CAJ
Committee on the Administration of Justice
Promoting Justice / Protecting Rights

Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) in relation to the supervision of the cases concerning the action of the security forces in Northern Ireland

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

February 2019

1st Floor, Community House
Citylink Business Park
6A Albert Street
Belfast BT12 4HQ

Tel – 028 9031 6000
Email – info@caj.org.uk
Web – www.caj.org.uk

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights (FIDH). Its membership is drawn from across the community.

This Rule 9 communication is for consideration at the 1340th meeting of the Ministers' Deputies in March 2019. CAJ has regularly made Rule 9 communications to the Committee of Ministers on the 'McKerr group of cases' most recently in August 2017. These submissions have charted the evolution of the 'package of measures' agreed to by the UK further to the above judgments, and their proposed replacement with measures agreed by the UK and Ireland, and political parties in the Northern Ireland Executive, under the December 2014 Stormont House Agreement (SHA).

The Committee of Ministers last examined the execution of these cases during its 1318th DH meeting (June 2018) and adopted decisions urging (in summary):

- Reiterating the "urgent need" to take forwards outstanding investigations in the individual cases "without further delay", including in the Finucane case once domestic litigation is concluded;
- "Recalled their serious concerns about the lack of progress in the establishment of the Historical Investigations Unit and other legacy institutions and underlined that, regardless of the complexity of the broader political picture, it is imperative that a way forward be found to enable effective investigations to be conducted, particularly in light of the length of time that has already passed since these judgments became final and the failure of previous initiatives to achieve effective, expeditious investigations as required by the judgments in this group;" and welcomed publication on 11 May 2018 of the SHA consultation and draft legislation;
- Recalled in 2013 the Court indicating the UK "must take as a matter of some priority all necessary and appropriate measures to ensure that, in cases where inquests concerning killings by the security forces in Northern Ireland are pending, the procedural requirements of Article 2 are complied with expeditiously; "
- "Expressing concern that delays in inquest proceedings continue, noted therefore with interest the judgment of the High Court of Northern Ireland of 8 March 2018 which both underlined the obligation to ensure that the Coroners Service could effectively comply with Article 2, irrespective of whether an overall package was agreed to deal with all legacy issues, and directed a reconsideration of the question of the provision of additional funding for legacy inquests which should not be postponed until broader political agreement is resolved;"
- Noted with satisfaction the UK's indication that legacy inquest funding would be revisited and strongly encouraging the UK to properly resource without any further delay legacy inquests in accordance with the NI Lord Chief Justice's proposals;

1st Floor, Community House
Citylink Business Park
6A Albert Street
Belfast BT12 4HQ

Tel – 028 9031 6000
Email – info@caj.org.uk
Web – www.caj.org.uk

Summary of Key Developments since previous decisions:

Public Consultation and draft legislation on Stormont House Agreement

- The public consultation, including draft legislation, on the implementation of the legacy institutions in the 2014 Stormont House Agreement, that was opened by the UK government on the 11 May 2018, was extended to October 2018;
- Whilst there are a number of positives in the draft, there are also provisions that would currently not be ECHR compatible. CAJ along with academics forming the 'Model (SHA) Bill' Team have made a detailed submission to the consultation, the Executive Summary of which is included as an Appendix to this submission;
- Since the consultation closed in October 2018 there has been ongoing dialogue as regards the proposals. However, to date the UK has not formally set out a timetable for the publication of revised proposals, amendments to the draft legislation or set a date for its introduction to the UK Parliament.

The Ministers' Deputies may wish to press the UK for clarity and a clear timetable for the introduction of the SHA legislation, in an ECHR complaint manner, into the UK Parliament

- One of the main concerns that delayed the original consultation was the insertion by the UK of a 'national security veto' power vested in UK Ministers to redact family reports from the HIU or ICIR into draft legislation. This power is explicitly defined as relating to the onward disclosure of material from the intelligence branches of the police, military and security services and as such appears designed to have the purpose or effect of permitting the concealment of human rights violations conducted by state agents;
- During the reporting period the 'national security veto' issues were brought into further focus by reports from the Police Ombudsman into the Loughinisland massacre and the subsequent Police arrests of journalists; the question of prosecutorial decision making further to Operation Kenova (an investigation by an independent team into a state informant in the IRA, undertaken through the 'call in' function of the package of measures; and the trial of a Loyalist commander and state agent, who pleaded guilty to over 500 offences, including 5 murders, but was eligible for immediate release following his trial under 'assisting offender' legislation.

Proposals for security force amnesty and misinformation on legacy cases

- In November 2017 the UK government indicated it would include a recommendation by Defence Committee of the UK Parliament in April 2017 on a 'statute of limitations' for members of the armed forces in the SHA consultation. This question was ultimately not explicitly included in the consultation although a question on alternative approaches was. This issue led to a split in the UK cabinet and a delay to the consultation. A further proposal is said to be under consideration by the UK Attorney General to reinstate a de facto power to veto prosecutions of soldiers, by

virtue of relevant offences requiring his consent, should this be taken forward it would represent a significant reversal of the reforms of the NI Peace settlement;

- Disinformation by the UK Executive has unfortunately continued, including an erroneous assertion by the Prime Minister in the UK Parliament that current legacy investigations only focus on the security forces; assertions from the UK's chief military officer that he would 'stamp out' legacy investigations, and a confused assertion from the Northern Ireland Secretary of State that she wished to stop all legacy investigations whilst officially supporting the SHA;

Challenges to the powers of the Police Ombudsman and Police arrest of journalists

