

¹³⁰ SHA, para. 40.

III. The Independent Commission on Information Retrieval

The Stormont House Agreement (2014) called for the creation of an Independent Commission on Information Retrieval (ICIR) ‘to enable family members to seek and privately receive information about the Troubles-related deaths of their relatives’ as part of the proposed set of mechanisms to deal with the legacy of the Troubles. Unlike the other parts of this package, the ICIR would be created by a treaty between the British and Irish governments. However, legislation would be required in both jurisdictions to give effect to the treaty. The governments agreed the draft Treaty on 15 October 2015, and made it public in January 2016.¹³¹ However, it has not yet entered into force. On 11 May 2018, the United Kingdom government published a consultation on the legacy proposals, including a draft Bill with provisions on the ICIR.¹³² The Irish Department of Foreign Affairs and Trade has indicated that it will seek the Irish government’s approval of its draft Bill on the ICIR before summer 2018 and ‘the General Scheme of a Bill will be published before the end of the public consultation on the UK legislation’,¹³³ which is due to complete on 10 September 2018.

This section sets out the main elements of the ICIR proposals drawing on the draft Treaty, draft UK Bill and the related explanatory notes, and the Consultation Document. It also analyses the extent to which the proposals comply with international human rights standards. This examination draws in particular on the work conducted by the Model Bill team to identify the strengths and limitations of the draft Bill and Treaty.

What would be ICIR’s Functions?

The primary objective of the ICIR is ‘to enable family members to seek and privately receive information about the Troubles-related deaths of their relatives’, according to the Stormont House Agreement.¹³⁴ This language appears in the subsequent official documents. The draft Treaty outlines the further functions of the ICIR as

- To receive information about deaths within its remit;¹³⁵
- To keep families informed about progress in the information retrieval process, when they have requested information about a death;

¹³¹ Draft Treaty (n 8).

¹³² NIO Consultation Paper (n 13). An earlier version of the draft Bill was leaked to the media in 2015. Unlike the HIU, the proposals for the ICIR did not change substantially between these two versions. This may be due to the agreement of the draft Treaty by both governments in 2015.

¹³³ DFA (n 104).

¹³⁴ SHA, para 41.

¹³⁵ A death would be within the ICIR’s remit if it ‘was wholly caused by physical injuries or physical illness that were the direct result of an act of violence or force carried out in Ireland, the UK or the rest of Europe between 1 January 1966 and 10 April 1998 for a reason related to political or sectarian hostility or to the constitutional status of Northern Ireland’. See draft Treaty, art 4(1).

- To provide written reports to families at the conclusion of its enquiries, containing only information that has been established to be credible;
- To provide a written report to the Implementation and Reconciliation Group on patterns and themes it has identified in its work and the level of cooperation it has received; and
- To publish an annual report on its finances, administrations and volume of work.¹³⁶

The draft Bill refers to the list of functions in the draft Treaty.¹³⁷

The Model Bill proposed a number of additional functions for the ICIR to ensure that its work was conducted in a rigorous manner. These included:

- To undertake outreach and other activities designed to publicise the work of the Commission and give individuals and organisations the necessary confidence to approach the Commission to provide information or to request it;
- To conduct research for the purpose of eliciting information or checking the credibility of information received; and
- To carry out a research function for collating and analysing information received to enable information to be cross-checked and themes and patterns to be identified.

What Principles would Govern the ICIR's Work?

The Stormont House Agreement stated that all the legacy institutions would operate under general principles,¹³⁸ which are restated in Clause 1 of the draft Bill and are provided in the introduction to this report. The draft Bill states that 'The Commission must exercise its functions in a manner that is consistent with the general principles'.¹³⁹ In addition, the preamble to the draft Treaty commits the governments to creating an ICIR that reflects the last of the general principles specified in the SHA, namely 'that the approach to dealing with Northern Ireland's past should be balanced, proportionate, transparent, fair and equitable'.

A later paragraph of the Stormont House Agreement further stated that 'The ICIR will be held accountable to the principles of independence, rigour, fairness and balance, transparency and proportionality'.¹⁴⁰ However, the additional principles of independence and rigour are omitted from the draft Treaty and Bill.

In addition, the draft Treaty and Bill provide that Commission would not be permitted to do anything that might:

¹³⁶ Draft Treaty, art 3.

¹³⁷ Draft Bill, cl 41.

¹³⁸ SHA, para 21.

¹³⁹ Draft Treaty, Preamble and Draft Bill, cl 43(1).

¹⁴⁰ SHA, para 50.

- Prejudice the national security interests of Ireland or the United Kingdom;
- Put at risk the life or safety of any person; or
- Have a prejudicial effect on any actual or prospective legal proceedings in Ireland or the United Kingdom.¹⁴¹

These provisions are important to ensure the protection of the right to life and the administration of justice; however, as we will see below, the addition of the requirement to refrain from actions that could prejudice national security has troubling implications for the ICIR's work.

What Powers would the ICIR have to carry out its Work?

The Stormont House Agreement stated that the ICIR would be 'free to seek information from other jurisdictions, and both governments undertake to support such requests'.¹⁴² The annex to the draft Treaty restates this commitment,¹⁴³ but it is not referred to in the draft Bill. In addition, the cover note to the draft Treaty states that 'Relevant authorities will cooperate with the ICIR'. However, the Consultation document makes clear that

The ICIR would be entirely separate from the criminal justice system. It would not have policing powers, or powers to compel witnesses or disclosure of information. All engagement with the ICIR, including by families, individual contributors and public authorities, would therefore be voluntary.¹⁴⁴

In contrast, the Model Bill proposals recommended that the ICIR have the power to require public authorities to disclose to it any information that it requires in the exercise of its functions. We view this robust power to compel disclosure by public authorities as necessary to help the ICIR test the credibility of the information that it receives.

Who would be able to seek Information from the ICIR?

The draft Treaty regulates who would be able to make an 'eligible family request' to the ICIR.¹⁴⁵ It anticipates that requests would come from a close family member of the deceased who was resident within the United Kingdom or Ireland at the time of the death or at the time of making the request. However, the ICIR would be allowed to exercise discretion in (a) receiving requests from more distant relatives, where no close family member objects, and (b) receiving requests from close family members

¹⁴¹ See also draft Treaty art 2(2) and draft Bill, cl 43(2).

¹⁴² SHA para 45.

¹⁴³ Draft Treaty, Annex, para 6.

¹⁴⁴ NIO Consultation Paper, para 12.9 (relating to cl 45 of the draft Bill).

¹⁴⁵ Draft Treaty, art 4.

who do not meet the residency requirement. Similar although not identical provisions appear in the draft Bill.¹⁴⁶

Who would be able to Provide Information to the ICIR?

As the Consultation Document makes clear, anyone would be entitled to approach the ICIR voluntarily with information about deaths within its remit:

The primary source of the information received by the ICIR would be individual contributors and it would be open to anyone with information to approach the ICIR directly or through an intermediary. It is envisaged that the contributors could include those directly involved in a particular death, bystanders who witnessed events, and those with second-hand information about Troubles-related deaths.¹⁴⁷

In addition, the Annex to the draft Treaty notes that

The Commission may seek and receive information about a death in any medium (including photographs and other such representations). The Commission shall not seek or receive any physical object except documents, or other media, which record information about a death.¹⁴⁸

However, the Consultation Document clarifies that the ICIR would only proactively seek information about a death in cases where there is an eligible family request.¹⁴⁹ In cases where there is no such request, the ICIR would hold unsolicited information securely for the duration of the ICIR's operations in case there is a subsequent family request.¹⁵⁰

While it is welcome that the ICIR would receive and hold unsolicited information, it is problematic that the draft Treaty and Bill do not stipulate whether the credibility of this information is to be subject to any degree of testing in the absence of a family request. This is problematic for three reasons. Firstly, under the current proposals, unless both governments agree to extend its operations, the ICIR would only operate for five years after which point its archives would be destroyed (see below). As it would run in parallel to the Historical Investigations Unit and families may choose to let a HIU investigation run its course before making a request to the ICIR, the time limit for the ICIR's operations may mean that families run out of time for the ICIR to seek information effectively in their case. Secondly, credibility testing of unsolicited information could lead to the discovery of information that is relevant to incidents for which there has been a family request. Thirdly, it would also make the inclusion of unsolicited information in the identification of themes and patterns more reliable. As

¹⁴⁶ Draft Bill, cl 50(3)-(4).

¹⁴⁷ NIO Consultation paper, para 12.9 (relating to cl 45 of the draft Bill).

¹⁴⁸ Draft Treaty, Annex, para 4.

¹⁴⁹ NIO Consultation Paper, para 8.1.

¹⁵⁰ Draft Treaty, Annex, para 3.

discussed below, the draft Bill and Treaty are unclear whether unsolicited testimony could be included in the ICIR's analysis of themes and patterns to be supplied to the Implementation and Reconciliation Group (see below).

While we believe that the Commission should only proactively seek to retrieve information and to produce family reports following a request from a bereaved family, we do not believe that the respecting the voluntary nature of victim engagement should preclude the ICIR from testing the credibility of unsolicited information. To enable such testing to take place would address the concerns we list above, and in particular, if a family decided towards the end of the ICIR's five-year period of operations to request information retrieval in relation to an incident for which unsolicited information had already been received, previous credibility testing of information could facilitate the Commission producing a family report more rapidly before its period of operations expires. We therefore recommend that the draft Bill be amended to specify that the ICIR would test the credibility of both solicited and unsolicited information.

How would the ICIR Evaluate the Credibility of the Information it Receives?

The draft Treaty states that the written reports provided to families by the ICIR would 'contain only information the credibility of which has been established to the satisfaction of the Commission'.¹⁵¹ The Annex to the Treaty states that 'The Commission may take such steps as it considers appropriate for evaluating the credibility of information about deaths that is received by it'.¹⁵² The Consultation Document gives the following information on the standards and techniques for evaluating credibility:

The ICIR would not be expected to verify information to the same standard of testing that would be expected in the criminal justice system. It would, however, take appropriate steps to evaluate the credibility of the information it received before reporting to families. This could include use of a variety of information sources, interview and analytical techniques.¹⁵³

It further states that 'with the permission of the family, the ICIR could publicise cases on which it is seeking information'.¹⁵⁴ In addition, members of the Commission would be required to 'each have experience of, and the skills necessary for: (a) handling sensitive information; (b) making judgements about the credibility of information'.¹⁵⁵

The provisions are all welcome. However, for them to operate effectively, the language of Article 6 of the draft Treaty should be amended to state that the staff of

¹⁵¹ Ibid, Art 3(2). This is restated in the draft Bill, cl 42(2).

¹⁵² Ibid, Annex, para 5.

¹⁵³ NIO Consultation Paper, para 8.3 (relating to cl 42 in the draft Bill).

¹⁵⁴ Ibid, para 8.8.

¹⁵⁵ Draft Treaty, art 5(3).

the Commission should include a multi-disciplinary research team, with the ability to test the credibility of information as well as identify themes and patterns in a robust and rigorous manner.

How would the ICIR Engage with Families during the Information Retrieval Process?

As noted above, the ICIR would only seek information about deaths if eligible families have asked them to do so.¹⁵⁶ Where such requests are made, the draft Treaty and draft Bill commit the ICIR to keeping the family informed about the progress in the information retrieval process.¹⁵⁷ These documents do not contain any further provisions relating to engaging with families or providing them with support. However, the Consultation Document asks consultees to suggest additional forms of support that the ICIR could provide to families.¹⁵⁸

Our model proposals stated that the functions of the Commission should include doing outreach with families, and organisations representing their interests, from the start of the Commission's work. Ideally, this would include enabling victims to inform the development of the Commission's procedures where relevant.¹⁵⁹ The model treaty also stipulated that the ICIR's functions should include providing appropriate support for those who engage with the Commission. Our proposals also contained commitments that in engaging with victims, the Commission shall take all reasonable steps to ensure that victims and survivors understand that (1) their engagement is voluntary and that they may withdraw from the process at any time, and (2) that they appreciate in advance the potential legal consequences of engagement with the Commission. We further recommended that the support provided by the ICIR to families should occur both during the information retrieval process and in helping them to deal with the consequences of the process. We also recommended that the Commission be able to defray expenses incurred by victims and survivors or other persons communicating or otherwise cooperating with the Commission.

What Information could Families Potentially receive from the Information Retrieval Process?

The draft Treaty states that at the conclusion of its enquiries into a particular request, the Commission would provide a written report to the family.¹⁶⁰ As noted above, the draft Treaty stipulates that 'Such a report shall contain only information the credibility of which has been established to the satisfaction of the Commission.'¹⁶¹

¹⁵⁶ NIO Consultation Paper, para 8.1.

¹⁵⁷ Draft Treaty, art 3(1)(b) and draft Bill, cl 41(2).

¹⁵⁸ NIO Consultation Paper, Question 7.

¹⁵⁹ Draft Treaty, art 7(3)(a) gives the Commission the power to determine its own procedures.

¹⁶⁰ Ibid, art 3(2). See also draft Bill, cl 42(1).

¹⁶¹ Ibid, art 3(2). This is restated in the draft Bill, cl 42(2).

Both official draft texts place limits on the information that could be disclosed in the reports to families:

- To ensure confidentiality, the reports could not reveal the name or identity of anyone who contributes information;¹⁶²
- As the Commission would not be testing information to the standard expected in the criminal justice system,¹⁶³ the reports would not be able to disclose the name or identity of those alleged by contributors to be responsible for a death;¹⁶⁴
- In producing the reports, the Commission would be prohibited from doing 'anything in carrying out its functions' that might '(a) prejudice the national security interests of Ireland or the United Kingdom; (b) put at risk the life or safety of any person; or (c) have a prejudicial effect on any actual or prospective legal proceedings in Ireland or the United Kingdom'.¹⁶⁵

The draft UK Bill sets out a number of steps that the Commission would be required to follow before it could release any written reports to families. These steps are intended to ensure that the Commission meets its obligations not to prejudice national security, endanger the life or safety of any person, or have a prejudicial effect on legal proceedings:¹⁶⁶

- The ICIR would be required to submit all draft family reports to the Secretary of State for Northern Ireland before releasing them to families.
- The Secretary of State would have 60 days to identify any information in the draft report that is deemed to pose a risk.
- If the Secretary of State determined that the draft report contains information that could pose a risk, the Commission would be required to remove all the information identified from the report before releasing it to the family.
- If the Commission decided to produce a different report, it would be required to also submit that report to the Secretary of State before it could be released.
- If the Secretary of State did not respond within 60 days, the Commission could release the report.
- If any member of the Commission breaches these obligations, inside or outside the United Kingdom, they could be liable for criminal prosecution with a range of potential penalties, the most serious being two years imprisonment, or a fine, or both. Similar penalties for disclosure would apply to ICIR staff members or other persons carrying out work for or giving advice to the Commission.

Unlike the proposals on the HIU, there is no provision to appeal decisions by the Secretary of State to withhold information contained in family reports produced by the ICIR.

¹⁶² Ibid, art 11(2); draft Bill, cl 43(3).

¹⁶³ Explanatory Notes, para 146.

¹⁶⁴ Draft Treaty, art 11(2); draft Bill, cl 43(3).

¹⁶⁵ Ibid, art 2(2). See also draft Bill, cl 43(2).

¹⁶⁶ Draft Bill, cl 46.

The draft Treaty notes that legislation in Ireland would set out similar measures to prevent disclosure.¹⁶⁷ Under these proposals, the ICIR would be required to seek notification from the Irish government, in addition to the Secretary of State, as to whether any information in each family report would, if disclosed, cause risk to Ireland's national security or the life and safety of any person. Irish legislation would set out how the Irish government would respond to these requests, but the Commission would not be able to disclose a report without the approval of the Irish government. Irish legislation would also create penalties for disclosure of confidential information.¹⁶⁸ The Consultation Document also noted that the British and Irish governments would be able to consult each other when considering any potential risks posed by a report.¹⁶⁹ It further stated that 'the ICIR would be required to remove the names or any information that could identify contributors or alleged perpetrators, before consulting the UK Government or the Irish Government'.¹⁷⁰

As discussed in the above section on national security, these proposals are deeply concerning as they could discourage potential information providers from engaging with the Commission, they could undermine the ICIR's legitimacy in the eyes of families, and they would risk not being Article 2 compliant. We therefore recommend that the national security arrangements for the ICIR be re-examined and assessed in terms of their effect on the workability of the ICIR and that alternatives be explored that might address legitimate national security concerns on the part of the two governments. As we discuss above, one solution might be to place the responsibility for determining national security concerns on the ICIR itself with an agreed protocol on consulting with either of the relevant governments if national security issues were 'flagged' - rather than have every single ICIR family report read and approved by both governments before it is released. At the very least, in keeping with our previously published model for information redaction, we recommend that the ICIR Chair or family members have the power to appeal any proposed redaction by the Secretary of State to an independent judicial authority.