- Further to the findings of paramilitary collusion of the 2016 Police Ombudsman's report into the 1994 Loughinisland massacre, an award winning documentary in 2017– *No Stone Unturned*– revealed further evidence of human rights violations through collision in the six murders. Following these two developments retired police officers launched a legal challenge to the Ombudsman's powers to make findings, and the PSNI arrested the journalists who made the documentary;
- The retired officers' challenge to the Ombudsman's legal powers to make findings were initially successful, until it transpired that the Judge in the case had represented the same applicants, as a lawyer, in similar past proceedings. Further to applications from the families for the Judge to recuse himself, the Judge stepped aside and the case was heard afresh by another Judge who dismissed the application;
- The legal challenge delayed the publication of pending Reports by the Ombudsman into other cases examining collusion. The judgment however appeared to clear the way for publication. Shortly after however it transpired that the PSNI had withheld significant amounts of sensitive disclosure from the Ombudsman, understood to be covert policing materials. The belated appearance of these materials, and the need to investigate them has delayed the publication of the reports, potentially beyond the term of office of the current Police Ombudsman. The Secretary of State is to appoint a successor. This whole episode raises significant concerns;
- In a case that has raised international concern, the two journalists Trevor Birney and journalist Barry McCaffrey, were arrested in August 2018 in relation to the use of leaked official documents, and released on bail, and their homes and the offices of several media companies raided by over 100 officers. Judicial review proceedings are currently live over the lawfulness of the search and seizure of journalistic material;

Unlawful withholding of resources for Legacy Inquests

- At the time of writing funding is yet to be released to allow legacy inquests to proceed. In March 2018 the High Court ruled that that the former First Minister had acted unlawfully, including in breach of Article 2, in preventing the approval of the legacy inquest funding sought by the Lord Chief Justice. The ruling is yet to have an effective remedy delivered and monies are still being withheld by the UK;

1. The Stormont House Agreement consultation

Background to SHA Consultation

In December 2014 the British Government published the Stormont House Agreement (SHA), the result of talks involving the parties in the Northern Ireland Executive and the British and Irish Governments. The SHA provided for a new set of institutions to deal with the legacy of the Northern Ireland conflict, including a new 'Historical Investigations Unit (HIU)' to conduct Article 2 compliant investigations into conflict-related deaths and an Independent Commission for Information Retrieval (ICIR). The SHA also provided for measures to maintain and make legacy inquests Article 2 compliant.

Our previous submissions of October 2016[1], February 2017[2] and August 2017[3] provide detail as to the series of events which have led to a delay in the implementation of the SHA legacy provisions. In summary the central issue which originally delayed the legislation for the HIU was the proposed insertion by the UK of a ministerial power to redact the contents of independent investigation reports by the HIU on undefined 'national security' grounds.

The then Secretary of State for Northern Ireland announced that he sought 'political consensus' between Northern Ireland parties before moving to publish the consultation document on the proposed legacy bodies in the SHA. This essentially provided a veto, despite ECHR Article 2 imposing binding procedural requirements on the UK.

In early 2017 the Northern Ireland power-sharing administration collapsed amid scandals relating to both corruption and sectarianism in decision making, but also in the context unfulfilled obligations from previous agreements making up the peace settlement. This included the failure to take forward the SHA mechanisms and the provision of funding to other 'package of measures' mechanisms, particularly, as detailed below, legacy inquests.

In June 2017 after a snap UK General Election the minority Conservative administration entered into a Confidence and Supply agreement with the Democratic Unionist Party (DUP – the largest NI party). This committed to the SHA consultation and the SHA's implementation, with the qualification that the SHA bodies did not "unfairly" focus "on former members of the armed forces or police."[4]

In February 2018 an agreement was briefly reached between the DUP and Sinn Féin (the two main NI parties) to restore power sharing. Reportedly this included commitments from

[1] http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/03/15125217/S459-CAJ-Rule-9-Submission-to-the-Committee-of-Ministers-on-the-McKerr-group-of-cases-October-2016.pdf
[2] http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/03/15125220/S460-CAJ-submission-re-Rule-9-February-2017.pdf
[3] https://caj.org.uk/2017/09/21/s468-cajs-submission-committee-ministers-august-2017/
[4] DUP-Tory Confidence and Supply Agreement – financial Annex, UK Financial Support for Northern Ireland https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/uk-government-financial-support-for-northern-ireland

the UK government to Sinn Féin to proceed with the SHA consultation; not to include the question of a 'statute of limitations' for the security forces in the consultation, and to release funding for legacy inquests for that financial year.[5] Within a few days however the DUP withdrew its support for the deal.[6] The Northern Ireland Executive and Legislature have not been restored to date, and the UK is currently not convening any negotiations to do so.

As the consultation on the SHA was not dependent on consensus between NI parties there were further calls for its publication at this point. Whilst the UK had long committed to do so there was then a further delay until May 2018 due to reported strong opposition within the UK Executive (cabinet) primarily from the Ministry of Defence. This reportedly focused on the question of an amnesty (in the form of a statute of limitations) being added to the SHA.[7] Such a proposal would have been outside the terms of the SHA consultation and legislation was eventually published in May 2018 without explicit reference to a statute of limitations. The consultation was set to run until September 2018 but was subsequently extended until October 2018.

Content of the SHA consultation and subsequent process

The Model Bill team consisting of CAJ and academics from the law schools of the two Northern Ireland Universities – Queens University and Ulster University- issued a detailed response to the consultation which is included as an appendix to this submission.[8]

The submission makes numerous recommendations for improvements for the bill, including in areas where such changes would, in our view, be necessary to ensure ECHR compliance.

Since the consultation closed in October 2018 there has been ongoing dialogue as regards the proposals. However, to date the UK has not formally set out a timetable for the publication of revised proposals, amendments to the draft legislation or set a date for its introduction to the UK Parliament.

The Ministers' Deputies may wish to press the UK for clarity and a clear timetable for the introduction of the SHA legislation, in an ECHR complaint manner, into the UK Parliament

The 'National security veto' and involvement of state agents in violations

One of the main concerns that delayed the original consultation was the insertion by the UK of a 'national security veto' power vested in UK Ministers to redact family reports from the HIU or ICIR into draft legislation. This power is explicitly defined as relating to the onward disclosure of material from the intelligence branches of the police, military and security

[5] http://eamonnmallie.com/2018/02/questions-no-answers%E2%80%8B-legacy-deal-brian-rowan/
[6] http://eamonnmallie.com/2018/02/new-light-shone-draft-agreement-eamonn-mallie/
[7] https://www.theguardian.com/uk-news/2018/may/11/consultation-launched-unit-investigate-troubles-era-killings-northern-ireland
[8] "Addressing the Legacy of Northern Ireland's Past: Response to NIO Public Consultation By Model Bill Team" September 2018. https://www.amnesties-prosecution-public-interest.co.uk/model-bill-team-response-to-nio-legacy-consultation/

services and as such appears designed to have the purpose or effect of permitting the concealment of human rights violations conducted by state agents.

The involvement of state agents in serious human rights violations including killings has again come into focus during the reporting period. The arrests of Journalists following revelations of the involvement of an informant in the Loughinisland massacre, and the attempts to challenge the Ombudsman's powers are detailed below.

In early 2018 saw the trial of Gary Haggarty, a commander in the Loyalist Ulster Volunteer Force (UVF) and state agent with the Royal Ulster Constabulary (RUC) Special Branch. Haggarty' had been sought for arrest by the PSNI Historical Enquiries Team (HET), in relation to four murders. Subsequent to being arrested for murder in 2009 in 2010 Haggarty became a 'supergrass' under the terms of the Serious Organised Crime and Police Act (SOCPA) and reportedly provided details of murders he was involved in and also was aware of and had provided advanced notice of to the RUC. Having spent time in custody Haggarty switched solicitors who were denied access to his previous police interviews. He was ultimately interviewed by police over 1000 times, pleaded guilty to 500 criminal offences including 5 murders, 5 attempted murders, 23 conspiracies to murder and other offences. Charges included offences which occurred after the 1998 Good Friday Agreement (and hence its early release scheme would not apply). Ultimately sentencing took place in January 2018 but the SOCPA process resulted in immediate eligibility for release. Prior to this, in October 2017, families of victims received notification that the evidence gathered in the SOCPA process would not be used in any further trials, and hence neither other Loyalist Paramilitaries, state agents or RUC Special Branch officers would be prosecuted as a result of the process.[9] Notwithstanding broader concerns about the process and the one recurring issue in this process may be the failure to keep or retain records within RUC Special Branch that would have provided further corroborating evidence.

More recently the question of prosecutorial decision making further to Operation Kenova has been raised publicly. This relates to an investigation being conducted by an independent team from a UK police force further to the 'call in' provision within the Package of Measures. The investigation relates to the activities of an alleged British Army agent known as 'Stakeknife' within the Irish Republican Army (IRA) including, but not limited to, murders, attempted murders or unlawful imprisonment. The investigation is to ascertain whether there is evidence of criminal offences committed by both the alleged agent and also members of the British Army, MI5 or other agencies.[10] In December 2018 the UK press reported that the head of MI5 would be questioned over 17 murders by Stakeknife but that MI5 would argue against the prosecution of Stakeknife as any trial may implicate MI5. The *Sunday Times* newspaper, citing detectives on Operation Kenova stated they believed they had uncovered sufficient evidence to charge Stakeknife the source claiming "Kenova is 100%

[9] Concerns in relation to British Government compliance with article 2 of ECHR in respect of legacy issues in Ireland. Niall Murphy Solicitor KRW Law LLP, October 2018 http://krw-law.ie/wp-content/uploads/2018/10/Submission-to-Commissioner-for-Human-Rights-Dunja-Mijatovic-2nd-OCTOBER-2018.pdf

[10] For background and the Terms of Reference to Operation Kenova see: https://www.opkenova.co.uk/investigation-terms-of-reference

confident that it is way over the threshold for the evidential test [for prosecution]."[11] Concerns were then raised that if the application of the 'public interest' limb of the prosecutorial test resulted in no prosecution this could question the legitimacy of the whole process. As the Ministers' Deputies will be aware transparency in decision-making on prosecutorial decisions and the independence of the office has been a cornerstone of reforms during the peace process and the implementation of ECHR Article 2 rulings. This has particularly been the case in relation to prosecutorial decisions involving alleged crimes by agents of the state that constitute human rights violations.

Further to proceedings taken by CAJ and others before the Investigatory Powers Tribunal[12] the Security Service MI5 has released a heavily redacted copy of its current (2011) "Guidance on the use of agents who participate in criminal activity." This process which permits MI5 officers to encourage, counsel or procure unspecified criminal offences by its agents, provided it is covered by an authorisation under the Guidance, at paragraph 9 states: "*The authorisation process and associated records may form the basis of representations by the Service to the prosecuting authorities that prosecution is not in the public interest*." CAJ has exchanged correspondence with the Director of Public Prosecutions (DPP) in Northern Ireland on this matter. The DPP response has further set out the process and prosecutorial test that will be applied.[13]

Events in the reporting period have therefore sharpened the concerns that processes that can lead to *de facto* impunity for state agents and officers are still capable of deployment. This furthers concerns as to the purpose and effect of the inclusion of a 'national security veto' onward disclosure, that is directly tied in the draft SHA legislation to the activities of RUC Special Branch, military intelligence and MI5.

The Ministers' Deputies may wish to press the UK to ensure that the SHA legislation can comply with the procedural requirements of Article 2 in relation to investigations and potential prosecutions against state agents.