How would the Confidentiality of the Process be Protected?

This Stormont House Agreement indicates that the ICIR would be modelled on the Independent Commission for the Location of Victims' Remains. Similar to that process, the ICIR proposals contain a number of measures to ensure confidentiality for persons who provide information. These protections are intended to remove obstacles for persons who could be at risk of exposing themselves to criminal liability

¹⁶⁷ Draft Treaty, art 11(3).

¹⁶⁸ DFA's Information Note on the Irish Government's cooperation with the legacy institutions states: 'The ICIR will be under a duty to protect life in the exercise of its functions. In light of this duty and in recognition that the ICIR will not test information to an evidential standard, ICIR reports will not name alleged perpetrators or disclose the identities of people who provide information.' It also states 'Analogous provisions to those in the UK draft Bill in relation to the creation of criminal offences for unauthorised disclosure ('leaks') will also be provided.'

¹⁶⁹ NIO Consultation Paper, para 12.10.

¹⁷⁰ Ibid.

and thereby encourage the voluntary provision of information. The draft Treaty and the draft Bill outline the following measures to ensure confidentiality:

- The Commission would not disclose (a) the name or identity of any individual from whom the Commission has received information about a death within the Commission's remit; and (b) the name or identity of any individual who is identified by that information as being responsible for a death within the Commission's remit or any crimes resulting from that death.¹⁷¹ The latter is a reflection that the Commission would not test the credibility of information received to the same standard of testing that would be expected in the criminal justice system.
- On completion of its work, the ICIR would destroy the raw material and operating files that it holds relating to deaths within its remit.¹⁷²

In addition, the Stormont House Agreement stated 'The ICIR will not disclose information provided to it to law enforcement or intelligence agencies'.¹⁷³ This understanding is not explicitly stated in the draft Treaty and draft Bill, but it appears in the Consultation Document.¹⁷⁴

As noted above, any Commissioner or staff member of the Commissioner who made an unauthorised disclosure could be liable to criminal prosecution and punishment.

We agree that confidentiality protections are vital for the ICIR to be able to fulfil its functions effectively. However, we believe that confidentiality can be ensured effectively without destroying the archives after the ICIR ceases to operate. Instead, we recommend that the archives are maintained and held confidentially for 50 years, and that law enforcement, intelligence agencies or other persons would be precluded from accessing them during this period. We felt this was necessary as the ICIR has the potential to gather a wealth of information that may be useful for understanding Northern Ireland's history for generations to come.

Could Information Provided to the ICIR form the basis for Prosecutions?

At no stage has an amnesty been part of the proposals for the ICIR. However, information provided to the ICIR would be inadmissible in criminal, civil and inquest proceedings.¹⁷⁵ This would mean no information provided to the Commission could be relied upon in court, even if it was included in a family report.¹⁷⁶ This does not grant amnesty for persons who provide information. These individuals could still be prosecuted for any crime they committed based on evidence coming from other sources, even where it relates to the same information provided to the ICIR. This is

¹⁷¹ Draft Treaty, art 11; draft Bill, cl 43.

¹⁷² Ibid, art 7(7); draft Bill, cl 49(1).

¹⁷³ SHA, para 46.

¹⁷⁴ NIO Consultation Paper, para 12.10.

¹⁷⁵ Draft Treaty, art 9; draft Bill, cl 45.

¹⁷⁶ Explanatory Notes, para 154.

acknowledged in the draft Bill, which states that the inadmissibility of information provided to the Commission ‘does not affect the admissibility of information which is held by a person other than the Commission, unless that information has been obtained from the Commission’.¹⁷⁷ The Explanatory Notes for this subclause state that it

has the effect that policing authorities or a coroner, for instance, would not be prevented from pursuing lines of inquiry based on information disclosed by the Commission in a report to a family. If such inquiry, pursued on the basis of information in a report, led to evidence being generated, then that new evidence would not fall under the inadmissibility provisions (despite the report itself being inadmissible).¹⁷⁸

This note makes clear that even though information provided to the ICIR would be inadmissible in legal proceedings, it would not prevent policing authorities or a coroner pursuing lines of inquiry based on information provided to families by the Commission. Where such inquiries, generated *new* evidence, the new evidence would be admissible. This observation highlights the possibility that where an individual provides information to the Commission, they could run the risk of providing information about their own actions or the actions of others that indirectly aids the work of criminal investigators and prosecutors. We believe that the risk of prosecutions resulting indirectly from information provided to the ICIR is extremely low, particularly since (former) paramilitaries may opt to engage with the Commission through interlocutors. Furthermore, if any such prosecutions were undertaken, they could be met with abuse of process applications from defence lawyers that would challenge the admissibility of evidence that was uncovered because of information produced by the ICIR.

In keeping with the Stormont House Agreement, the Model Bill contained similar inadmissibility provisions as we regard them as necessary protections against self-incrimination and a means to remove an obstacle to information providers choosing voluntarily to take part. However, the observation in the Explanatory Notes could create a disincentive for persons with information engaging with the Commission. To address this challenge, we have outlined a number of recommendations to bolster the existing safeguards in the ICIR proposals:

- Clause 3 of the Northern Ireland (Location of Victims’ Remains) Act 1999 could provide a model for amending Article 9 of the draft Treaty. An amended version could include the following:
 - (1) The following shall not be admissible in evidence in any legal proceedings (including proceedings before a Coroner)—

¹⁷⁷ Draft Bill, cl 45(4).

¹⁷⁸ Explanatory Notes, para 155.

- (a) any information received by the Commission about deaths within its remit; and
- (b) any evidence obtained (directly or indirectly) as a result of such information being so provided.

To reflect the above changes to the draft Treaty, Clause 45(3) of the draft Bill could be amended to state

The information received by the Commission about deaths within its remit or any evidence obtained (directly or indirectly) as a result of such information being so provided is not admissible in any legal proceedings.

- In addition, similar to the Explanatory Notes accompanying Clause 3 of the Northern Ireland (Location of Victims' Remains) Act 1999, the Explanatory Notes for Clause 45 of the draft Bill should make clear that private prosecutions are covered by the inadmissibility provisions.
- Clause 3(2) of the Northern Ireland (Location of Victims' Remains) Act 1999 states that the provisions on inadmissibility 'shall not apply to the admission of evidence adduced in criminal proceedings on behalf of the accused.' It may be useful to explore whether a similar provision should be added to the draft Bill.
- Clause 42(2) of the draft Bill could be amended to place an obligation on the Independent Commission on Information Retrieval to seek to ensure that information is not disclosed in family reports that could expose information providers to risk of prosecution. Similar language could be added to Article 3(2) of the draft Treaty.
- Article 3(1)(b) of the draft Treaty should be amended to create an obligation to ensure that families who request the opening of an information retrieval process do so on the basis of fully informed consent that includes discussion of the legal consequences of information retrieval process.

How would the ICIR Contribute to the Analysis of Themes and Patterns?

The draft Treaty states that the Commission's functions would include providing the Chair of the Implementation and Reconciliation Group with a written report on (1) themes and patterns it has identified from its work and (2) the level of cooperation it has received in carrying out its work.¹⁷⁹ The draft Bill states that this report should be submitted on the last working day of the five-year period, which would begin when that section enters into force.¹⁸⁰ The Commission would also be permitted, but not required, to submit interim reports to the IRG.¹⁸¹ As discussed in detail in the section on the IRG, the draft Bill stipulates that the IRG would commission a report from independent academic experts on themes and patterns that would draw on the reports submitted by the ICIR, together with equivalent reports submitted by the HIU,

¹⁷⁹ Draft Treaty, art 3(3).

¹⁸⁰ Draft Bill, cl 42(5).

¹⁸¹ Ibid, cl 42(4).

the Oral History Archive, and Coroners' Courts.¹⁸² The academic team could also refer to the ICIR's annual reports and family reports produced by the ICIR that are publicly available or made available to the academics by the family concerned.¹⁸³

The following points are unclear from the current legislative proposals and require further clarification:

- Whether unsolicited statements could be included in the thematic analysis;
- The research techniques that would be used to identify themes and patterns;
- When the ICIR should commence this data analysis within its five-year timeframe as to be meaningful and comply with the principles governing its work, as much data as possible should be considered within this analysis; and
- Whether the deadline for submitting thematic reports to the IRG would be extended if both governments agree that the ICIR could operate longer than five years.

How would the Commissioners be Appointed?

As reflected in its title, the Commission is intended to be independent of the British and Irish governments. The draft Treaty (reflecting the SHA) states that there would be five Commissioners, who would be appointed as follows:

- One Chair, who may be of international standing, jointly appointed by the UK Government and the Irish Government (in consultation with the First Minister and deputy First Minister);
- One Commissioner appointed by the UK Government;
- One Commissioner appointed by the Irish Government; and
- Two Commissioners jointly appointed by the First Minister and deputy First Minister.¹⁸⁴

In terms of who is eligible to be appointed to the ICIR, the draft Treaty states that Commissioners would collectively have:

- Experience of working with individuals who have suffered injury or bereavement as a result of the Troubles;
- Experience of working in legal practice (with a particular member having to have at least 10 years' work in legal practice to count in that experience) or as a judge of the superior courts; and
- Knowledge or experience of the criminal justice system and in particular of policing and security matters.¹⁸⁵

¹⁸² Ibid, cl 62.

¹⁸³ Ibid.

¹⁸⁴ Draft Treaty, art 5(1). See also SHA para 44. cl 40(4) of the draft Bill also states that OFMDFM can appoint two Commissioners.

¹⁸⁵ Draft Treaty, art 5(2).

In addition, all Commissioners would be expected to have experience of, and the skills necessary for:

- Handling sensitive information;
- Making judgments about the credibility of information; and
- Establishing good working relationships with organisations of the kind that can assist the Commission to carry out its functions.¹⁸⁶

The draft Bill states that ‘The First Minister and the deputy First Minister have the power jointly to appoint two members of the Commission in accordance with the ICIR agreement’.¹⁸⁷ However, it does not set out any appointments criteria.

This appointments mechanism may need to be amended to reflect the fact that the devolved institutions are not functioning. Also the Model Bill differed in its proposals for the appointment of Commissioners as we stated that the Chair must be a person of international standing and reputation; that there must be at least two women on the Commission; and to safeguard independence, the Commissioners must be and be perceived to be impartial, and must have no conflicts of interest. In addition, while we stated that Commissioners must have experience of handling sensitive information, we did not require any Commission members to have experience or knowledge of the criminal justice system and in particular, of policing and security matters as we felt that many professions can provide relevant experience. To enhance the transparency of the process, the Model Bill stated that the appointing institutions should publicly state the reasons for appointing their chosen individuals. In addition to safeguarding the Commission’s independence, the Model Bill contained provisions relating to the tenure of the Commissioners and mechanisms for replacing Commissioners where necessary.

The Model Bill also recommended that the secretariat include staff with experience of psychosocial and trauma counselling (including gender sensitivity); handling sensitive information and making judgments about its reliability; and that the requirements on impartiality and conflicts of interests that apply to Commissioners should apply to staff. The draft Treaty and Bill do not contain any such requirements. Instead, the draft Treaty states that the Commission may appoint any staff as necessary to fulfil its functions, but the terms and conditions of employment are subject to the approval of both governments.¹⁸⁸

¹⁸⁶ Ibid, art 5(3).

¹⁸⁷ Draft Bill, cl 40(4).

¹⁸⁸ Draft Treaty, art 6.

How would the Commission be Funded?

The draft Treaty states that the Government of Ireland and the Government of the United Kingdom on a basis to be determined by them would provide funding, premises, facilities, and services required by the ICIR.¹⁸⁹ The draft Bill states that ‘The Secretary of State may provide the Commission with such moneys, premises, facilities and services as the Secretary of State considers appropriate.’¹⁹⁰

Given that the Irish government is committed to contributing towards the running costs of the ICIR, part of the funding for this institution would come from outside the £150 million that the UK government has earmarked for the legacy institutions.¹⁹¹ To safeguard the independence of the Commission, the Model Bill committed the Secretary of State to paying for a range of expenses relating to the ICIR and to publishing the arrangements for funding the Commission. It further stipulated that these costs should be covered by the Consolidated Fund.

For how long would the Commission Operate?

The draft Treaty states there would be a three month *preparatory period*, which would begin when the chairperson and at least two other Commissioners are appointed and would end three months after the treaty entered into force (unless the two governments agree to an earlier date).¹⁹² This preparatory period would allow the Commission to recruit staff, occupy its premises, and make other arrangements to enable it to fulfil its functions.¹⁹³ After this period ends, the Commission would operate for five years.¹⁹⁴ This timetable contrasts somewhat with Clause 42 of the draft Bill that states

The Commission must provide the Implementation and Reconciliation Group with the report [on themes and patterns] on the last day of the period of 5 years beginning with the day on which this section comes into force (or, if that day is not a working day, on the last working day before it).¹⁹⁵

As there are no provisions to indicate that Clause 42 would come into effect at a different time to the rest of the legislation, this provision would seem to indicate that the Commission would function for five years after the legislation comes into effect. This would not allow for a preparatory period, and given the time that would be required to recruit the Chair and Commissioners before the preparatory period would even have been triggered, this would reduce the period of effective operations of the Commission substantially. We believe that this would severely hamper the

¹⁸⁹ Ibid, art 10(2).

¹⁹⁰ Draft Bill, cl 40(3).

¹⁹¹ Explanatory Notes, para 202.

¹⁹² Draft Treaty, art 7(6).

¹⁹³ Ibid, art 7(4).

¹⁹⁴ Ibid, art 7(5).

¹⁹⁵ Draft Bill, cl 42(5).

ability of the ICIR to fulfil its functions and we therefore recommend that the draft Bill be amended to include provision for the preparatory period that is specified in the draft Treaty. We further recommend that the Bill should be amended to make clear that references to obligations arising at the end of five years (ie to end the ICIR's operations and submit a report on themes and patterns to the IRG), should be based on five years from the end of the preparatory period (rather than five years from the entry into effect of the legislation).

With respect to end of the ICIR's operations, the draft Treaty states that at the end of five years, the Commission should destroy all the information it holds about deaths and all records relating to such information.¹⁹⁶ In contrast, the draft Bill states that Secretary of State may 'by regulations, make provision for winding up the ICIR', but before doing so, he or she must consult the Irish government and any other persons the Secretary of State deems appropriate.¹⁹⁷ It continues that the ICIR could operate for five years 'or any other period which is agreed' between the two governments.¹⁹⁸

We welcome the provisions indicating that the ICIR's term could be extended beyond five years, as we believe, based on the experience of the ICLVR, that it may take time for the Commission to gain the confidence of families and information providers. In addition, if families choose to let the HIU process run its course in their case before requesting an information retrieval process, without the possibility of extending the period of the ICIR's operations, families could lose the opportunity for information retrieval if the Commission's operations were closed before it had time to seek information into their relatives' death.

Where would the ICIR be Located?

As a product of a treaty between the two governments, the ICIR would be an international institution, and its archives and premises would have the inviolability of a diplomatic mission.¹⁹⁹ The draft Treaty states that it 'shall have premises in Dublin, Belfast and, if the Commission considers it appropriate, other premises in Ireland or the United Kingdom'.²⁰⁰

¹⁹⁶ Draft Treaty, art 7(7).

¹⁹⁷ Draft Bill, cl 49(2)-(4).

¹⁹⁸ Ibid, cl 49(6).

¹⁹⁹ Draft Treaty, art 8(1); Draft Bill, cl 44.

²⁰⁰ Ibid, art 10(1).

Would the ICIR have to Report on its Work?

The draft Treaty states that the ICIR would have to report annually to the UK and Irish governments in a report that would be published, on

- The finances of the Commission;
- The administration of the Commission;
- The number of requests for information made to the Commission;
- The number of family reports that have been provided to persons requesting them; and
- Other data relating to the volume of information about deaths received by the Commission.²⁰¹

The draft Bill reproduces this list; however, it adds that each annual report must state the number of notifications relating to disclosure of information that could pose a risk to life or national security that the Secretary of State has given to the Commission in the previous financial year.²⁰² This is a welcome addition, as it would make public how often the Secretary of State uses these powers. In keeping with the confidentiality and non-disclosure requirements, the annual reports would not contain details of any information received from contributors.

²⁰¹ Ibid, art 3(4).

²⁰² Draft Bill, cl 42.