Proposals for security force amnesty and misinformation on legacy cases

The 'Statute of limitations'

In April 2017 the Defence Committee of the UK Parliament published an inquiry report calling for an amnesty, (referred to as a statute of limitations), covering all conflict-related

[11] *MI5 chief to be questioned over IRA double agent Stakeknife's '17 murders'* Sunday Times 16 December 2018 https://www.thetimes.co.uk/article/mi5-chief-to-be-questioned-over-ira-double-agent-stakeknife-s-17-murders-6b8bw7vbb

[12] https://www.theguardian.com/uk-news/2018/oct/04/mi5-sought-immunity-for-agents-criminal-acts-tribunal-told

[13] Correspondence from CAJ to DPP of 17 December 2018, and detailed response of 8 February 2019.

incidents until 1998 involving members of the armed forces.[14] This was in the context of the first two decisions to prosecute soldiers for NI conflict-related deaths as a result of legacy investigations. The proposal from the Committee was in part predicated on a position that there was disproportionate focus on military cases in PSNI legacy investigations, although this assertion is not supported by relevant data.

In November 2017 the UK government response to the Committee indicated it would include a recommendation on a 'statute of limitations' for members of the armed forces in the SHA consultation, despite this being outside the terms of the SHA. This question was ultimately not explicitly included in the consultation although a question on alternative approaches was. In November 2017 supporters of the proposed amnesty in the UK Parliament also introduced a (non-government) Armed Forces (Statute of Limitations) Bill.[15] This is yet to progress. The Bill would prevent proceedings being taken against members of the armed forces if ten years had passed, which would include by definition all NI legacy cases. As alluded to above the issue of a statute of limitations led to a split in the UK cabinet which delayed the SHA consultation.

Strong legal arguments have been presented against a statute of limitations.[16] There has been an acknowledgement within the UK Government by the Secretary of State for Northern Ireland that a statute of limitations for the military only would conflict with international law. The Secretary of State therefore ruled out support for such a proposal.[17] It remains to be seen, and is likely, that its supporters will regardless seek to amend any SHA bill when it is introduced to the UK Parliament to include such a procedure.

Proposal for a veto to be vested in the UK Attorney General over solider prosecutions

More recently one of the alternative proposals reportedly put forward by Conservative MPs and members of the UK Government who support a military amnesty is the reintroduction of a power of veto vested in the UK Attorney General (AG – technically the Advocate General in Northern Ireland) whereby the consent of the office holder, an MP who attends UK Cabinet, would be required for prosecutions of Soldiers. The AG was reported to be considering such a proposal at a time that Conservative members of the UK Parliament,

[14] The Committee also sought a truth-recovery mechanism and urged the government to consider extending such an amnesty to the police and other security personnel and, in implicit recognition that this may be discriminatory, stated that it would be a matter for a future government to determine whether such an amnesty should cover all conflict-related incidents. (House of Commons Select Committee 'Investigations into fatalities in Northern Ireland involving British military personnel'HC1064 April 2017).
[15] https://services.parliament.uk/bills/2017-19/armedforcesstatuteoflimitations.html
[16] https://www.theguardian.com/commentisfree/2018/may/11/investigations-troubles-ex-soldiers-northern-ireland?CMP=share_btn_tw
[17] Troubles legacy: Karen Bradley rules out statute of limitations BBC News 1 October 2018. https://www.bbc.co.uk/news/uk-northern-ireland-45701869 see also http://eamonnmallie.com/2018/09/exclusive-sos-karen-bradley-writes-for-eamonnmallie-com-on-legacy-of-the-troubles/

including former a defence minister and former heads of the military, petitioned the UK Prime Minister to drop the SHA.[18]

CAJ has written to the Advocate General to raise concerns that any such proposal would mark a reversal of the reforms of the NI Peace Settlement. The Criminal Justice Review, established under the Belfast Good Friday Agreement, when considering the question of the AG's role recommended that "there should be no power for the Attorney General to direct the prosecutor, whether in individual cases or on policy matters."[19] The Review Group noted in their report that "it is clear from comments made to us throughout the consultation period that independence from political influence is what is sought above all else." [20] They therefore went on to say that "We see the Attorney General [for Northern Ireland] as a non-political figure drawn from the ranks of senior lawyers…"[21] They recommended that legislation should "confirm the independence of the prosecutor" and "make it an offence for anyone without a legitimate interest in a case to seek to influence the prosecutor not to pursue it…"[22] Many of the recommendations of the Review Group were enacted in the Justice (Northern Ireland) Acts 2002 and 2004, and the NI Attorney General no longer has the powers of superintendence over the Director of Public Prosecutions. Such a proposal would therefore considerably reverse the justice reforms of the peace settlement, and endanger Article 2 compliance.

Misinformation on Legacy Cases

In the CAJ submission to the UN Human Rights Committee of June 2017 we detailed both accurate official statistics on legacy investigations (and prosecutions) and also documented a lengthy narrative, including from members of the UK Executive, of misinformation in relation to such statistics, generally grounded in allegations of disproportionate focus on the security forces.[23]

There have been further examples of this in the reporting period, including, as well as misinformation, assertions that indicate a significant misunderstanding of the nature of procedural obligations under Article 2, and the separation of powers in a democratic society. This includes twice in 2018 the UK Prime Minister telling the UK Parliament that

[18] Northern Ireland: Tory MPs urge Theresa May to ditch unsolved killings probe, BBC News Online, 23 October 2018 https://www.bbc.co.uk/news/uk-politics-45947678
[19] Review of the Criminal Justice System in Northern Ireland. HMSO. March 2000 Para. 4.162
[20] Ibid. Para. 4.157
[21] Ibid. Para. 4.160
[22] Ibid. Para. 4.163
[23] Submission from the Committee on the Administration of Justice (CAJ) to the United Nations Human Rights Committee in response to the Concluding Observations on the 7th Periodic Report of the UK under the International Covenant on Civil and Political Rights (ICCPR) June 2017 Follow up Procedure: "accountability for conflict-related violations in Northern Ireland" (CCPR/C/GBR/CO/7, paragraph 8). http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/06/30110335/S465-CAJ-Submission-to-UNHRC-ICCPR2c-June-2017.pdf

police legacy investigations were only focusing on the security forces, despite this being flatly contradicted by police figures.[24]