IV. The Oral History Archive

The Stormont House Agreement (2014) stated that:

The Executive will, by 2016, establish an Oral History Archive to provide a central place for people from all backgrounds (and from throughout the UK and Ireland) to share experiences and narratives related to the Troubles. As well as collecting new material, this archive will attempt to draw together and work with existing oral history projects.²⁰³

As with the other elements of the Stormont House Agreement, versions of this mechanism were trailed in previous rounds of legacy negotiations. As early as 1998, the report into victims and survivors commissioned by the then Secretary of State Mo Mowlam highlighted ‘the value of “telling the story”’.²⁰⁴ The Consultative Group on the Past provided much fuller detail on the potential role for storytelling, recognising its potentially ‘cathartic nature’ in enabling people to have their perspective – and in particular their pain and suffering - acknowledged. They envisaged a role for the chair of the Legacy Commission, through a Reconciliation Forum, to promote storytelling schemes and memorial projects and further recommended the collation of stories in some form of archive.²⁰⁵ Similarly, the Haass-O’Sullivan document recommended that the Northern Ireland Executive should establish ‘an archive for conflict-related oral histories, documents and other relevant materials’ for those who ‘wish to share their experiences connected with the conflict’. That report also proposed that, in addition to collecting new material, it would function as a repository for existing oral history archives.²⁰⁶

The NIO draft Northern Ireland (Stormont House Agreement) Bill published in May 2018 includes provision for the establishment of an Oral History Archive. The Consultation Paper that accompanies this bill proposes that those responding to the public consultation exercise consider two questions in relation to the OHA:

Do you think that the Oral History Archive proposals provide an appropriate method for people from all backgrounds to share their experiences of the Troubles in order to create a valuable resource for future generations? Yes/No

²⁰³ SHA para 22.

²⁰⁴ Sir Kenneth Bloomfield wrote: ‘As I received passionate letters of ten, a dozen or more pages, or listened to the first-hand account by survivors of their own trauma, I had a growing realisation that, for some at least, the cathartic effect of putting one’s experience on record is profound.’ Kenneth Bloomfield, *We Will Remember Them: Report of the Northern Ireland Victims Commissioner* (April 1998) ch 3, para 12 <http://cain.ulst.ac.uk/issues/violence/victims.htm> accessed 14 August 2018.

²⁰⁵ *Report of the Consultative Group on the Past* (23 January 2009) http://cain.ulst.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf accessed 14 August 2018, 97-98.

²⁰⁶ Richard Haass and Meghan O’Sullivan, *Proposed Agreement, 31 December 2013: An Agreement Among the Parties of the Northern Ireland Executive*, http://cain.ulst.ac.uk/events/peace/haass-talks/haass_2013-12-31.pdf, accessed 22 August 2018, 35-37.

What steps could be taken to ensure that people who want to share their experiences of the Troubles know about the Archive and are encouraged to record their stories?²⁰⁷

Attention is thus focused on the appropriateness of oral history as a *methodology* and the steps that might be taken to *publicise* the OHA. These questions sidestep a more fundamental issue, which is whether the *model* being proposed for the Archive (whereby it is under the charge and superintendence of the Deputy Keeper of the Public Records Office of Northern Ireland) is an appropriate means of enabling people from all backgrounds to record and share their stories. They also gloss over the fact that very little detail has been offered as to how the proposed model would work in practice.

We greatly welcome the inclusion of the OHA as a core legacy mechanism but have listed in the Executive Summary 17 recommended changes that we believe are essential if the archive is to realise its potential. In the sections that follow, we seek to place those recommendations in a broader context and to explain our reasoning.

How Important is the work of the OHA? Why does it Matter?

In transitional justice contexts, oral history is sometimes regarded as a ‘soft’ option – a complement to the ‘serious’ work of prosecutions and information recovery. Throughout this consultation process, we have argued that it is in fact ‘core business’ – a centrally important element of dealing with the past.

Beyond Legalism

The Historical Investigations Unit (HIU) and the Independent Commission for Information Retrieval (ICIR) are designed to operate within tightly defined limits. They are primarily focused on deaths and must understandably address these on a case-by-case basis. Whilst vitally important for victims and survivors, the parameters of this work are necessarily narrow.²⁰⁸ The OHA offers a valuable alternative for those whose needs cannot be met by the HIU or the ICIR. The importance of this was underlined by former UN Special Rapporteur, Pablo de Greiff, in his report on Northern Ireland when he stated that the legacy of the past is unlikely to be ‘fixed’ by legal means alone:

Efforts thus far have relied heavily on judicial procedures, leading to an inevitable ‘fragmentation’ of the issue. Judicial procedures are

²⁰⁷ NIO (n 13), para 9.3.

²⁰⁸ For a fuller critique of the dominance of legalism within transitional justice scholarship and practice see Kieran McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’ (2007) 34(4) *Journal of Law and Society* 411–40. For the repercussions in the context of oral history work see Anna Bryson, ‘Victims, Violence and Voice: Transitional Justice, Oral History and Dealing with the Past’ (2016) 39(2) *Hastings International and Comparative Law Review* 299–353.

traditionally case-based, and therefore primarily individualizing and perpetrator-centered.²⁰⁹

Widening Participation

The Oral History Archive could act as a buttress against this fragmentation by enabling a much broader cross-section of our society to share their experiences of conflict. People of all ages, from all walks of life, and from both rural and urban parts of Ireland and the UK, could come forward to tell their stories. For those who have suffered - publicly and / or privately - this is often, as noted, a significant and therapeutic process. It is particularly important for those who feel that they have been overlooked, silenced, or excluded.²¹⁰

Sharing Responsibility

Enabling people from all walks of life to participate in the OHA acknowledges the fact that those of us who lived through the horror of the last forty years have all – to greater and lesser extents – been affected by it and that we have a shared responsibility to do what we can to ensure that the burden is not bequeathed to our children and grandchildren.

Hearing ‘the Other’

Creating opportunities to recount past experiences in a non-judgmental, measured, and respectful context can provide a useful counterweight to other less inclusive approaches. Speaking, listening, hearing, and preserving are profoundly humane activities – they encourage reflection, empathy, and the broadening of perspectives. That is not to suggest that people should not commemorate their loved ones as they see fit but rather to acknowledge the potential benefits of couching individual narratives in a broader societal context. As De Greiff notes:

The arduous task is to find a way in which everyone, together, can deal with a complicated past, not so that ‘closure’ can be achieved, but so that everyone is disburdened of the sense that past tragedies must be remembered. Once everyone is recognised as an equal member of a shared political project, it is easier to manifest allegiances and loyalties in ways that do not call for frequently rehearsing the many ways in which different communities aggrieved each other in the past.²¹¹

²⁰⁹ See *Preliminary Observations and Recommendations by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff, on his Visit to the United Kingdom of Great Britain and Northern Ireland* (18 November 2015) www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16778&LangID=E accessed 9 August 2018 (‘UN Special Rapporteur Report’).

²¹⁰ See eg Jessica Senehi, ‘Constructive Storytelling: A Peace Process’ (2002) 9(2) *Peace and Conflict Studies* 41-63; Jessica Senehi, ‘Building Peace: Storytelling to Transform Conflicts Constructively’ in Dennis J. D. Sandole, Sean Byrne, Ingrid Sandole Staroste and Jessica Senehi (eds), *Handbook of Conflict Analysis and Resolution* (Routledge 2009) 201-215.

²¹¹ UN Special Rapporteur Report (n 209).

Gender Equality

Addressing a major imbalance in our approach to the past, this mechanism could also help to address gender-related issues – prioritising hitherto unheard female accounts of the conflict, documenting evidence of sexual and gender-based violence, and probing the impact of violence and conflict on masculinities and family life.²¹² The latter would also help to inform our understanding of broader issues concerning the impact of the conflict on both physical and mental well-being.²¹³

Acknowledging Complexity

There has been much debate in the media in recent times about the need to avoid a ‘rewriting of the past’. Linked to this is a suggestion that we should aim to substantiate with facts and verifiable statistics an agreed and undisputed narrative of the past. Like most academics, we are wary of proposals for ‘official’ or ‘agreed’ histories. As McBride et al note, ‘The purpose of academic research is not to close down public debate but to inform it.’²¹⁴ Empirical work is the foundation for all historical enquiry: facts and verifiable evidence most certainly matter. But the work of oral historians goes well beyond ‘who done what, where and when’. Crucially they are also inclined to ask ‘why?’ and to document how individuals felt about various aspects of their past experience. These complex questions rarely generate ‘black and white’ responses. Rather they tend to reveal a variety of motivations, points of tension and contradiction, and a range of evolving emotions such as anger, resentment, hurt, betrayal, healing, loyalty, patriotism, weakness, shame, pride, forgiveness, fear, and joy. By documenting the complexities of human experience (including, for example, despondency at times of apparent triumph and humour in the face of grim and terrifying ordeals), these individual accounts can act as a buttress against naïve and simplistic accounts of the past.

²¹² See Legacy Gender Integration Group, *Gender Principles for Dealing with the Past*, Belfast (September 2015) <https://caj.org.uk/2015/08/17/gender-principles-dealing-legacy-past/> accessed 14 August 2018. The long-term repercussions of underrepresenting female perspectives is reflected in the Witness Statements concerning the 1913-1921 Irish revolution and civil war period (collected on behalf of the Irish state between 1947 and 1957). A mere eight per cent of these statements were taken from women, and this profoundly influential collection is thus dominated by male and militaristic accounts of the period. See Eve Morrison, ‘The Bureau of Military History and Female Republican Activism, 1913-23’, in Maryann Gialanella Valiulis (ed), *Gender and Power in Irish History* (Irish Academic Press 2009).

²¹³ See Anna Bryson, ‘The Interview: A Tool for Peace Building? Reflections on the Peace Process: Layers of Meaning Project’ (2014) 9 *Journal of Cross Border Studies in Ireland* 79-90.

²¹⁴ See *Historians and the Stormont House Agreement*’ (2016) <http://irishhistoriansinbritain.org/?p=321> accessed 14 August 2018.

Reconciliation and Non-Recurrence

By providing opportunities to see and hear ourselves in ‘the other’ and by thus building empathy and understanding across and between different sections of our society this archive could ultimately make an important contribution to the promotion of reconciliation. Providing information about the fundamental and underlying causes and motivations for conflict it could also advance the much-lauded aim of ‘non-recurrence’.

What Principles would underpin the Work of the OHA?

The principles to which all participants to the Stormont House Agreement signed up are set out in the Introduction to this report.²¹⁵ In relation to the Oral History Archive, the Agreement further stipulates that ‘the sharing of experiences will be *entirely voluntary* and, more importantly, it notes that: ‘The Archive will be *independent and free from political interference*’.²¹⁶

This principal was included in the preceding Haass-O’Sullivan report and it has since been underlined repeatedly by victims and survivors. For example, the Victims Commissioner, Judith Thompson, has publicly outlined a set of core legacy principles agreed by members of the Victim and Survivors Forum. Central to these is the stipulation that all of the legacy mechanisms should be independent and impartial, and that they should have ‘no political friends’.²¹⁷

Who would take Charge of the OHA?

The Stormont House Agreement did not specify who would take charge of the OHA but in the political negotiations that ensued the Public Records Office of Northern Ireland (PRONI) was invited to explore options for the establishment of the Archive. We understand that they initially considered a number of models including:

1. Establishing a statutory office holder with independent decision-making powers;
2. Contracting a non-statutory body such as a University to run the Archive; and
3. A partnership model whereby a statutory body would establish agreements with other oral history entities as necessary.

Perhaps not surprisingly, Option 1 – whereby PRONI itself takes charge of the Archive – was the model recommended and this is now reflected in the NIO proposals. The Draft Northern Ireland (Stormont House Agreement) Bill proposes that ‘the Public Record Office has the function of organising an oral history archive’

²¹⁵ SHA para 21.

²¹⁶ Ibid, para 24.

²¹⁷ Introductory overview presented by Judith Thompson at a public event titled ‘Stuck in the Past’ at St Mary’s College Belfast on 7 August 2018 (organised by Féile an Phobail).

and that ‘The archive is under the charge and superintendence of the Deputy Keeper’.²¹⁸

Many within the oral history community were surprised at the decision to invite the Public Records Office to lead on the Oral History Archive. PRONI is a respected institution that provides an important public service, but as the custodian of predominantly official and state records, it has never before been actively involved in the creation of an oral history collection and (with the notable exception of work on the Prison Memory Archive project) has very limited experience of curating oral history records. Moreover, given that PRONI is a division of the Department for Communities, and its Director, the Deputy Keeper, is a career civil servant, accountable to the Minister of the Department for Communities (the ‘Keeper of the Records’), we immediately flagged concerns regarding the independence of the proposed model.²¹⁹ In light of the fact that the Victims and Survivors Forum and other representative bodies have made it abundantly clear that the issue of independence is vital, we believe that the proposed model is unlikely to garner widespread public support.²²⁰

The NIO proposals address the issue of independence by granting the Deputy Keeper a degree of autonomy from the Minister with regard to their ‘OHA duties’. For example, the section titled ‘The Role of the Deputy Keeper’ proposes that ‘A Northern Ireland department may not give the Deputy Keeper any direction in respect of the Deputy Keeper’s duties under this section’. Whilst this may confer a degree of independence in terms of the day-to-day running of the Archive, a subsequent section nonetheless makes it clear that

the relevant Northern Ireland department may make rules about the exercise of the function of organising the archive (including the performance of the duties of the Deputy Keeper in connection with the exercise of that function).²²¹

In particular, the department would reserve the right to make rules concerning:

- What records can be admitted to the Archive (see below concerns regarding determinations on consent);

²¹⁸ Draft Bill, cls 51 and 52.

²¹⁹ See Anna Bryson ‘The Stormont House Oral History Archive, PRONI, and the Meaning of Independence’ *RightsNI* (October 2015) <http://rightsni.org/2015/10/the-stormont-house-oral-history-archive-proni-and-the-meaning-of-independence-guest-post-by-dr-anna-bryson/> accessed 12 August 2018.

²²⁰ The NIO is subject to S 75 of the Northern Ireland Act 1998. This requires public authorities in Northern Ireland to take due regard to promote equality of opportunity between persons of different backgrounds including with regard to religious belief, political opinion, racial background and age. A Screening Form for the proposed policies on legacy is available at http://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706291/Section_75_Equality_Screening_Form.pdf accessed 14 August 2018. Surprisingly this does not address the possibility of a ‘chill factor’ deterring contributions from the broader nationalist community, given the concerns that have been raised about the proposed model by both the SDLP and Sinn Féin.

²²¹ Draft Bill, cl 56.

- The circumstances under which existing oral history records made by community groups, academics and others may be admitted to the Archive; and
- Any other matter arising under section 9 of the Public Records Act (NI) 1923.

The latter grants far-reaching powers including, for example, the right to make rules in respect of the admission of persons to access and use the records (charging a fee if deemed appropriate).²²²

There are in existence examples of statutorily independent entities that operate within a given Department's accounting boundary. The Attorney General's office, for example, falls within the accounting boundary of the Northern Ireland Executive Office and is supported by civil service staff. Unlike PRONI, however, this office is not an arms-length division of a government department and the responsibilities and roles of the Attorney General are statutorily independent of the First and deputy First Minister, the Northern Ireland Executive, and the Northern Ireland Departments. The Attorney General is also an independent law officer rather than a career civil servant.²²³

In order to clarify whether or not the model of independence being proposed by the NIO was workable in practice we consulted Dr Maurice Hayes, a former Northern Ireland Ombudsman, and Permanent Secretary at the Department of Health and Social Services. He suggested that what was being proposed amounted to a 'fig-leaf of independence' and added:

There may be, if you like, metaphysical seconds in which a senior civil servant has operational autonomy, but to whom is he or she accountable for the remainder of that minute, hour, day and week?²²⁴

Reflecting on the public service culture and practice outlined by Dr Hayes, we noted in a blog on the proposed model that: 'Operational independence is well and good in theory but, in light of organisational impulses and constraints, it is difficult to envisage a career civil servant closing his or her ears when the political piper calls a tune.'²²⁵

At any rate, we believe that the solution to the issue of independence is not to strengthen the powers of the Deputy Keeper of PRONI *vis-à-vis* the prevailing Minister. This misses the key point set out in the Stormont House Agreement – which is to safeguard the independence of the Archive itself. In our Model Bill, we proposed that it be established as an independent legal entity by the First and deputy First Minister. It would be governed by three executive directors, assisted by

²²² To avoid the prospect of firewalls and tariffs we deliberately included a section in our Model Bill to stipulate that there would be free public access to the oral history material published by the Archive. See Model Bill, s 63(2)(l).