On appointment as the head of the UK military, General Sir Nick Carter, Chief of the Defence Staff, in particular reference to legacy investigations in Northern Ireland, stated that "vexatious claims" into soldiers "will not happen on my watch. Absolutely not." The head of the military went on to say "I would absolutely stamp on any of that sort of activity." Clearly there is no lawful basis in which the head of the UK military should or could intervene to obstruct or 'stamp out' legacy investigations in Northern Ireland. CAJ wrote to the Chief of the Defence Staff to raise concerns that the statement was either an "unconstitutional threat to the rule of law or essentially meaningless but certainly inflammatory rhetoric." We sought assurances that the head of the military was not arrogating to himself the power to take any action in respect of any independent legal proceedings.[25] The response ultimately received from the Ministry of Defence stated that it was right for allegations of wrongdoing to be dealt with under the rule of law, noting 'increasing criticism' of legacy cases in Northern Ireland and alluding to the SHA consultation.[26]

In November 2018 the Secretary of State for Northern Ireland Karen Bradley MP, in appearing before a Committee at the UK Parliament, and being questioned in relation to the Statute of Limitations made the following statements:

> [A statute of limitations] "would also not stop the coronial inquests and… those inquests that are going on at the moment are much of the problem"
>
> "…A statute of limitations would say a prosecution didn't happen but wouldn't stop the investigation it wouldn't stop... people having to go and face charges sitting police cells and being interviewed, now I want to get to a position where we stop all of that..."
>
> "....I am working hard on the [SHA] consultation responses so that we can find away where we can deal with this matter, so that we can all be happy that our service veterans and our former police officers do not face harassment in the courts"[27]

Clearly it is inappropriate for a serving member of the UK Executive to refer to due process in legacy inquests as 'much of the problem' and judicial processes involving the military as 'harassment in the courts' as well as implying that all investigations, interviews and charges of soldiers should be "stopped". Such assertions contradict the UK's official position on the SHA and it is not clear if the Secretary of State simply strayed off script or revealed an intention not to proceed with the SHA.

---

[24] This first occurred in May 2018 and again in June 2018 see 'PM: Northern Ireland system investigating past 'unfair' BBC News 9 May 2018 https://www.bbc.co.uk/news/uk-northern-ireland-44054424; and 'Theresa May repeats claim paramilitaries are not being investigated for Troubles killings' *Irish News* 6 June 2018.
[25] CAJ correspondence to General Sir Nick Carter, Chief of the Defence Staff, 2 August 2018.
[26] MoD Head of Inquests, Judicial Reviews and Public Inquiries correspondence to CAJ, 2 November 2018
[27] See https://twitter.com/CAJNi/status/1065262694687756290 and https://www.parliamentlive.tv/Event/Index/226f5010-7320-43d2-9497-f3a798b68a45

Challenges to the powers of the Police Ombudsman and Police arrest of journalists

In June 2016 the Police Ombudsman in exercising statutory powers issued a report into the 1994 Loughinisland massacre finding that collusion had been a significant feature in the sectarian murders of six civilians in a machine gun attack on the Heights Bar.[28]

In 2017 an award winning documentary – 'No Stone Unturned' in part relying on leaked official documents further revealed details of human rights violations through paramilitary collusion with the massacre.[29]

Despite the evidence uncovered by the Ombudsman and the documentary no one has been charged with the massacre. In August 2018 however a raid did take place, involving 100 police officers of the homes and workplaces of two journalists, Barry McCaffrey and Trevor Birney who had worked on the documentary. This related to the use of allegedly leaked documents with the PSNI sustaining that the Ombudsman had reported a 'theft' of such documents from the Ombudsman's office and the Ombudsman sustaining that he had not. Judicial review proceedings have been taken as regards the legality of the search and seizure of journalistic material and the two journalists have been released on bail. The arrests have prompted significant concern from human rights and press freedom and representative bodies as well as international attention. Further details are found on a Council of Europe alert and Media Freedom report.[30]

In 2017 former members of the RUC, including a former head of Special Branch took forward a judicial review arguing that the Ombudsman had exceeded his statutory powers by making findings in his public statement on the massacre. On the 21 December 2018 the High Court in Northern Ireland upheld the challenge at first instance issuing a damning judgment stating that the Ombudsman had exceeded his statutory powers by reasons of the content of his statement. Such a ruling would render the Police Ombudsman's office unable to discharge the Article 2 ECHR functions the UK had assigned to it as part of the Package of Measures. In essence it would have precluded the Ombudsman on a technical basis from making findings in relation to paramilitary collusion or broader police wrongdoing. However, the integrity of the ruling was then seriously questioned when it was revealed in the Irish media in January 2018 that the judge had previously represented as a lawyer the same applicants in an unsuccessful yet similar challenge to a previous Ombudsman report (into

[28] https://www.policeombudsman.org/Media-Releases/2016/The-murders-at-the-Heights-Bar-in-Loughinisland-Po
[29] http://film.britishcouncil.org/no-stone-unturned
[30] https://mappingmediafreedom.ushahidi.io/posts/22627
https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_sojdashboard_WAR_coesojportlet_alertId=39053000

the 2001 Omagh bombing which killed 31 persons). This led to families applying to the court for the judge to recuse himself from concluding the judgment. The judge ultimately agreed to step aside and the court was reconstituted.[31] Judgment was formally delivered on 29 November 2018 reversing the earlier position and dismissing the application.[32] The powers of the Police Ombudsman's office to issue public statements have therefore been maintained, however the Ombudsman suspended the release of Public Statements and reports whilst the proceedings were ongoing. An appeal has been reportedly lodged by the applicants against the ruling.