²²³ The Justice Act (2002) Art 22(5) states that 'The functions of the Attorney General for Northern Ireland shall be exercised by him independently of any other person.'

²²⁴ Interview with Dr Maurice Hayes, Belfast (25 September 2015).

²²⁵ Bryson (n 219).

a seven-strong Advisory Board or Steering Group. We proposed that PRONI could provide the shell for the records and that, as such, the Deputy Keeper of PRONI would have an *ex officio* seat on the Steering Group. The criteria for the appointment of the other members of the Steering Group and their remit, function and tenure were clearly set out in our Model Bill.²²⁶

In essence we proposed to invert the model outlined by the Northern Ireland Office i.e. rather than the Minister and the Deputy Keeper of PRONI consulting the Steering Group as and when they deem necessary, the Steering Group should have ‘charge and superintendence’ of the Archive, consulting the Deputy Keeper as necessary. As outlined below, this diverse and representative Steering Group would assume responsibility for

- Mapping out a clear and transparent vision for the Archive;
- Establishing a comprehensive code of conduct and an interviewer training programme;
- Agreeing the acquisitions and access policy;
- Establishing a strategy of outreach and engagement to existing oral history organisations, archives and networks;
- Building cross-community trust and support; and
- Compiling a report on patterns and themes.

Such a model we believe would succeed in curbing *both* potential political interference in the design and conduct of the archive and the bureaucratic impulses of a ‘top-down’ civil service model.

How would the OHA Function in Practice?

The Stormont House Agreement envisaged the OHA as a ‘central place’ for people from all backgrounds to ‘share experiences and narratives relating to the Troubles’. There is, however, very little detail in the draft NIO bill and related documentation as to how the OHA would function in practice. It is unclear, for example, whether or not the Archive will be accessible online and / or at the Titanic Quarter premises. We are simply told that the Public Records Office would have the function of organising the archive and that this includes:

- a) inviting the contribution of oral history records,
- b) making oral history records of experiences recounted by other persons,
- c) otherwise receiving oral history records and other relevant records,
- d) preserving the archive (including by enhancing or changing the format in which records are kept), and

²²⁶ Model Bill, s 57 and s 59.

- e) making the archive publicly available, except to the extent that it is appropriate or necessary for particular records not to be made publicly available.²²⁷

In our Model Bill, we included provision for a non-statutory Code of Practice and set out in some detail how the Archive might work in practice.²²⁸ This included reference to the need to conduct extensive research to inform the overall acquisitions policy, to consult stakeholders nationally and internationally (including victims and survivors and those who represent them), and to make practical arrangements for the conduct, processing and accessing of oral history records.

With regard to the appointment of interviewers to carry out the oral history interviews, we proposed a partnership model that was designed to work with and through existing oral history networks, organisations, and projects. This included a flexible ‘train the trainers’ scheme. The rationale for the latter was fourfold:

- Many individuals only feel comfortable conducting an interview with a known and trusted interviewer;
- It is nonetheless imperative that all interviews adhere to core ethical, technical and legal standards;
- Interviewees must be made fully aware of procedures regarding long-term access and storage to ensure that they are not lulled into a false sense of security; and
- This scheme enables existing practitioners to secure a ‘license’ to point their collections in the direction of PRONI and provides them with the resources necessary to up-skill other members of their host organisation. This is a cost-effective means of maximising the reach and workability of the Archive.

With the skeletal model that has been put out for public consultation we are being invited – in the absence of any detail with regard to how the stories will be collected – to simply trust that the Deputy Keeper of PRONI will include similar provisions and basically get all of this right. We are particularly concerned about the prospect of a business model that seeks to collect interviews based on tenders for set targets.

Who would Staff the OHA?

The NIO draft Bill proposes that the Deputy Keeper must superintend the persons employed in the Public Record Office in keeping the Archive and further suggests that persons appointed under section 2(3) of the Public Records Act (Northern Ireland) 1923 are to assist in exercising the function of organising the Archive under the superintendence of the Deputy Keeper. The section of the Public Records Act referred to simply highlights the fact that such staff are appointed by and answerable to the Minister: ‘the persons so appointed shall assist in executing this Act under the superintendence of the Deputy Keeper of the Records of Northern Ireland in such

²²⁷ Draft Bill, cl 51(8).

²²⁸ Model Bill, s 63 - ‘The Work of the OHA’.

manner as the Minister [of Finance] may direct.’ This does nothing to allay fears about the independence of the proposed model or to address the core challenge of securing the trust of those who may consider sharing their personal and private recollections with the Archive.

In our Model Bill, we proposed that a dedicated secretariat provide research, archival, interviewing, and other professional and administrative support to the OHA. We also specified that staff should have between them experience and knowledge of a) the potential for memory to provoke trauma b) gender sensitivity and c) handling sensitive information and making judgments about its suitability for public release. We also cross-referenced the criteria for appointments to the Steering Group (see below) which includes reference to the need to be impartial and to avoid conflicts of interest. We deliberately proposed that ‘Staff may be (but need not be) appointed on secondment from a public authority, including PRONI’.

To what Extent would PRONI draw on Broader Expertise and Experience?

We welcome the inclusion in the draft NIO bill of a Steering Group who might help to shape the OHA. Unfortunately, however, we consider that the provisions regarding the Steering Group fall well short of what is required to hold the Deputy Keeper to account and to inspire confidence and trust across the broader community. The NIO provisions propose that the Deputy Keeper ‘must consult’ the steering group when issuing the statement setting out the manner in which the Deputy Keeper is to exercise his or her functions in relation to the archive. Similarly it is stated that before making rules concerning procedures for destroying records not forming part of the archive, the relevant Northern Ireland department ‘must consult’ the steering group. There is a slight advance in a later clause that states that the Deputy Keeper must ‘have regard’ to any advice given by the Steering Group.²²⁹ However, this does not amount to a binding obligation to heed the advice and input of the Steering Group.

The proposed ‘good faith’ model could potentially work were it not for the trust deficit that exists in our divided society. In light of that reality – and to ensure that the OHA has a decent chance of garnering widespread support and buy-in across the UK and Ireland – we included in our Model Bill provision for a strong, diverse, and independent Steering Group. We set out the necessary criteria for appointments to this body i.e. experience of: the management of public bodies; the administration of archives; the practice of oral history; relevant academic work; or working with victims and survivors. We also emphasised the importance of members having qualities which:

- Are likely to command the respect and confidence of contributors and other persons likely to engage with the OHA, including victims and survivors;
- Are impartial, and perceived to be impartial, by contributors and other persons likely to engage with the OHA, including victims and survivors;

²²⁹ Draft Bill, cl 52(9)(c).

- Have experience and skills which will assist the OHA in handling sensitive information and making judgements about the circumstances and timing of contributions being made public; and
- Neither have nor expect to have any financial or other interests that are reasonably likely to conflict with the exercise of their functions.

As noted above, we believe that this body should (by majority vote if necessary) be tasked with agreeing the aims and objectives for the OHA, and the necessary policies and procedures to collect, preserve and publish new and existing oral history accounts.

How would Appointments to the OHA Steering Group be made?

The NIO draft Bill proposes that the Deputy Keeper

must make arrangements to appoint a group of at least five persons ('the steering group') who, in the Deputy Keeper's view, have (between them) experience of obtaining oral history records in Northern Ireland and experience of obtaining oral history records outside Northern Ireland.

The proposals also state that it would be for the Deputy Keeper to decide who has the necessary 'experience of obtaining oral history records' and thus qualified to serve on the Group.²³⁰

As noted above we propose to give to the Steering Group much more wide ranging and specific powers than proposed in the NIO draft Bill (as crafted it is merely a consultative group) and as such we recognise the importance of ensuring that suitably qualified individuals are appointed to it.

We also see in the Steering Group an important opportunity to ensure representation from existing community oral history initiatives and networks and to bring to the fore relevant professional, practical, technical, medical, and legal expertise. It is thus very important that the criteria for appointments to the group are clear, specific, and transparent.

The NIO's Consultation Paper that accompanies the draft NIO Bill highlights the importance of ensuring that the work of the academics appointed to the Implementation and Reconciliation Group is 'recognised as being independent, rigorous and in line with academic best practice.' It furthermore suggests that 'it may be valuable for the academic report to use a multi-disciplinary approach and to work with organisations such as the Economic and Social Research Council (ESRC) to help provide structure for the project'. We think that it is equally important to ensure that the OHA Steering Group is 'recognised as being independent, rigorous and in line with academic best practice'. We thus suggest that either the ESRC or its sister

²³⁰ Ibid, cl 52(9).

body – the Arts and Humanities Research Council (AHRC) – could be drawn upon to help establish and apply criteria for appointments to the OHA Steering Group.

What Records would the OHA admit?

The NIO draft Bill stipulates that the archive would relate to

events that have the required connection with Northern Ireland and occurred in Northern Ireland or Ireland during the period beginning with 1 January 1966 and ending with 10 April 1998; and other significant events that have the required connection with Northern Ireland.²³¹

The ‘required connection with Northern Ireland’ is defined in this section as relating to events related to:

- a) the constitutional status of Northern Ireland or
- b) sectarian or political hostility between persons in Northern Ireland.²³²

With regard to the HIU, an act of violence or force would be interpreted as having the ‘required connection with Northern Ireland’ if the act was carried out:

- a) for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between persons there, or
- b) in connection with preventing, investigating, or otherwise dealing with the consequences of, an act intended to be done, or done, for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between persons there.

It is unclear why the definition of the ‘required connection with Northern Ireland’ is narrower with regard to the OHA but, at any rate, the key point is that decisions about how the ‘required connection’ is applied in practice should not be taken solely by the Deputy Keeper of PRONI. The NIO draft Bill proposals define an ‘oral history archive’ as ‘a collection of records which recount personal experiences (“oral history records”) and which are of a lasting historical significance.’ Presumably gender-based violence, intergenerational trauma and so forth could qualify as relating to ‘sectarian or political hostility’ but the point again is that, as proposed, it is for the Deputy Keeper to determine what records have ‘the required connection’.

²³¹ Ibid, cl 51(12).

²³² This differs from the definition offered in the Draft Bill in relation to the work of the Historical Investigations Unit where ‘the required connection with Northern Ireland’ relates to a) the constitutional status of Northern Ireland or to political or sectarian hostilities between persons there, or b) in connection with preventing, investigating, or otherwise dealing with the consequences of an act intended to be done, or done, for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between persons there.’ Ibid, cl 5(6).

The draft NIO bill also states that the oral history records in the archive may take ‘any form’ including audio, visual, and audio-visual records and transcripts. However, it notes that the OHA

may also include records ... that are not oral history records (including catalogues and indexes, and records which would or might be regarded in other contexts as ephemera), if they

- a) are ancillary to oral history records in the archive, and
- b) would assist the orderly preservation of, and access to, the archive.²³³

It is unclear from these clauses whether quilts and other artefacts that have been central to the creation of some oral history collections would be admissible. Again, if the Bill as proposed becomes law, the admissibility of such material would depend on what the Deputy Keeper deemed to be ‘ancillary’ to the oral history records and the extent to which they assist the cause of ‘preservation’ and ‘access’.

How would ‘Informed Consent’ be Determined?

The draft Bill stipulates that the relevant Northern Ireland department would have the power to make rules that make provision about:

- The giving of consent by a person to any oral history record of that person’s experiences being made by, or on behalf of, the Public Record Office for the archive; and
- The receipt of records not made by, or on behalf of, the Public Record Office for the archive²³⁴

Securing informed consent by way of a participation agreement (ideally signed in advance) for the conduct, archiving, and dissemination of an oral history interview is nowadays a basic ethical standard. It is thus entirely reasonable that those tasked with running the OHA should strive to ensure that this is secured for all new interviews and – insofar as is reasonably practicable – for all existing oral history records donated to the archive. There is nonetheless a concern that, as set out in the draft Bill, these sections could be employed by the Deputy Keeper and the Minister for Communities as a *carte blanche* to decide which records they choose to admit and which they choose - not only to discard - but also to destroy.

²³³ Ibid, cl 51(7).

²³⁴ Ibid, cl 56 (2).

What Records would the OHA Destroy?

It is curious that, although there is hardly any substantive detail in the draft Bill as to how the OHA would work in practice, there are no less than ten subsections on the procedures for disposing of records not forming part of the Archive. In particular, it is proposed to bestow on the Deputy Keeper the power to 'dispose of records' which 'the Deputy Keeper has decided should not form part of the archive' and 'records in respect of which any required consent has not been given'. The relevant subclauses include provision for laying before the Department for Communities and in turn the Assembly a copy of the schedule for disposal (by destruction or otherwise) of particular records (some of which may be listed in aggregate) that the Deputy Keeper deems to fall outside the remit of the archive. It is notable that, although the Deputy Keeper would be obliged to inform the Minister for Communities and politicians in the Assembly about proposals to destroy records, there is no mention of any obligation to inform the individual human beings to whom the records relate, or to give them any say in what happens to their records. Whatever the specific detail of the proposals to destroy records, this type of approach tends to feed accusations of a 'state-centric' model that is more concerned with protecting the institution than the individuals it is designed to help.

The proposed procedures to allow the Deputy Keeper to decide what records meet the criteria for inclusion in the OHA and to empower the Department for Communities to make rules about the issue of consent also highlights the importance of balancing legal obligations with creativity, imagination, and common sense. It goes without saying that both archivists and oral history practitioners must be ever vigilant to matters of legal and ethical probity, but there is currently a very lively and important debate in oral history circles about the competing dangers of

- a) insufficient regard for the letter of the law, and
- b) a disproportionately risk-averse and legalistic approach to the filleting and disposal of invaluable historical records.

These important and challenging deliberations about what to collect, how to collect it, who should access it and what should be redacted, withheld or destroyed should in our view be taken by a Steering Group comprising individuals with the necessary legal, practitioner and curatorial expertise rather than by the Deputy Keeper of PRONI and the Department for Communities.²³⁵

²³⁵ In para 20 of the 2013-14 PRONI Annual Report the Deputy Keeper stated that 'PRONI is risk-averse in its preservation of the archive'. See Department of Arts, Culture and Leisure, *Public Record Office of Northern Ireland: Report of the Deputy Keeper of the Records 2013-14*, <http://communities-ni.gov.uk/publications/proni-deputy-keepers-reports> (accessed 14 August 2018). At a recent workshop on the preservation, access and engagement challenges associated with the Prison Memory Archive project, Professor Steven High, Director of the state-of-the-art Center for Oral History and Digital Storytelling at Concordia University in Canada expressed his belief that an unduly cautious application of data protection and other legislation amounted to 'an assault on the practice of oral

Who would be able to Contribute to the OHA?

The Stormont House Agreement states simply that the sharing of experiences with the OHA would be ‘entirely voluntary’. The draft Bill echoes this commitment by stating that people would be invited to contribute oral history records. In our Model Bill, we emphasised the importance of enabling and facilitating contributions from individuals – and in particular victims and survivors - residing outside Northern Ireland. We thus welcome the proposal in the draft Bill that states: ‘The records in the oral history archive may be received from persons in the United Kingdom, Ireland, or elsewhere.’²³⁶ In theory, any individual who wishes to recount their personal experiences of events relating to the Northern Ireland conflict could contribute to the OHA but, as noted, we are concerned that stories would only be admitted if they meet the qualifying criteria to be determined and decided upon by the Deputy Keeper. In our Model Bill, we underlined the importance of seeking the cooperation of individuals and organisations outside Northern Ireland by including a dedicated section on ‘Arrangements with the Republic of Ireland’. By contrast, the Explanatory Notes to the draft Bill make it clear that ‘The majority of the provisions in the Bill extend to the whole of the UK, with the exception of Part 4 (the Oral History Archive) ... which extend to Northern Ireland only.’²³⁷ It is vitally important the Archive is poised to be outward rather than inward facing and as such, this is an issue that could usefully be clarified in the course of the consultation.

Would Certain Individuals or Stories be Prioritised?

The draft Bill proposes that the Deputy Keeper

make arrangements for the Public Record Office to identify other organisations which have made, or make, oral history records, and to inform those other organisations of the possibility of the oral history records made by them being included in the archive.²³⁸

Beyond an obligation to make this possibility known and to invite the contribution of new records there is no reference in the draft Bill or accompanying documentation to a strategy for targeting of existing and new material.

The contribution of records to the oral history archive must, of course, be on a voluntary basis but oral historians have long since cautioned against the dangers of a ‘lazy reliance’ on ‘voluntary self-selection’.²³⁹ Without a concerted effort to a) identify work that has already been done; b) establish gaps and omissions; and c) reach out to unheard or ‘hard to reach’ voices and perspectives, there is a danger

history’. Workshop on preservation, access and engagement at ‘Dangerous Oral Histories’ conference, Queen’s University Belfast (29 June 2018).