The Courts ruling on the Police Ombudsman's powers however cleared the way for the release of much delayed reports, also investigating collusion from the Ombudsman's office. This was expected to happen in early 2019 however on 14 February 2019 the Police Ombudsman for Northern Ireland (PONI) Dr Michael Maguire issued a press statement advising that:

> 'His investigators have identified significant, sensitive information, some of which relates to covert policing, which is held by police but was not made available to his staff investigating events during 'the Troubles'.[33]

This startling discovery was made during its investigation of matters connected to the 1992 shooting at a bookmakers' shop on the Ormeau Road in Belfast in which five people were killed. The material which has now become available to the PONI affects it investigation into the murder of Patrick Shanaghan among a number of other deaths. The Ombudsman stated that:

> 'My staff became aware that police were preparing to disclose a range of material as part of impending civil proceedings. Following a request from this Office, police released this material to us which helped identify significant evidence relevant to a number of our investigations.
>
> 'Following on from this, police have now also identified a computer system which they say had not been properly searched when responding to previous requests for information.
>
> 'In that instance, it would seem information which police told us did not exist has now been found," said Dr Maguire.
>
> 'Reports outlining the findings of these various investigations, which the Police

[31] Concerns in relation to British Government compliance with article 2 of ECHR in respect of legacy issues in Ireland. Niall Murphy Solicitor KRW Law LLP, October 2018 http://krw-law.ie/wp-content/uploads/2018/10/Submission-to-Commissioner-for-Human-Rights-Dunja-Mijatovic-2nd-OCTOBER-2018.pdf

[32] https://judiciaryni.uk/judicial-decisions/summary-judgment-court-delivers-judgment-loughinisland-report

[33] https://www.policeombudsman.org/Media-Releases/Police-did-not-disclose-sensitive-%E2%80%98troubles%E2%80%99-relat

Ombudsman had hoped to begin publishing in the coming weeks, will now be delayed.[34]

We understand that the material discovered is in 30 lever arch folders of sensitive material which relates to covert policing.

While the PSNI has issued an apology and claimed that human error was responsible this is far from satisfactory. The Police Ombudsman's office relies on the PSNI acting in good faith to assist it in its investigations as RUC archive material remains within its control. These developments clearly expose the lack of willingness or capacity of the PSNI to provide full disclosure to the Police Ombudsman to allow him to carry out independent and effective investigations.

It is also notable that the current Ombudsman's term of office ends in current months and we are concerned that the timing of these events may essentially run down the clock until a successor is appointed. Due to the collapse of the NI Executive that appointment will now be made by the UK Secretary of State for Northern Ireland. As the Committee many recall the previous appointment made by a Secretary of State (of the current Ombudsman's predecessor) involved significant irregularities and the Ombudsman subsequently resigned in light of a damaging independent report over the failure to deliver legacy investigations.

We attach at Appendix 2 CAJ's press statement and that of the family of Patrick Shanaghan in relation to this matter.

We urge the Minsters' Deputies to give detailed scrutiny to the General Measure of the Police Ombudsman and its powers to discharge Article 2 ECHR investigative duties.

Continued withholding of resources for the Legacy Inquests Unit

Following proposals put forward by the Lord Chief Justice of Northern Ireland in January 2016 setting out a five-year plan for dealing with outstanding legacy cases before the Coroners' Court through the establishment of a dedicated Inquest Legacy Unit, resources have not yet been made available for realisation of that plan within the coronial process. In March 2017 the State Party announced that no resources will be released for the establishment of a dedicated Legacy Inquest Unit until there is overall agreement on the full range of mechanisms to deal with the past.[35] The collapse of the Executive in January 2017 related to issues concerning, *inter alia,* the establishment of such mechanisms. Therefore, the introduction of a requirement by the State Party for cross-party consensus on this issue prior to the release of resources was going to delay the establishment of a Legacy Inquest

[34] As above.

[35] James Brokenshire: Deal needed on all legacy issues before inquest cash released (Irish News 10 March 2017) http://www.irishnews.com/news/politicalnews/2017/03/10/news/james-brokenshire-deal-needed-on-all-legacy-issues-before-inquest-cash-released-960356/

Unit. It should be noted that there are no legal constraints within the constitutional settlement which we are aware of that would prevent the UK government providing these monies without the approval of all parties to the NI Executive. In addition, the Secretary of State has a power to direct Northern Ireland Departments to take any action necessary to comply with international obligations where necessary. This power, under the Northern Ireland Act, has not been exercised in this instance.[36]

In January 2019, the Court of Appeal allowed an appeal taken by Raymond McCord against a case management decision not to remove a stay on the hearing of his application for judicial review against the PSNI, Department of Justice and Coroner Service seeking a declaration that the delay into an inquest into his son's death violated Article 2 ECHR[37]. Citing the Court of Appeal decision in Hugh Jordan's Application [2015] NICA 66 the Court noted that the fresh inquest should take place within a reasonable timeframe and any failure to do would constitute a fresh breach of the Convention which could result in a remedy of damages.

We understand that there are currently 100 deaths before the Coroner's court to be investigated and at present only those which form part of the Ballymurphy Massacre, Kingsmill Massacre and the death of Seamus Bradley are currently at hearing[38].

We call upon the Ministers' Deputies to give scrutiny to the cumulative effect of the UK's failure to establish cohesive measures for investigating the past in Northern Ireland.

Individual Measures

Shanaghan

The next of kin had anticipated receipt of the Police Ombudsman report into this death in early 2019 but recent developments, as outlined above, have resulted in an unknown delay in the provision of this report. This has caused the family profound distress and upset. They have engaged with this office following the judgment of *Shanaghan v UK in 2001* and regrettably have never received a completed Article 2 investigation report in any form in relation to this murder. The HET was disbanded before delivery of its report into this death given concerns surrounding its independence and effectiveness.

[36] s26 Northern Ireland Act 1998." (1)If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or public order, he may by order direct that the proposed action shall not be taken. (2)If the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations, of safeguarding the interests of defence or national security or of protecting public safety or public order, he may by order direct that the action shall be taken

[37] https://judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20Judgment%20-%20In%20re%20Raymond%20McCord%2018.01.19.pdf

[38] Information provided by the Coroners Service for Northern Ireland on 12 February 2019

As the Ministers' Deputies will recall, the European Court of Human Rights stated that the murder of Patrick Shanaghan was one that 'cries out for an explanation'; regrettably, 18 years later the family face another obstacle in their search for the truth as to what happened to their brother.

McKerr

The first preliminary hearing of these inquests (since the inquests were abandoned in December 1994) was held in the autumn of 2007. This followed the judgment of the House of Lords in March 2007 in *McCaughey v Chief Constable PSNI* which finally clarified the obligations upon the Chief Constable of the PSNI to comply with section 8 of the Coroners Act (NI) 1959 in relation to disclosure by police to the Coroner of all documentation in writing held by police touching the death of the deceased. There have been many preliminary hearings since 2007, however the postponed hearing scheduled for December 2018 was the first planned preliminary hearing since Weir LJ reviewed all current inquests in January 2016

Finucane

Three decades on from this murder on 12 February 1989, the next of kin still await an Article 2 compliant investigation into the death of Patrick Finucane.

This matter was before the Supreme Court for a two day hearing on 26 and 27 June 2018 and judgment is still outstanding. The issues in these proceedings were:

1. Whether the respondent's decision to appoint Sir Desmond de Silva to conduct a review into the murder of Patrick Finucane rather than to hold a public inquiry into the murder of the appellant's husband was taken in accordance with the stated decision making process or whether it was a sham process and/or whether the outcome was pre-determined.
2. Whether the appellant had a substantive legitimate expectation that a public inquiry would be established. Was any expectation frustrated by the respondent and if so, was the frustration justified?
3. Whether the failure to establish a public inquiry into the murder of the appellant's husband is compatible with Article 2 ECHR.

McCaughey

On 14 June 2018 an application was lodged with the ECtHR in the name of *Gribben v UK,* taken by the sister of Martin McCaughey deceased. A decision on admissibility is awaited.

Jordan

The inquest verdict into this death was challenged and leave was refused by the High Court and the appeal was dismissed by the Court of Appeal. On 5 December 2016 Mr Justice

Horner, sitting as Coroner, made a referral to the Public Prosecution Service concerning two police officers who were witnesses at the inquest into the death of Pearse Jordan. We understand that no update in relation to this has been provided.

Kelly & Others

In March 2018 the High Court in Northern Ireland further to an application by Bridget Hughes, the widow of a man killed in Loughgall, the case in the *Kelly and Others v the UK* ruling, successfully judicially reviewed the actions of the former First Minister in preventing the release of funding for legacy inquests had been unlawful. This included a ruling that Ministerial actions had been unlawful by virtue of failure to take into account the duties to comply with ECHR Article 2 and erroneously subjecting the release of monies for legacy inquests to an 'overall package' to deal with legacy issues. [39]

However, almost a year on from this ruling the UK is yet to comply and provide an effective remedy and release monies to allow legacy inquests to proceed.

In ongoing civil proceedings, the discovery process is still not completed and is subject to further hearings in March 2019.

We would urge the Ministers' Deputies to consider invoking infringement proceedings given that 18 years have now passed since the judgments in the McKerr Group of Cases were delivered and the victims and survivors continue to suffer ongoing violations.

[39]Hughes (Brigid) Application [2018] NIQB 30 https://judiciaryni.uk/judicial-decisions/2018-niqb-30

Appendix 1: Executive Summary of the submission of the Model Bill Team to the SHA legacy consultation

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 with 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.

1st Floor, Community House
Citylink Business Park
6A Albert Street
Belfast BT12 4HQ

Tel – 028 9031 6000
Email – info@caj.org.uk
Web – www.caj.org.uk

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.[40] The two governments agreed the draft Treaty on 15 October 2015 but it has not yet entered force.[41] 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 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 judgments about the credibility of information.

[40] Legislation would be required in both jurisdictions to give effect to the treaty.
[41] Agreement establishing the Independent Commission on Information Retrieval (ICIR) http://opac.oireachtas.ie/AWData/Library3/FATRdoclaid210116_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').

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 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.[42]

[42] See Lauren Dempster, 'The "Disappeared", the ICLVR, and "Dealing with the Past" in Northern Ireland' (April 2018)

***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.

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:

http://www.niassembly.gov.uk/globalassets/documents/raise/knowledge_exchange/briefing_papers/series7/dempster180418.pdf accessed 22 August 2018.

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 (i.e. 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.[43] 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.[44] 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

[43] Draft Treaty, art 3(1)(b) and draft Bill, cl 41(2).
[44] Draft Treaty, art 7(3)(a) gives the Commission the power to determine its own procedures.

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.

1st Floor, Community House
Citylink Business Park
6A Albert Street
Belfast BT12 4HQ

Tel – 028 9031 6000
Email – info@caj.org.uk
Web – www.caj.org.uk

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.[45]

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 importantly, it means that victims and survivors could come forward to tell their story in full and in context, at

[45] Stormont House Agreement (2014) ('SHA'), para 22.

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?[46]

- 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'.

[46] 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.[47] 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.

[47] 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.[48]

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

[48] Draft Northern Ireland (Stormont House Agreement) Bill (2018) ('draft Bill') cl 52(9).

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.

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'.[49] 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)'.[50] 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

[49] SHA, para 22.
[50] Draft Bill, cl 51(5).

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 Northern Ireland'.[51] 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'.[52]
- 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'.[53] 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.'[54]

---

[51] Ibid cl 51(12).

[52] 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).

[53] 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.

[54] Northern Ireland (Stormont House Agreement) Bill Explanatory Notes (2018) ('draft Explanatory Notes'), para 10.

- 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.

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.[55]

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.[56]

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

[55] 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.
[56] Draft Bill, cl 57(3).

the opportunity to make representations and should be fully informed about decisions affecting their story.[57]

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 it 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.[58] 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

[57] Stormont House Agreement Model Implementation Bill (2015) ('Model Bill'), s 67.
[58] Model Bill, s 63 - 'The Work of the OHA'.