²³⁶ Draft Bill, cl 51(8).

²³⁷ Explanatory Notes, para 10.

²³⁸ Draft Bill, cl 51(6).

²³⁹ See eg Thompson (n 20) 26.

that only the ‘middle groups’ in society are represented and/or that louder or more insistent voices dominate the overall collection.

We feel that the difficult and challenging questions concerning where efforts and resources are channelled should not be sidestepped and that rather there should be an open and transparent articulation of the aims and objectives of the Archive, and a corresponding five-year strategy for the prioritisation and acquisition of new and existing material. Again, this should be determined by a strong and diverse Steering Group, rather than the Deputy Keeper.

What would be the Purpose of the Proposed Historical Timeline?

The Stormont House Agreement included a paragraph which proposed that ‘A research project will be established as part of the Archive, led by academics to produce a factual historical timeline and statistical analysis of the Troubles, to report within 12 months.’²⁴⁰ The draft Bill curiously does not include reference to this timeline in the section on the OHA but it is referenced in a later section on ‘Reports to the IRG’, which refers to ‘a report provided to the IRG by any research project established as part of the oral history archive (see paragraph 25 of the Stormont House Agreement)’.²⁴¹ It is also referred to in the NIO’s Consultation Paper and summary documents (longer version and easy read version). Here it is stated that, in addition to recording new stories and gathering information about existing projects, the OHA would ‘make a historical timeline of the Troubles’.²⁴²

This issue was addressed by a team of historians and social scientists from Northern Ireland, Ireland and Britain at a workshop on ‘Historians and the Stormont House Agreement’ led by Professor Ian McBride at Hertford College, Oxford, in October 2016. In their joint report, they noted that ‘the purpose of “a factual historical timeline” is unclear’. They note the existence of a plethora of excellent detailed chronologies and caution that greater clarity about the purpose of this timeline is necessary in order to avoid the ‘risk of creating misunderstandings among the wider public about the nature of academic research’. The report goes on to acknowledge that:

One advantage of historical scholarship is precisely the lack of importance attached to polemical arguments over ‘who fired the first shot?’ Dealing with the past in Northern Ireland will require engaging with more complex questions of causation and responsibility.²⁴³

²⁴⁰ SHA, para 25.

²⁴¹ Draft Bill, cl 61(1)(e).

²⁴² See eg NIO Consultation Paper.

²⁴³ The contributors to this report were: Dr Huw Bennett (University of Cardiff), Dr Máire Braniff (University of Ulster), Dr Anna Bryson (Queen’s University Belfast), Professor Ian McBride (University of Oxford), Professor Fearghal McGarry (Queen’s University Belfast), Dr Marc Mulholland (University of Oxford), Dr Niall Ó Dochartaigh (NUI Galway), Dr Simon Prince (Canterbury Christ Church), Professor Jennifer Todd (University College Dublin), Dr Tim Wilson (University of St Andrews). See *Historians and the Stormont House Agreement* (2016) <http://irishhistoriansinbritain.org/?p=321> accessed 14 August 2018.

As noted above, the purpose of this Archive in our view is indeed to get beyond the dehumanising and reductionist approach of a statistical timeline and instead to give space to individuals to tell their story in full, in context, and in all of its broader complexity. Professor Paul Thompson emphasises the potential that oral history holds out to engage with the ‘messiness’ of ‘awkwardly individual lives’ and notes:

Reality is complex and many-sided; and it is a primary merit of oral history that, to a much greater extent than most sources, it allows the original multiplicity of standpoints to be recreated.²⁴⁴

Before asking members of the general public to comment on whether or not ‘the Oral History Archive proposals provide an appropriate method for people from all backgrounds to share their experiences of the Troubles’, it is imperative that more detail is provided on those proposals, including the role and function of the proposed historical timeline and any related ‘research projects’. In particular, the NIO should articulate clearly how and to what extent the timeline (and any related ‘research projects’) might influence the criteria for inclusion of stories to the OHA and the subsequent report on patterns and themes.

How would the OHA ‘attempt to draw together and work with existing groups’?

The SHA stated that the OHA ‘will attempt to draw together and work with existing oral history projects’.²⁴⁵ In the draft Bill, the nature of this cooperation is reduced to a commitment by PRONI to facilitate the inclusion of existing oral history records i.e. a commitment that the Archive may include existing oral history records ‘which have been made, or are, made (at any time) by other persons (whether received by the archive from the person who made them or from another person)’.²⁴⁶ There is a further clause which proposes that the Deputy Keeper must make arrangements for the Public Record Office to ‘identify other organisations which have made, or make, oral history records, and to inform those other organisations of the possibility of the oral history records made by them being included in the archive’.

Given the central importance of working with and through existing groups, this approach is unduly passive. It goes without saying that no organisation or group should be compelled to cooperate with the OHA but a concerted effort should be made to facilitate and enable the long-term preservation of existing collections. It is undoubtedly easier to create new material but the tendency in transitional justice to ‘reinvent the wheel’ and overlook the valuable work that has already been done should be avoided. Identifying and preserving existing collections is time-consuming and painstaking work. It necessitates:

- Updating and aggregating existing inventories of oral history collections;

²⁴⁴ Thompson (n 20) 36.

²⁴⁵ SHA, para 22.

²⁴⁶ Draft Bill, cl 51(5).

- Reaching out to archivists and project leaders (many of whom have retired or moved on to other projects);
- Proposing sensible and workable accommodations with regard to the legal requirements for the deposit of collections at PRONI; and
- Working in a spirit of partnership with existing groups to provide viable solutions for the digitisation and long-term preservation of their collections.

Securing the trust of individuals who gave their story to one individual or group and who are now being invited to update the terms of their participation to including long-term preservation at PRONI is a significant challenge. It is obviously complicated in situations where the participants are now deceased or incapable of providing informed consent. However, these challenges are not insurmountable.

We see in the creation of the Steering Group an opportunity to enlist the support of existing oral history networks and organisations – to gain from their experience and expertise and to help garner widespread support for the archive. Our thinking on this issue was influenced by the ‘aggregator’ models that colleagues in the international oral history community pointed us towards, namely the Digital Public Library of America and the Europeana initiatives – both of which attempt to maximise public access to shared history, culture and knowledge by connecting the riches held within dispersed historical, archival and cultural heritage organisations.²⁴⁷ As noted in the Explanatory Notes to our Model Bill we believe that the relationship between the OHA and existing projects could be mutually beneficial. The OHA could, for example, provide the resources necessary to digitise and safeguard vulnerable collections into the future. In order to achieve this, we think it important that the Steering Group establish a comprehensive outreach and engagement strategy for existing organisations, identifying potential barriers to participation and agreeing workable solutions. It could, for example, design deposit agreements with suitably flexible terms and conditions. In the same way that it is possible for individual contributors to put a ‘stay’ on elements of their interview for a specified period of time, it should be possible to provide a range of access options for these collections.

Should Existing Oral History Groups feel Threatened by the Proposed OHA?

The fact that there is in existence a plethora of excellent conflict-related oral history archives, groups, and networks raises a fundamentally important question. When the proposed OHA was first mooted a number of local oral historians understandably asked: Why do we need a central, state-sponsored archive? Would it not be better to fund and support existing archives, groups, and networks? Is there not a danger that this new central body would displace and disrupt the good work that is being done on

²⁴⁷ See Digital Public Library of America, ‘About Us’ <http://dp.la/about> accessed 14 August 2018; Europeana, ‘Welcome to Europeana Collections’ <http://europeana.eu/portal/en/about.html> accessed 14 August 2018. We are particularly grateful to Dr Rob Perks (Lead Curator of Oral History and Director of National Life Stories at the British Library) and Dr Doug Boyd (Director of the Louie B. Nunn Center for Oral History at the University of Kentucky and President of the *Oral History Association*) for their advice and input on these proposals.

the ground rather than supporting and enabling it? This was likened in our consultation with the president of the *Oral History Association* to the effect of Walmart coming to town and gradually wiping out smaller grocery stores.²⁴⁸

Whilst we fully understand these concerns and feel strongly that existing groups should not in any way be threatened or diminished by the OHA, our sense is that there is a need for a coordinated strategy for conflict-related oral history research and that this mechanism could bring to light the valuable work that has gone before and point up new directions for future work. Most importantly, we recognise that, in the absence of a properly funded sound archive, with adequate space, resources and longevity, much of the valuable heritage material currently held in drawers and attics, or indeed in smaller archives that have run out of funding, is currently at risk. The pace of change in recording technology is relentless and sound files are thus particularly vulnerable to becoming obsolete. Likewise, online archives can easily go under when funding dries up due to broken links, viruses, and failure to maintain domains.²⁴⁹ We see in the creation of a central archive a valuable opportunity to safeguard the viability of at-risk sound archives and at the same time to create opportunities to magnify their impact and reach.

Whilst PRONI may not have been our first choice for the provision of a central repository, it does have the benefit of a new and purpose built premises in the Titanic quarter and has fully trained staff with expertise in archiving and preserving records. As such – subject to the necessary checks and balances – it could provide the platform for a long-overdue, properly resourced, sound archive.

How would the Credibility of Stories be Evaluated?

Unlike the evidence submitted to the ICIR and the HIU for the purposes of compiling family reports and (in the case of the HIU) potentially triggering a prosecution, there is less emphasis with oral history records on the verification of facts. Ethical and well-trained oral historians are obviously concerned to avoid vexatious and deliberately distorted accounts of the past. For example, they generally conduct as much background research as possible in order to help individual interviewees faithfully recount their memories. That said, an oral history interview is not an interrogation and the credibility of individual accounts is something that tends to be evaluated after the event by historians and others (typically by triangulating and crosschecking with other sources, checking for internal consistency and validity, and considering potential bias and distortion). Whatever about the credibility of individual stories, it is nonetheless important to bear in mind that the credibility of the OHA as a

²⁴⁸ Correspondence with Dr Doug Boyd (Director of the Louie B. Nunn Center for Oral History at the University of Kentucky and President of the *Oral History Association*), 11 May 2015.

²⁴⁹ The INCORE Accounts of the Conflict project created a most valuable digital archive of personal accounts of the conflict but it was facilitated by a time-bound grant from the Special EU Programmes Body and without a further injection of funding will be unable to further develop its remit. See INCORE, 'What is Accounts of the Conflict?' <http://accounts.ulster.ac.uk/repo24/index.php> accessed 9 August 2018.

whole would depend on the extent to which it succeeds in garnering widespread support and input from across communities.

To what Extent would the Confidentiality of Stories admitted to the OHA be Protected?

The SHA stated that ‘The Archive will bring forward proposals on the circumstances and timing of contributions being made public’. The NIO Consultation Paper expands on this point noting that, in some cases, final contributions could contain information, for example personal information, which is fundamental to the oral history account and its historical value but which, for legislative reasons, or at the request of the contributor should not be made public immediately. It is envisaged that this information could be kept private for an extended period, if necessary. The draft NIO bill bestows the power to make such decisions on the Deputy Keeper.²⁵⁰ The draft Bill and accompanying documentation do not, however, contain any detail about the criteria by which public access decisions would be taken. Presumably, the records admitted to the archive would be subject to a standard ‘sensitivity review’: there would be an assumption of public access and restrictions and / or redactions would only be introduced for specific reasons and for a limited time span. As with the decisions regarding which records are to cease to form part of the Archive and to be destroyed, we feel that more should be said about the rights of the individual contributors in relation to decisions affecting access to their stories. In the Model Bill, we included a series of sections acknowledging the right of contributors to make requests regarding the publication of their story (or parts thereof) and to be consulted and fully informed regarding any decision taken to redact their story or withhold it from publication.

Would the OHA offer Immunity from Legal Liabilities?

At no stage has any form of amnesty or immunity from prosecution been part of the proposals for the OHA. The NIO Consultation Paper notes in the section on the OHA that:

Potential contributors would also be made aware of PRONI’s duties regarding the protection of information and disclosure. In relation to the OHA, PRONI would be subject to existing laws on protection of information and disclosure, including the Data Protection Act 1998, the Freedom of Information Act 2000 and the Human Rights Act 1998 and would not be exempt from any court order served for the release of information, including requests for disclosure in relation to criminal investigations. Nor would it be exempt from any statutory duty to report crimes.

²⁵⁰ Draft Bill, cl 52(3).

It is thus clear that information provided to the OHA would be admissible in criminal, civil and inquest proceedings. This reality has been underlined in the sharpest possible terms by the repercussions of the Boston College Tapes project. In 2011, the Police Service of Northern Ireland (PSNI) began a legal bid to access oral history interviews given by former paramilitaries. Subpoenas were subsequently issued and several of the accounts admitted to the archive were then used in criminal investigations and proceedings. The repercussions of this project have undoubtedly introduced a 'chill factor' in relation to sensitive oral history research and, in particular, fears have heightened about the risks of inadvertently incriminating oneself or named third parties. This fear is not confined to paramilitaries but affects state actors and indeed all members of the general public who may have witnessed unlawful activity of one kind or another.

Our approach to this issue is to mitigate the potential dangers and thus reassure potential contributors that their stories can be safely told. This is generally achieved by ensuring that, as part of their training, interviewers are made familiar with the relevant legislation (e.g. Section 5 of the Criminal Law Act (NI) 1967) and that the potential repercussions of disclosing information about criminal activity or allegations of criminal offences that have not been prosecuted and fully determined are explained clearly to interviewees.

We feel that it is important to keep these issues in context. The OHA would not be designed to be a magnet for information about illegal activity (contributors wishing to share such information with victims will be directed to the Independent Commission on Information Retrieval). Whilst it is possible that information disclosed to the archive could be used in a criminal investigation, the police cannot go on 'fishing trips' in archives to scan individual stories – in order to request access to a confidential account they would need a genuine reason linked to the investigation of a named serious offence.²⁵¹ It should also be borne in mind that, whilst projects that could potentially attract information about unlawful activity have undoubtedly been thwarted, serious, and sensitive post-conflict oral history projects have been successfully completed before and after the Boston project.²⁵² All concerned should be mindful of the potential risks and dangers, but fear should not become an alibi for unnecessary self-censorship.

The draft Bill specifically addresses the issue of defamation, and proposes that, in relation to work carried out for the OHA, the Department, its staff and agents have limited protection from defamation claims in the courts. A further clause proposes

²⁵¹ See Oral History Society, *Statement on the Boston College Belfast Project* (May 2014) http://www.ohs.org.uk/documents/OHS_Statement_Boston_College_Belfast_Project_May2014.pdf accessed 14 August 2018.

²⁵² For an example of the type of project that has been derailed see Alan Meban, 'Henry McDonald: Security forces oral history project axed in wake of PSNI raid on Boston archive', *Sluggie O'Toole* www.sluggieotoole.com/2018/08/18/henry-mcdonald-security-forces-oral-history-project-axed-in-wake-of-psni-raid-on-boston-archives/ accessed 19 August 2018. For an overview of some of the projects that have been successfully developed in the aftermath of the Belfast Project see Kieran McEvoy and Anna Bryson 'Justice, Truth and Oral History: Legislating the Past "From Below" in Northern Ireland' (2002) 67(1) *Northern Ireland Legal Quarterly* 84-85.

that the Deputy Keeper reserves the power to waive this immunity (in whole or to any extent) on any person.²⁵³ Whilst we think it understandable for PRONI to seek to protect its staff against defamation and other claims with regard to the Archive, it is equally important to consider the rights and vulnerabilities of contributors. Rather than simply making contributors aware of PRONI's legal obligations, all interviewers should be fully trained on these issues. Decisions regarding the disclosure of information contained within individual records or the need to exclude records (or parts thereof) from the Archive on legal grounds should be taken by the Steering Group in light of clear and transparent criteria. As noted above (and as stipulated in the Model Bill), the original contributor should also be granted the opportunity to make representations and should be informed about decisions affecting their story.²⁵⁴

Does the issue of National Security arise in relation to the Oral History Archive?

The OHA is not designed to attract information about unlawful activity or secrets of the state but it is nonetheless possible that information included in an individual testimony could be deemed harmful to national security and, on that account, redacted or destroyed.

We propose that decisions on redaction and closure should be taken by the Steering Group in line with clear and transparent criteria. In the (albeit highly unlikely) event that it is proposed to redact or destroy an account because the information contained within it is deemed harmful to national security, we recommend that the individual who contributed the information should (if they are unhappy with the decision of the Steering Group) have recourse to the appeal mechanism we have proposed for national security redactions arising in the context of the HIU and the ICIR (see section on 'National Security' in 'Key Issues That Must be Addressed' and Appendix).