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.

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.'[59] 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)'.[60] It is also referred to in the NIO's Consultation Paper and summary documents. 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'.
- 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'.[61]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

[59] SHA, para 25.
[60] Draft Bill, cl 61(1)(e).
[61] 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.

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'.[62]
- 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 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'.[63]
- 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

[62] 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.
[63] Draft Bill, cl 54(1) (emphasis added).

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.[64]

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 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.

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

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.[65]

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

[65] Ibid, para 104.

Assembly, a councillor, a Member of Parliament, a member of the 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 by 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.[66] 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).

[66] Draft Bill, sch 17, cl 6(2).

Recommendation: *T*o 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.

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.[67]

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'.[68] That report refers to existing

[67] 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.
[68] NIO Consultation Paper (n 46) 1.

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 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'.[69] 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

[69] SHA, para 51.

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,[70] the extensive Linenhall Library Northern Ireland Political Collection,[71] the numerous official reports into key events in Northern Ireland[72] or authoritative academic or historical reference points such as the *Lost Lives* book.[73]
- 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.[74] 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

[70] Conflict Archive on the Internet (CAIN), http://www.cain.ulst.ac.uk/ accessed 20 August 2018.
[71] 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.
[72] 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.
[73] 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).
[74] Historians and the Stormont House Agreement Report (n 61).

> 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.

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.'[75] 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.

[75] 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'[76] 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'.[77]

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

[76] Dil and Others v Commissioner of Police [2014] EWHC 2184 (QB), para 42
[77] Smith and Grady v. United Kingdom (1999) 29 EHRR 493

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 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' convention[78] 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.

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

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 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.[79] 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.

[79] 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'.

Appendix 2: Press statement from CAJ re Police Ombudsman's reports being delayed by PSNI failure to disclose information

14 February 2019

The Police Ombudsman for Northern Ireland (PONI) has said that a number of his reports into past killings, which may have involved collusion, will be delayed because of police failure to disclose information.

The Committee on the Administration of Justice (CAJ) understands that new information on the activities of Loyalist murder squads has come to light. The PSNI claims that 'human error' meant that written and digital records from the 1980s and 1990s had not been disclosed. The information arises directly in relation to the Lower Ormeau Road bookmaker's shop murders of 1992, but will affect other cases. The Ombudsman must now review these cases again, which will delay his reports.

CAJ represents the family of Patrick Shanaghan in one of the affected cases and is concerned and outraged at these new developments. Mr Shanaghan was murdered in 1991 after photographs identifying him 'fell off the back of an army vehicle'.

The 'Shanaghan v. the United Kingdom' case (1) was among a number decided by the European Court of Human Rights (ECHR) in 2001, in which the ECHR held that the UK violated the right to life (Article 2 of the European Convention on Human Rights). In response to these damning judgments, the UK said that the establishment of the office of the Police Ombudsman in Northern Ireland would be a mechanism to investigate police wrongdoing, such as that as outlined in the murder of Patrick Shanaghan.

The ECHR at the time stated that Mr Shanaghan's murder, given the circumstances in which it occurred, was one that cried out for an explanation. 18 years later and once again the family face another obstacle in their search for the truth as to what happened to their brother.

The Police Ombudsman's office relies on the PSNI acting in good faith to assist it in its investigations as RUC archive material remains within its control. These developments clearly expose the lack of willingness or capacity of the PSNI to provide full disclosure to the Police Ombudsman to allow him to carry out independent and effective investigations.

Brian Gormally, Director of CAJ, said: "These developments are deeply worrying for three main reasons. First, what further light is to be shed on the activities of state agents who we already know imported arms from South Africa for Loyalist use, used illegal death squads to target perceived 'enemies of the state' and then tried to cover up their crimes?

"Second, we have complained for years that the PSNI was withholding information and delaying disclosure of top secret files in order to cover up the past crimes of RUC Special Branch officers. That this practice is still continuing is deeply shocking and the claim that it is due to 'human error' simply insults our intelligence.

"Third, we have recently seen a campaign of denigration of the work of the Ombudsman. The current Police Ombudsman, Michael Maguire, is due to step down from his post, possibly before the outstanding reports – now further delayed – can be published. We are aware that the Secretary of State is due to appoint his successor in the near future. CAJ started the process of criticism of lack of independence that finally led to the resignation of his predecessor, Al Hutchinson. We insist that, whoever is appointed, they maintain rigorously both the independence of the Ombudsman and his or her ability to publish case and thematic reports. The first test will be the publication of the outstanding reports."

-ENDS-

(1) App. No. 37715/97, Shanaghan v. United Kingdom, judgment of 4 May 2001.

Notes to editors

- The Committee on the Administration of Justice (CAJ) is an independent, non-governmental human rights organisation, which works to ensure that the administration of justice in Northern Ireland is compatible with the highest international human rights standards.
- In 2011, CAJ published a report on PONI, entitled 'Human Rights and dealing with Historic Cases – A review of the Office of the Police Ombudsman's Office for Northern Ireland'. This can be read here: https://caj.org.uk/2011/06/01/human-rights-dealing-historic-cases-review-office-police-ombudsman-northern-ireland/
- See www.caj.org.ukfor further information on CAJ and its work.

Statement from the family of Patrick Shanaghan re. the PSNI's failure to disclose information to the Police Ombudsman

14 February 2019

"Yet again more delays. And all because of the ongoing collusion and cover ups in our policing service.

"From the 10 years prior to Patrick's murder. To the police's involvement on the day of Patrick's murder. To the farce of the police investigation of Patrick's murder, that all became apparent during Patrick inquest at the Coroner's Court, when it eventually took place.

"What other conclusion can we draw from today's statement from the Ombudsman other than that the police service is still withholding information?

"It has been 18 years since the European Court instructed the authorities to conduct a proper investigation into the circumstances of Patrick's murder. To date, we have not received anything tangible.

"And still we wait for some form of justice for Patrick."