To what extent would Vulnerable Interviewees be Facilitated and Protected?

There is no information in the draft Bill and accompanying papers about the ways in which the OHA would work with and through existing organisations that represent victims and survivors such as the Victims and Survivors Service. We propose that individuals with direct experience of working with victims be included in the Steering Group and that efforts are made via the 'train the trainers' model to capitalise on the knowledge and expertise of those who have specific experience of interviewing and supporting vulnerable and traumatised individuals. We further propose that an individual with professional training in trauma is included on the Steering Group and that every effort is made to ensure cross learning between oral historians and other

²⁵³ Draft Bill, cl 57(3).

²⁵⁴ Model Bill, s 67.

professionals with relevant practical, medical, and legal training. In our Model Bill, we proposed that this should be reflected both in the interviewer training programme and in a comprehensive code of practice that includes a range of measures to facilitate contributions from victims and survivors.

How would the OHA be Funded?

The OHA section in the draft Bill does not have a specific section on ‘funding’. However, the Explanatory Notes suggest under ‘Financial Implications of the Bill’ that it would be funded from the £150 million (£30 million per annum for 5 years) allocated by the UK Government. Given that the Public Record Office, which is a division within the NI Department for Communities, would be assigned the function of organising it, we presume that the NIO is proposing that the Department of Communities should decide the amount necessary to set up and run the OHA and to duly pay the expenses via PRONI. The OHA would thus be paid from the Department for Communities’ budget and there would be no obligation on the UK centrally to resource it. By contrast, the Model Implementation Bill proposed payment from the Consolidated Fund through the UK Treasury. We also noted in our Explanatory Notes to the Model Bill the vital importance of ensuring funding beyond the five-year window proposed for the other mechanisms.²⁵⁵

For how Long would the OHA Operate?

Unlike the HIU and the ICIR, the work of the OHA (subject to available funding) is not time-bound. This is one of its greatest strengths. Archives are designed to last and the fact that accounts could be contributed for years to come facilitates important intergenerational work. More importantly, it means that victims and survivors can come forward to tell their story in full and in context, at a time and place that best suits *their* needs.²⁵⁶ They can also revisit their stories in light of changing circumstances and perspectives.

The read across to the work of the Implementation and Reconciliation Group does, however, introduce an important caveat with regard to the proposed timeframe. As noted below the stories admitted to the OHA are destined to be a central source of information for the identification of patterns and themes. This work is due to commence five years after the mechanisms get up and running. As things stand, it is unclear whether stories that are admitted to the OHA after this period can be considered.

²⁵⁵ Model Explanatory Notes, para 164.

²⁵⁶ See Sean Field, ‘Beyond “Healing”: Trauma, Oral History and Regeneration’ (2006) 34(1) *Oral History* 31-42; Sean Field, ‘Disappointed Remains: Trauma, Testimony and Reconciliation in Post-Apartheid South Africa’ in Donald A Ritchie (ed) *The Oxford Handbook of Oral History* (OUP 2010) 142-58; Stephen M Sloan, ‘The Fabric of Crisis: Approaching the Heart of Oral History’ in Mark Cave and Stephen M Sloan (eds), *Listening on the Edge: Oral History in the Aftermath of Crisis* (OUP 2014) 262.

Would the OHA have to Report on its Work?

The draft Bill proposes that the Deputy Keeper of PRONI must produce and publish an annual report on the exercise of the function of organising the Archive. The draft Bill further proposes that a copy of this annual report must be given to the HIU, the ICIR and the IRG but it is unclear how, if at all, the report should influence the work of these bodies. This issue was raised at a recent briefing we provided to the Victims and Survivors Forum.²⁵⁷ One member of that group welcomed our emphasis on the contribution that the OHA could make to documenting gender-related issues but asked how, if at all, this might affect the work of the HIU or the ICIR. In her view, it was not enough that, for example, testimonies relating to gender discrimination should simply inform a few paragraphs in the IRG's report on patterns and themes and that the relevant testimonies should then be available to future generations. Rather she wanted to know how the stories accruing to the OHA might inform and shape the work of the other legacy mechanisms. We think this is an important point and thus suggest that the annual report relating to the OHA should include consideration as to how the patterns and themes emerging might inform wider legacy work. This speaks to the overarching need to avoid fragmentation and to ensure that all of the legacy mechanisms are harnessed to pull together.

How would the OHA Contribute to analysis of Themes and Patterns?

There has been some debate to date about the procedures by which academics might be appointed to work on a report on patterns and themes for the Implementation and Reconciliation Group (IRG). Concerns have also been raised about the sources that the academics might draw upon to compile that report. Less attention has been paid to the processes by which evidence will accrue to the Oral History Archive. We regard this as a significant oversight because, regardless of the other sources that the IRG appointed academics may or may not consult, the reports from the ICIR, HIU and OHA are clearly flagged as 'the principal reports'.²⁵⁸

As currently crafted, the draft NIO bill proposes to give the Deputy Keeper the power to decide which stories meet the criteria for inclusion in the archive. It furthermore proposes that:

The Deputy Keeper must provide the Implementation and Reconciliation Group with a report on patterns and themes the Deputy Keeper has identified from the exercise of the function of organising the archive.²⁵⁹

The draft Bill proposes this report must be provided to the IRG exactly five years after the Northern Ireland (Stormont House Agreement) Bill comes into force.

²⁵⁷ Meeting of the Victims and Survivors Forum, Wellington Park Hotel, Belfast (13 June 2018).

²⁵⁸ Draft Bill, cl 61(4) on 'Reports to the IRG' notes that the duty to share a relevant report arises at the time when the 'four principal reports' have been provided to the IRG.

²⁵⁹ Ibid, cl 54(1).

It is totally unacceptable, in our view, to grant a career civil servant, accountable to the Minister for Communities, with sole discretion to determine which stories can be admitted to the Archive, which should be redacted, withheld or destroyed, and which sections of the publicly available accounts should inform a report on patterns and themes. The work on patterns and themes is a cornerstone of the legacy programme and as such, it is imperative that it should be guided and directed by an independent, diverse, and representative Steering Group.

V. The Implementation and Reconciliation Group

The Stormont House Agreement also provided for the creation of an Implementation and Reconciliation Group (IRG). Three very brief paragraphs (51-54) refer to the work of the IRG. Paragraph 51 provides that the IRG would be established to oversee ‘themes, archives and patterns’ and that after five years after the IRG and the other legacy institutions are established, the IRG should commission independent academic experts to produce a report on themes and patterns. It also stipulates that ‘any potential evidence base for patterns and themes should be referred to from any of the legacy mechanisms which may comment on the level of cooperation received’. Finally, it declares that ‘this process should be conducted with sensitivity and rigorous intellectual integrity, devoid of any political interference.’ Paragraph 52 states

Promoting reconciliation will underlie all of the work of the IRG. It will encourage and support other initiatives that contribute to reconciliation, better understanding of the past and reducing sectarianism.

Paragraph 53 states that in the context of the work of the IRG, the UK and Irish governments would consider statements of acknowledgement and would expect others to do the same.

Paragraph 54 deals with the make-up of the IRG. It states that the IRG will consist of political appointees (DUP 3, Sinn Féin 2, one each from SDLP, UUP, Alliance, UK, and Irish government).

The leaked version of the 2015 Stormont House Bill did not contain any provisions relating to the IRG. However the 2018 draft Bill and related consultation document contains provisions on the functions of the IRG, how it would operate, how its members would be appointed and proposed governance structures with regard to the work of the academics involved in the preparation of the report on themes and patterns.

This section of our response will provide an overview of key components of the IRG and where appropriate will make recommendations for amendments to the draft Bill to ensure that the IRG delivers upon its mandate in a manner that is both workable and human rights compliant.

What would be the Functions of the IRG?

Clause 60 of the draft Bill details the IRG’s functions. These are:

- To take such steps as the IRG considers necessary promote reconciliation in Northern Ireland and combat sectarianism;
- To support and encourage other persons in the promotion of reconciliation;

- To review and assessment the implementation of all past-related parts of the Stormont House Agreement; and
- To report annually to the FM/DFM and UK and Irish governments on any steps that it has taken to promote reconciliation and review and assess legacy work.

The formulation of the IRG's functions in the draft Bill seemingly extends beyond the SHA as the SHA tasked the IRG with overseeing 'themes, patterns and information recovery', whereas the draft Bill expands its oversight responsibilities to include the HIU. This expansion seems inconsistent with the provisions in the draft Bill relating to oversight of the HIU, which do not mention the IRG.

Although it is not expressly listed as a function of the IRG, as discussed below, Clause 62 requires the IRG to commission an independent academic report on the themes and patterns identified in the work of the HIU, ICIR, OHA, and the Coroners' Courts.

Which Principles would Govern the IRG's work?

In exercising its functions, the IRG is required to act consistently with the general principles in the SHA and Clause 1 of the draft Bill. In addition, Clause 60(6) provides that the person chairing the IRG must ensure that the Group's annual reports do 'not contain any information which— (a) might put at risk the life or safety of any person, or (b) would contravene the Data Protection Act 1998, if it were to be published.'²⁶⁰ Furthermore, Clause 60(7) requires 'The members of the IRG must have regard to the need for them to work collaboratively and in such a way as to secure public confidence in the IRG'.

How would the IRG Promote Reconciliation?

The promotion of reconciliation is an overarching principle of the SHA's legacy proposals, in recognition that 20 years after the Good Friday Agreement, meaningful societal reconciliation has largely not yet been achieved. The Implementation and Reconciliation Group is the body primarily tasked with drawing together the work of the other mechanisms and advancing this vitally important objective. However, beyond the broadly framed commitments to promoting reconciliation referred to in the IRG's functions, the package of documents in the consultation provide no further guidance on how the IRG would promote reconciliation. It would certainly be helpful if further clarification was provided on this point as a result of the consultation.

Under the IRG's power to support or encourage persons to promote reconciliation, it might, for example, be able to award some funding to grassroots reconciliation projects, which would be welcome.

²⁶⁰ Presumably the reference to the Data Protection Act will need to be updated to take account of the Data Protection Act 2018.

In addition, the academic report on themes and patterns that is to be commissioned by the IRG could help the process of broader reconciliation.

Furthermore, the IRG could promote reconciliation and support reconciliation efforts of others by promoting statements of acknowledgment. The Stormont House Agreement states that ‘In the context of the work of the IRG, the UK and Irish Governments will consider statements of acknowledgement and would expect others to do the same.’²⁶¹ However, the draft Bill does not mention the link between the work of the IRG and these proposed statements of acknowledgement.

Consideration should be given to the placing of a statutory duty on the IRG to conduct such work as it deems necessary for preparing materials that will be useful for two governments and others to considering the issuing of statements of acknowledgement as mandated in the Stormont House Agreement.

How would the IRG Oversee the Implementation of the Stormont House Agreement?

The IRG would be established as body corporate and would be intended to operate independently to oversee the review and assess the implementation of the Stormont House Agreement. In the draft Bill, the IRG’s means of performing this function are presented as receiving and producing reports.

The HIU, ICIR, and the OHA would be required to submit copies of their annual reports to the IRG among other recipients.²⁶² Furthermore, in addition to providing final reports to the IRG on themes and patterns, these institutions would be permitted to submit interim reports to the IRG on themes and patterns or in the case of the ICIR, on the level of cooperation they were receiving.²⁶³ These interim reports would not be disclosed and the Chair of the IRG would have a duty to receive the reports in confidence. The Chair would be required to share the reports with the other members of the IRG once the four ‘principal reports’ have been received, but the Chair has the discretion to share reports with other IRG members earlier if he or she thinks it is appropriate to do so. The IRG can also receive from the OHA ‘a report ... by any research project established as part of the oral history archive’.²⁶⁴

As noted above, the IRG would be required to produce annual reports detailing the steps it has taken to oversee the implementation of the SHA and to provide these reports to both governments and FM/DFM. However, the draft Bill provides no further guidance on how the IRG would carry out its oversight functions. In particular, it is unclear whether the IRG would be permitted or required to take any action if the HIU or ICIR submitted an interim report declaring that it was not receiving adequate cooperation from an entity.

²⁶¹ SHA, para 53.

²⁶² Draft Bill, cl 42(10)(c), cl 53(4)(c) and Sch 16, cl 1(4).

²⁶³ Ibid, cl 42(4), cl 54(1) and Sch 16, cl 6.

²⁶⁴ Ibid, cl 61(1)(e).

How would the IRG Members be Appointed?

The draft Bill makes it clear that while those appointed to the IRG are political appointees, they cannot simultaneously hold a relevant public elected position. Relevant public elected positions include being a member of the Northern Ireland Legislative Assembly, a councillor in Northern Ireland, a Member of Parliament, a member of the House of Lords, a member of Dáil Éireann, a member of Seanad Éireann or a member of the European Parliament from any member state.

The draft Bill proposes that the IRG would be chaired by a person 'of international standing' to be appointed by the First and deputy First Minister. The SHA stipulates that one member would be appointed by the UK government, another by the Irish government, and the remainder nominated by the five largest political parties in Northern Ireland according to the formula agreed in the Stormont House Agreement. The draft Bill lays out the process for nomination to these positions.

What would be the Process for Removing Members of the IRG?

Schedule 17, Clause 2(2) states that the relevant 'appointing authority' may remove a member of the IRG from office simply by giving him or her 'written notice of removal'. This would appear to present the obvious risk that once nominated onto the IRG, unless a person rigidly follows the party political positions of the different political parties (or indeed the two governments), they could be summarily removed from the IRG and presumably be replaced by someone more pliant who would not deviate from such party political positions. For the IRG to function properly, be consistent with principles (a) and (f) of Clause 1 of the Draft Bill, and fulfil its mandate with regard to promoting reconciliation, it would require those appointed to act in the public interest and to act without fear that they will be summarily removed for narrow party political reasons.

The solution to the risk of IRG members being dismissed for party political reasons could be found in Schedule 17, Clause 2(6) of the Draft Bill. It provides that IRG members are to hold office subject to the terms and conditions to be determined by the First and deputy First Minister and that any additional provision on the removal of office could be contained therein.

The current *carte blanche* provisions in Schedule 17, Clause 2(2) of the draft Bill should be removed and replaced by an agreed protocol from FM/DFM that would detail the responsibilities of the IRG members as office holders. This would include how they are to abide by the principles outlined in the SHA and Clause 1 of the draft Bill and stipulate the precise grounds by which any IRG member could be removed by the IRG itself rather than by the nominating parties. Removal for party political reasons should not be one of those grounds. These grounds, including those relating to confidentiality, should also make clear how the terms of appointment of IRG members will square with current protections for whistle-blowers who become aware of human rights abuses or other illegal activities.

What Procedures would Govern the IRG's Operations? Could any Member or Group of Members Exercise a Veto?

The draft Bill stipulates (as did the Model Bill) that the IRG should be established as a body corporate, similar to the HIU and ICIR as discussed above. Again, this is to be broadly welcomed as a required step to protect the independence of the IRG.

One obvious point with regard to the proposed nomination formula for the IRG is that it reflects the political configuration in 2014 when the Stormont House Agreement was concluded. Presumably, those negotiating this formula in the SHA assumed that the enabling legislation would be introduced either in 2015, or at least before the next Assembly elections. However, this did not happen and it may be several years before legislation is passed, the IRG is established and its members are appointed, by which time the political arithmetic may have altered.²⁶⁵

With regard to its practical working arrangements, Schedule 17 makes clear that for the IRG to be quorate 7 members must be present including the Chair, the UK Government nominee, and the Government of Ireland nominee. It also stipulates that decisions must be agreed by at least two-thirds of members participating. For example, this would mean if there are 7 members participating, 5 members would need to agree for a valid decision to be made, if there were 8 or 9 members participating, 6 would need to agree, if there were 10 members participating, 7 would need to agree, and if 11 members were participating, 8 would need to agree for any decision to be valid.

The requirement of a two-thirds working majority,²⁶⁶ which is not contained in the Stormont House Agreement, in effect offers the combined voting of the Democratic Unionist Party (3 nominees) and the Ulster Unionist Party (1 nominee) a de facto veto over any decision made by the IRG. The two nationalist parties (Sinn Féin 2 nominees, and SDLP 1 nominee) could not exercise such veto without the support of the Irish government or Alliance Party (1 nominee each). If the current formula were retained, the combined votes of the DUP and UUP would not require the support of the British government or any other party to exercise any such veto. The key issue in judging the impact of that veto is what are the 'decisions' which are likely to be made by the IRG which could be blocked by any such veto. Decisions to be made by the IRG would include those related to the promotion of reconciliation²⁶⁷ and the role of the IRG in reviewing and assessing implementation of the other legacy mechanisms of the Stormont House Agreement.²⁶⁸

²⁶⁵ By way of illustration, in the Assembly elections (2011) preceding the SHA being concluded, the DUP secured 38 seats, Sinn Féin 28 seats, the UUP 18 seats, SDLP 14 seats, and Alliance secured 8 seats. In the 2017 Assembly elections, the DUP won 28 seats, Sinn Féin 27 seats, the SDLP 12 seats, the UUP 10 seats, and the Alliance Party 8 seats. Although these elections results would not have altered the allocation of ministerial seats in the Northern Ireland Executive, relative minor shifts from this position would.

²⁶⁶ Draft Bill, sch 17, cl 6(2).

²⁶⁷ Ibid, cl 60(1).

²⁶⁸ Ibid, cl 60(3).

Given the long delay, the configuration of political nominees to the IRG should be based on the most recent Northern Ireland Assembly election results prior to the IRG's establishment rather than 'frozen' in 2014 – and thus the legislation should be amended accordingly.

To avoid the risk of the credibility of the IRG being undermined by the appearance that the political representatives of one section of the community could operate a de facto blocking veto over the decision-making process within the IRG, a simple majority of 6 from 11 (or equivalent if less members are present) should be adopted.

What Procedures or Standards would govern the Commissioning of the Independent Academic Report on Themes and Patterns?

Clause 62(1) of the draft Bill states the IRG 'must commission academic experts to identify, and then report to the IRG on, patterns and themes'. This report would be commissioned once the IRG has received the principal reports (but not simply interim reports) from the HIU, ICIR, OHA, and the Coroners' Courts of Northern Ireland. This would not happen until five years after the legislation has entered into effect in order to ensure that the independent academic experts have a sufficient evidence base with which to work.

In addition to the draft Bill and Explanatory Notes, the Northern Ireland Office published a specific document on how the Independent Academic Report element of the IRG could work.²⁶⁹ That document considers 'how the academic expert work could be commissioned, taking into account issues of independence and impartiality; good governance and ethics; and ownership of research'.²⁷⁰ It refers to existing mechanisms, which fund high quality research as well as provide an architecture for the commissioning, governance, peer review, independence, and ethics of that research. It suggests that these mechanisms could provide a model for commissioning academic research. It cites the examples of the Economic and Social Research Council (which oversees social science research including sociology, politics, law, elements of psychology etc.), the Arts and Humanities Research Council (which oversees arts subjects such as history, languages, religious studies, aspects of law etc.). It also refers to the Irish Research Council, which covers both social science and arts subjects and provides a similar architecture for research governance, independence, and rigour.

It also correctly notes the strong emphasis on multi-disciplinary research across all of these bodies and that the ESRC (and AHRC) regularly 'provide advice and support' to those seeking to benefit from their expertise and connections to academic networks.

²⁶⁹ NIO (n 35).

²⁷⁰ Ibid, 1.

How would the Independence of the Independent Academic Experts be Safeguarded?

Clause 62(4) of the draft Bill states that ‘the academic experts must be independent, free from political influence and act in way which can secure public confidence’. Given that the IRG would be made up of political appointees, the independence, professionalism, and integrity of the work of the academic report on themes and patterns would be absolutely central to the credibility of the work of the IRG and indeed the SHA legacy mechanisms in general. In the absence of such a report on themes and patterns, the work of the OHA, HIU, and ICIR is by its nature largely individualistic and ‘case by case’ focused. It is the role of the IRG, through the academic report, to produce an account that assesses the themes and patterns or ‘bigger picture of the conflict.’ This work would in turn be central to the efforts of the IRG to challenge sectarianism and promote reconciliation.

The ESRC and AHRC should be engaged explicitly to commission the academic work on patterns and themes to ensure independence, impartiality, and best practice in the academic research. The reason for engaging both the ESRC and AHRC (who work collaboratively on a regular basis under the broader umbrella of UK Research and Innovation)²⁷¹ is to ensure that those involved in preparing the academic report encompass both social science and arts disciplines. Placing the ESRC and AHRC at centre of this process, rather than simply advising the political appointees who make up the IRG, is a fundamental prerequisite to the credibility of this work.

In addition, a new provision should be inserted into the relevant clause of the legislation making it clear that any attempt by any member of the IRG to unduly influence or otherwise unduly interfere with the work of the independent academics involved in producing the academic report may be viewed as a breach of duty and that individual may be excluded from the IRG. If the power to suspend a nominating authority’s ability to replace someone who has been so excluded (either a political party or one of the two governments) for up to six months is retained in the final version of the legislation as a sanction for breach of the duty on the IRG, interference with the work of the academics involved in producing the academic reports should be one of the specified grounds for such a sanction.

²⁷¹ UK Research and Innovation is new body that brings together all seven research councils including the AHRC and ESRC together with the other respective councils on medicine, engineering, biotechnology etc.

What Sources of Information would inform the Work of the Independent Academic Experts?

To assist the academic experts in writing their report on the patterns and themes, the draft Bill states in Clause 62(2)(a) that ‘the academic experts **may** (to the extent, if any, that the academic experts think it appropriate to do so) take account of information’ from a range of specified sources listed in subclause (3). Clause 62(2)(b) states academic experts may **not take account of such information unless it has lawfully been made available in the way referred to in subclause (3).**

The sources referred to in subclause 3 are:

- HIU family reports and annual reports;
- HET reports that are publicly available or made available to the academic experts by the family concerned;
- ICIR reports that are publicly available or made available to the academic experts by the family concerned;
- ICIR annual reports;
- Police Ombudsman reports that are publicly available, or in the case of family reports, that are made available to the academic experts by the family concerned;
- OHA records that are publicly available;
- OHA reports that are produced by the Deputy Keeper (annual reports relating to the oral history archive);
- Criminal Court Decisions in the United Kingdom and Ireland;
- Judgments of civil courts and tribunals in the United Kingdom and Ireland that are made publicly available;
- Conclusions reached in Coroners’ Courts proceedings in the UK and Ireland and inquiries under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2015, that are made publicly available.

The Stormont House Agreement (paragraph 51) states that ‘any potential evidence base for patterns and themes should be referred to the IRG from any of the legacy mechanisms.’ As noted above, it further states that ‘this process should be conducted with sensitivity and rigorous intellectual integrity, devoid of political interference.’

This makes clear that the evidence base for the examination of themes and patterns should emerge from the other SHA mechanisms. However, once a possible theme or pattern emerges from those mechanisms, it is difficult to see how the academics appointed could assess the validity of any such potential theme or pattern with the required level of ‘sensitivity and rigorous intellectual integrity’ by **only** researching its merits from the list of sources in subclause 3.

The word ‘may’ in Clause 62(2)(a) would seem to suggest that the academics may give whatever weight they wish to the information provided by the list of sources detailed in subclause 3. However, it does not provide the independent academic

experts with express authority to consult sources beyond this list and weigh up the relevance or otherwise of those other sources in assessing the veracity of any suggested theme or pattern. Common sense would suggest that they should have such authority but that authority is not express in the draft Bill.

If the independent academic experts were not to be permitted to read beyond the list of sources in subclause 3, they would not (for example) be able to consult the widely used Cain web service on the Troubles,²⁷² the extensive Linenhall Library Northern Ireland Political Collection,²⁷³ the numerous official reports into key events in Northern Ireland²⁷⁴ or authoritative academic or historical reference points such as the *Lost Lives* book.²⁷⁵

This would seem a perverse act of anti-intellectualism and run contrary to the statutory obligation placed upon the independent academic experts for ‘rigorous intellectual integrity’ and operating ‘in such a way as to secure public confidence in the reports’. Moreover, it would run contrary to the professional standards that govern academic research across all social science and arts disciplines and would almost certainly mean that academics with the required professional profile would be unwilling to undertake the work.

In 2016, a group of distinguished academics led by Professor Ian McBride (Foster Professor of Irish History at Oxford) held a workshop at the University of Oxford on the role of historians with regard to the implementation of the Stormont House Agreement mechanisms.²⁷⁶ Although it is envisaged that the independent academic experts working with the IRG on themes and patterns would be drawn from a range of backgrounds (not just history), their conclusions have obvious read across for other disciplines. They argued that the academics involved in work associated with the IRG ‘should have access to a wider range of archival sources’ beyond those available in the UK national archives and the Public Records Office of Northern Ireland.²⁷⁷ They argued that the SHA should result in greater access for the academics appointed to relevant records held by the Northern Ireland Office, Ministry of Defence, Foreign and Commonwealth Office and Cabinet Office archives – all of

²⁷² Conflict Archive on the Internet (CAIN) available at <http://www.cain.ulst.ac.uk/> (accessed 20 August 2018).

²⁷³ Linenhall Library, Collections, NI Political Collection and Divided Society: Northern Ireland 1990 – 1998, <https://www.linenhall.com/pages/ni-political-collection-and-divided-society-northern-ireland-1990-1998> accessed 22 August 2018.

²⁷⁴ E.g. Lord Cameron, *Disturbances in Northern Ireland: Report of the Commission appointed by the Government of Northern Ireland* (1969) Cmnd 532; Lord Diplock *Report of the Commission to consider legal procedures to deal with Terrorist activities in Northern Ireland* (1972) Cmnd 5185; Lord Gardiner, *Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland* Cmnd (1975) 5847; Desmond de Silva, *The Report of the Patrick Finucane Review* (2012) HC 802 2012-13.

²⁷⁵ David McKetterick, Seamus Kelters, Brian Feeney, Chris Thornton and David McVea, *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles* (Mainstream Publishing 2007).

²⁷⁶ *Historians and the Stormont House Agreement Report on a Workshop held at Hertford College, Oxford, 19 October 2016.* <http://irishhistoriansinbritain.org/?p=321> accessed 20 August 2018.

²⁷⁷ *Ibid.*, 10.

which ‘hold thousands of files relevant to the writing of the thematic reports’.²⁷⁸ They further argued that

the opening up of government records will not inevitably lead to one-sided accounts concentrating exclusively on the security forces. Official records also contain extensive information on paramilitary organisation and activities, because they were a central focus for the state.

They also suggested that the records of various churches, peace campaigners, political parties, and international organisations could be drawn upon when the thematic reports are being written.

The power of the independent academic experts to review, evaluate and determine the relevance of all open access materials in assessing themes and patterns emerging from the SHA legacy mechanisms should be made explicit in the legislation. Moreover, as recommended by Professor McBride and his colleagues, with regard to archives that are not currently available, compromises must be reached on releasing as much material to the academic experts as possible to aid understanding without endangering people’s lives.

What Guarantees are there that the Independent Academic Report would be Published?

A key concern for academics involved in the writing of the report on themes and patterns will be to ensure that once all necessary legal and quality checks have been made, the report will actually be published. Clause 62(6) of the draft Bill stipulates that the IRG must give copies of any academic report that is produced to (a) the First Minister and deputy First Minister; (b) the Secretary of State, and (c) the Government of Ireland at the same time. Since the term used is ‘must’, it would appear that there no ‘decision’ on the part of the IRG regarding the passing on of the academic report.

Clause 62(8) states that The First Minister and deputy First Minister acting jointly must—(a) lay the copy of the academic report given to them before the Northern Ireland Assembly, and (b) publish that copy of the report in the manner which the First Minister and deputy First Minister acting jointly consider appropriate. Again, this appears to be a straightforward statutory obligation to lay the academic report before the Assembly and to publish it.

While the obligation to lay a copy of the academic report before the Assembly appears absolute, given past experiences with regard to legacy related matters, concerns have been expressed to us during the consultation that the requirement to act jointly in publishing the report ‘in a manner that the OFM/DFM jointly consider appropriate’ could be used to unreasonably delay publication of the report. Obviously if the report is laid before the Assembly, it is to all intents and purposes in the public

²⁷⁸ Ibid, 11.

domain. However, if there is any doubt created by the requirement to publish the academic report when it is jointly considered appropriate, additional wording could be added to Clause 62(8) stating that that the requirement to act jointly cannot be utilised to unreasonably delay the publication of the academic report on themes and patterns or in laying it before the Assembly. In the event of the FM/DFM failing to agree an appropriate format for the publication of the academic report within a reasonable time, it should be published in the manner it is received.

Would the IRG Funding Arrangements ensure Delivery of the Reconciliation and Themes and Patterns Work?

Clause 59(4) provides that The First Minister and deputy First Minister acting jointly must provide the IRG with such moneys, premises, facilities, and services, as it considers appropriate. Schedule 17, Clause 5 also states that the IRG may do anything it thinks necessary or expedient in connection with the exercise of its functions including employing or seconding staff, entering into contracts and acquiring or disposing of property.

Given past experiences regarding the unlawful blocking of legacy related funding (with regard to inquests) there are likely be concerns in Northern Ireland that the reconciliation facing and themes and patterns focused work of the IRG might be put at risk with similar difficulties related to funding. In order to avoid such difficulties, as suggested in the Model Bill, we would argue that the IRG should be paid for by the UK treasury from the Consolidated Fund.

Are the Procedures for Winding up the IRG Clear Enough?

Clause 63 provides that the FM/DFM acting jointly or the Secretary of State may, make provision for winding up the IRG after consulting the Government of Ireland and any other person the FM/DFM considers appropriate. The draft Explanatory Notes (Note 192) make it clear that this would happen ‘at the conclusion of its work.’ That phrase is not included in the draft Bill.

The phrase ‘At the Conclusion of its Work’, should be inserted into the first sentence of Clause 63 of the draft Bill.

Appendix:

Dealing with the Past: A Proposed Model for Information Redaction under the Stormont House Agreement

Introduction

This paper is designed to assist efforts to narrow the gap between the different actors on the outstanding issues preventing the establishment of the various past-focused institutions contained in the Stormont House Agreement (2014). In particular, it suggests an independent judicial mechanism that could make determinations on balancing the state's responsibilities to protect people, with the truth-recovery related rights of families affected by the conflict. It focuses, in particular, on the workings of the Historical Investigations Unit (HIU). In the interests of harmonising as much as possible the work of the Stormont House Agreement institutions, the proposed mechanism could be used to make independent determinations in any analogous disputes between the Independent Commission on Information Retrieval (ICIR) and the British or Irish governments or indeed any disagreements which might arise with regard to the other agreed mechanisms in the SHA.

Underpinning Principles

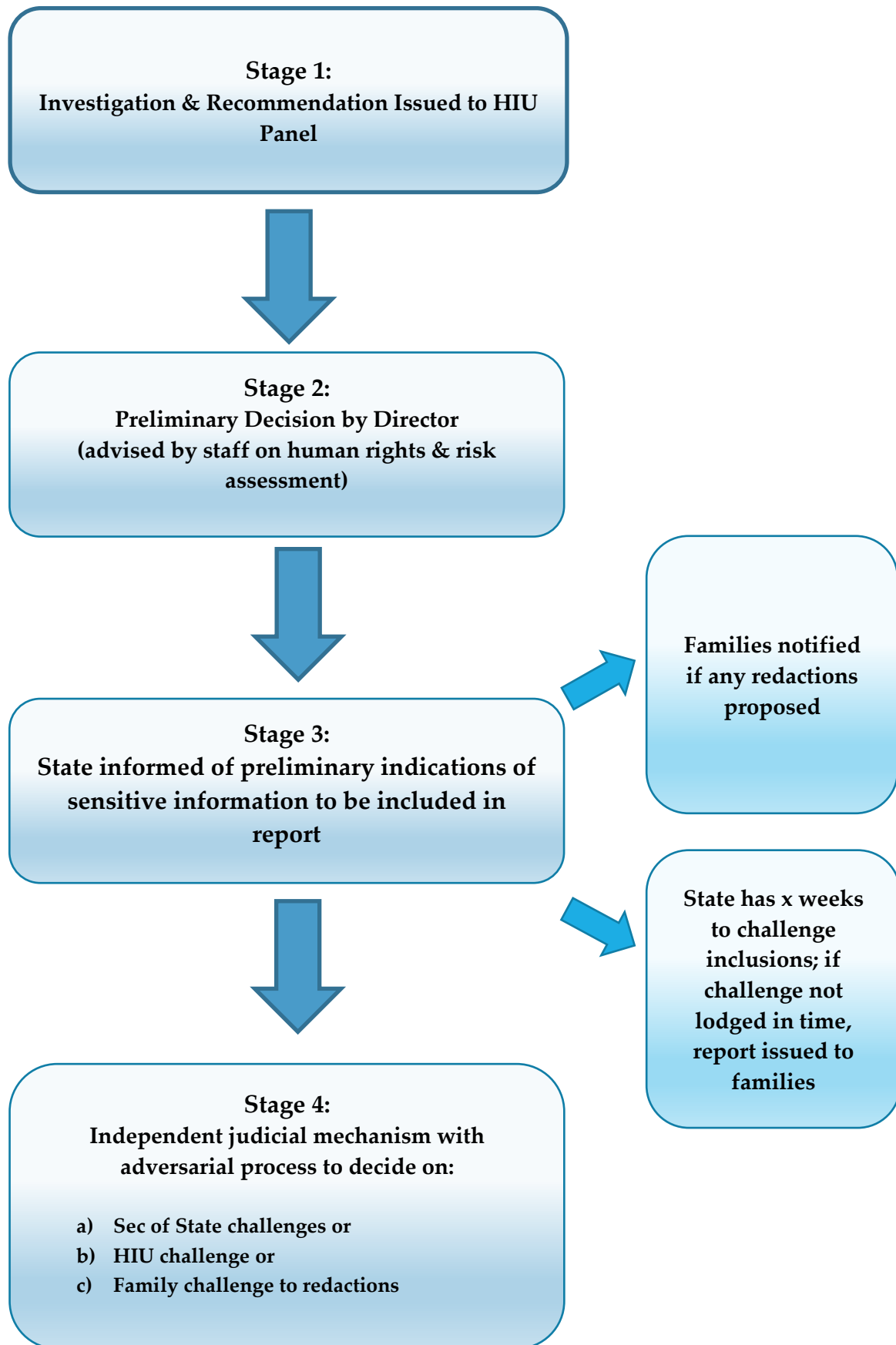
Having examined in some detail the relevant UK and European Court of Human Rights jurisprudence in particular, as well as analogous practical experience in the UK and elsewhere, a number of working assumptions have emerged which have underpinned and been incorporated into the model proposed below:

- Families who have lost relatives as a direct result of the conflict have a right to truth and the right to an investigation into the circumstances of such deaths, which is compliant with Article 2 of the European Convention on Human Rights.
- The State has an obligation to provide Article 2 compliant investigations in all conflict-related deaths.
- States have a legal obligation to protect all persons within their jurisdiction from harm. In tightly defined circumstances (see Appendix 1), this may necessitate proportionate restrictions on disclosure to protect the effectiveness of operational methods of the police and other security services which are in current use and which are lawful.
- Such restrictions cannot be used to hide human rights violations or otherwise unlawful or embarrassing activities.
- Public confidence in the HIU, ICIR and other mechanisms outlined in the SHA can only be served by maximising the independence and decision-making powers of the relevant institutions, free from state or other political interference.
- Where disputes arise between the HIU and the Secretary of State or other government departments with regard to onward disclosure of information to

families, and where such disputes cannot be resolved within a reasonable period of time, decisions on balancing competing imperatives should be made by an independent mechanism.

- This independent mechanism should be presided over by a judge, or judges, of at least high court level.
- To maximise public confidence in the process, criteria to inform the HIU and (where necessary) the independent judicial mechanism should be published in the legislation that establishes the Stormont House Agreement institutions. Those criteria should be devised from the relevant UK, European Court of Human Rights jurisprudence and other relevant international standards (see Appendix 1 draft criteria).
- The UK government has to date indicated a desire to use the term national security as the basis for seeking to redact sensitive information from HIU reports. However, national security is not defined in UK legislation. Using this term in the implementing legislation would require defining the term – at least for the purposes of dealing with the past regarding the conflict in or related to Northern Ireland.
- A more straightforward approach would be to excise the term national security from the enabling legislation and replace it in the legislation with the actual criteria for redaction. The term that is used in the Stormont House Agreement is ‘keeping people safe and secure’ and that could be used as short hand for this duty.
- The independent judicial mechanism tasked with reviewing decisions on information redaction should involve an adversarial process wherein the respective arguments of the HIU, government departments and the public interest in disclosure would be tested.
- Such an adversarial process requires that all parties are represented by lawyers in whom they have full confidence. Steps should be taken to ensure ‘equality of arms’ between those lawyers representing the Secretary of State, the HIU Director, and the affected families. To that end, a pool of independent or ‘public interest’ advocates should be created. Families would then choose lawyers from that pool to represent their interests before the independent judicial mechanism. These lawyers would be vetted to ensure that they could have access to all sensitive materials. Protocols should be developed to allow these advocates to provide a ‘gist’ of the proceedings to the families, their lawyers, and NGOs supporting them as part of taking their instructions (see further below).
- Senior judicial personnel with relevant knowledge and experience, in either the jurisdiction or elsewhere, should staff the independent judicial mechanism. The appointed judge(s) must be capable of commanding public confidence and support. The Lord Chief Justice of Northern Ireland, in consultation with the British and Irish governments, should appoint the judge(s). Other appropriate international institutional stakeholders should also be consulted, including the UN Special Rapporteur on Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence and the Council of Europe Commissioner on Human Rights.
- The detailed reasoning for the decision taken by the independent judicial mechanism should be published, subject to the same redaction criteria.

- If a decision is taken to redact sensitive information from a report to families, the redactions must be the minimum necessary to materially reduce the risk of death or harm to the specified persons concerned and proportionate to the level of risk when balanced against the public interest in disclosure. As is the case with reports issued by the Office of the Police Ombudsman, such redactions should only relate to the narrative or ‘findings’ elements of HIU report and not to the conclusions reached. Such redactions cannot be used to obscure or block information below the minimum disclosure requirements as detailed in Appendix One.
- All steps should be taken to minimise the potential for vexatious challenges to the decision of the independent judicial mechanism. One way to minimise such challenges would be to include a statutory appeal mechanism within the enabling legislation with a right of appeal to a higher judicial authority (e.g. the Northern Ireland Court of Appeal) with the grounds for appeal specified in that legislation.



Stage One: HIU Investigation and Recommendation

HIU investigation team conducts investigation and drafts case report findings for families. The enabling legislation should specify the assumption that all relevant information shall be provided to families, subject only to the duty to keep people safe and secure. Draft reports shall indicate whether any 'sensitive information' is included relevant to the death(s) under investigation.

Stage Two: Preliminary Decision by HIU

Advised by an appropriate panel, the HIU Director shall consider whether the sensitive information should be included in the report. That panel shall include a *Human Rights Advisor* and an *Advisor on Public Safety and Security*. The Policing Board will appoint the panel members. The panel shall balance the public interest and families' truth-recovery related rights against the duty to keep people safe and secure.

Stage Three: Preliminary Indication on Sensitive Information and Space for Resolution of any Disputes

The HIU Director shall inform the Secretary of State of the intent to use any sensitive information in the report and shall specify which sensitive information is intended to be used. The Secretary of State shall have a specified period to respond; otherwise, the report including the sensitive information will be issued to the family.

This stage may include provision for a time-limited resolution of any disputes between the HIU and the relevant authorities regarding the publication of sensitive information.

If there are disputes between the HIU and the Secretary of State relating to the publication of any sensitive information that cannot be resolved, either the HIU or the Secretary of State may refer the matter to an independent judicial mechanism. Affected families members shall have a similar right of referral to the independent judicial mechanism.

Stage Four: Independent Judicial Mechanism to Review HIU Decision re Sensitive Information Redaction or Inclusion

Once engaged, the independent judicial mechanism would hear arguments on the merits regarding redaction or disclosure of sensitive information in reports destined to go to families and make binding determinations. This would be substantial review rather than a review of the decision-making process. In a review, the senior judge or judges would examine the granular detail of the sensitive information to be included or redacted. Any element of the hearing that relates to sensitive information would be held *in camera*. Throughout, the review would be an adversarial process with the respective interests of the Secretary of State, the HIU and the families' interests in

disclosure being legally represented. The criteria by which the independent judicial mechanism shall make its determination should be published in the enabling legislation (see below). The detailed reasoning for the judicial decision taken shall be published, subject to the duty to keep people safe and secure. The independent judicial mechanism shall determine whether the relevant sensitive information should be included or redacted and instruct the HIU accordingly.

As far as is legally possible, the enabling legislation should seek to narrow the grounds for vexatious challenges to the independent judicial mechanism. One effective way of doing this would be through incorporating a statutory appeal mechanism in the legislation providing for the ability to appeal a decision of the judicial mechanism to a higher judicial authority (e.g. the Appeal Court of NI) on a range of appropriately specified grounds.

The Legal Representation of Families

To ensure that the rights of families are properly protected, and in particular, that they have ‘equality of arms’ before the independent judicial mechanism, a process should be devised whereby lawyers representing their interests and the public interest in disclosure can play a full part in the discussion of sensitive information before the independent judicial mechanism. Having considered a number of alternatives, the following option has been agreed as the minimum required to ensure equality of arms for affected families. It would involve appointing an ‘Independent Advocate’ or ‘Public Interest Advocate’ to represent the interests of families in the independent judicial mechanism.²⁷⁹

- A pool of suitably qualified human rights lawyers should be created to take on this function.
- The lawyers in this pool would be vetted to the required degree.
- Families, in consultation with their lawyers, would then chose which lawyer or lawyers from the pool they would wish to represent their interests before the Independent Judicial Mechanism.

²⁷⁹ This option would be based, in part, on public interest immunity (PII) hearings, where public interest advocates are appointed by the court to assist with *ex parte* PII claims. The role of the public interest advocate is to represent the public interest in the disclosure of documents/information, providing a counterweight to the government counsel in PII hearings that represents the public interest in non-disclosure (usually on national security grounds). The public interest advocate is appointed by the court to represent ‘the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done’ (Conway v Rimmer [1968] AC 910 per Lord Reid at 940). This role must be distinguished from the role of Special Advocates. Special Advocates are used in closed proceedings in the UK including in appeals against immigration decisions and hearings on detention and control orders. In such settings, once a Special Advocate has seen the ‘closed material’, s/he is unable to have contact with the individual, or the individual’s solicitor, in whose interests they are acting. This system has been the subject of significant criticism including by the Parliamentary Joint Committee on Human Rights, a major Justice Report and Special Advocates themselves who have highlighted the ‘fundamental unfairness of the system within which they operate.’ See further Amnesty International (2012) *Submission to the Joint Committee on Human Rights Justice and Security Green Paper*. London: Amnesty International.

- Once selected, these lawyers would have full access to all of the sensitive information that is seen by the judge or judges and the legal representatives of the HIU and the Secretary of State. They would be able to participate fully in the work of the independent judicial mechanism.
- Appropriate protocols would be developed to ensure that the vetted lawyers appearing before the Independent Judicial Mechanism could provide a 'gist' of the discussions to unvetted lawyers representing families without disclosing sensitive information that might jeopardise the responsibilities to keep people safe and secure.
- It would be necessary to ensure that the independent or public interest advocate lawyers are appropriately resourced both individually and collectively (e.g. in terms of administration, research, IT support etc.) to ensure that they are able to carry out their duties properly.
- The sharing of experiences amongst this pool of advocates would be encouraged as an important counter-weight to the Secretary of State's lawyers in these proceedings.

Keeping People Safe and Secure: Draft Criteria for Restrictions on Disclosure from the HIU to Families

Introduction

There will be a general presumption of disclosure of all relevant information in the possession of the HIU to families, subject only to the duty not to prejudice the administration of justice and the criteria detailed below. In circumstances where the HIU have concerns regarding whether the disclosure of information could jeopardise the administration of justice (i.e. a possible prosecution or prosecution with a reasonable chance of success), the HIU shall seek the advice and guidance of the DPP as to whether particular information should be included in a family report or indeed whether any family report should be issued in advance of a pending or ongoing prosecution.

Extent of Disclosure

In cases where the information reveals evidence of human rights abuses, criminal activity and misconduct by act or omission by any person, the information disclosed to the families shall, in all circumstances where relevant information exists, be sufficient to establish in general what measures might reasonably be taken to prevent recurrence and, without prejudice to that generality, in particular to:

- a) Identify the organisation, group, or state agency involved;
- b) Describe the nature of the wrongdoing including:
 - i. The nature of acts of commission or omission.
 - ii. Whether any relevant action or omission by a public authority was lawful (including, in particular, whether any deliberate use of force was justified in the circumstances).

- iii. Whether any action or omission of a perpetrator was carried out with the knowledge or encouragement of, or in collusion with, a public authority.
- iv. Whether the actions investigated had or may have been wholly or partly motivated by racial, religious, or other sectarian factors.
- c) Make clear the chains of command of the persons directly involved in the wrongdoing and, in the case of state involvement, the supervisory systems, or lack of them, that existed;
- d) Indicate whether the actions investigated were or may have been connected with other offences or actions (whether or not already investigated); and
- e) Detail the legislative, regulatory or policy gaps that allowed the wrongdoing to occur.

The above elements represent a minimum level of disclosure.

Redactions of Sensitive Information

Article 2 The Duty to Protect Life

No 'sensitive information' shall be provided in a HIU report to a family that might present a real and immediate threat to the life of an identified individual or individuals from the criminal acts of a third party.

The first ground for restrictions on disclosure is the duty on the state to prevent harm to individuals deriving from Article 2 of the ECHR. The 'floor' of the Article 2 substantive obligation on the state to protect life is the Osman test. The full test is that if

the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and ... they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk

they have failed to meet their Article 2 obligation.²⁸⁰

The HIU Panel and the Independent Judicial Mechanism would have to determine, in the context of the presumption of full disclosure of information to families gathered in the course of a HIU investigation, whether the redaction of specified sensitive material was required in order to mitigate a real and immediate risk to the life of an individual or individuals.

Article 3 The Duty to Prevent Harm to Individuals

The state also has a positive duty to prevent harm to individuals under Article 3 of the ECHR. In relation to restrictions on disclosure, this duty should be interpreted in the following way:

²⁸⁰ See paragraph 116, *Osman v UK* (87/1997/871/1083), ECHR Judgment 28 October 1998

Duty is to individuals

The risk of harm must be to an identified individual or individuals, not a class of persons.

The harm to be prevented

The harm to be prevented includes physical or specific psychological injury or harassment or intimidation likely to reach the threshold of inhuman or degrading treatment.

The risk

There must be a direct, foreseeable, and describable link between the proposed disclosure and the anticipated harm. That means that the risk must be imminent or in the foreseeable future and wholly created or materially enhanced by the proposed disclosure.

The nature and source of the threat

The threat must be to carry out harm as defined above through criminal acts. The source of the threat must be either an identified individual or individuals or a clearly definable group that in either case has demonstrated the willingness and capability to carry out threats as described to either the individual(s) concerned or to a defined class of persons to which the individual(s) arguably at risk belong.

Protection of Operational Counter-Terrorist Methodologies and Effectiveness

On the basis that under Articles 2 and 3 ECHR it may be considered necessary and proportionate, some information may be redacted from HIU reports to protect the effectiveness of operational methods of the police and other security services which are in current use and which are lawful - i.e. obsolete or 'arguably illegitimate'²⁸¹ methods cannot be concealed by restrictions on disclosure. Information about contemporary, legitimate operational methods must not already be in the public domain to qualify for redaction. It must also be demonstrated that the proposed disclosure would, in fact, in the foreseeable future, damage the operational effectiveness of the method in question in such a way as to place a person or persons at a real and immediate risk of serious harm. In general, the reasons for restricting disclosure under this criterion must be 'particularly convincing and weighty'.²⁸²

The Redactions

Any redaction of information must be the minimum that is necessary to materially reduce the risk of death or harm to the specified persons concerned and proportionate to the level of risk when balanced against the public interest in

²⁸¹ *Dil and Others v Commissioner of Police* [2014] EWHC 2184 (QB), para 42

²⁸² *Smith and Grady v. United Kingdom* (1999)

disclosure. As is the case with reports issued by the Office of the Police Ombudsman, such redactions should only relate to the narrative or 'findings' elements of HIU report and not to the Conclusions reached. Such redactions cannot be used to obscure or block the disclosure of information below the minimum necessary elements of information outlined above.

Key Sources

- Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland Establishing the Independent Commission on Information Retrieval (Draft Treaty), available at http://data.parliament.uk/DepositedPapers/Files/DEP2016-0057/Agreement_establishing_the_ICIR.pdf (accessed 22 August 2018)
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- Draft Northern Ireland (Stormont House Agreement) Bill (Draft Bill) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706283/Draft_Northern_Ireland_Stormont_House_Agreement_Bill.pdf (accessed 22 August 2018)
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Stormont House Agreement Model Implementation Bill (Model Bill) (2015), available at <https://amnesties-prosecution-public-interest.co.uk/themainevent/wp-content/uploads/2015/09/SHA-Model-Implementation-Bill-September-2015-Final.pdf> (accessed 22 August 2018)

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