

Comparator Table the Stormont House HIU and ICIR – independent and effective investigations

Below a comparator table between key provisions for the Historical Investigations Unit (HIU) provided for by the Stormont House Agreement (SHA) and the Independent Commission for Information Retrieval (ICIR). The comparators are as provided for in the following:

- HIU-Model Bill – the bill drafted by Daniel Greenberg on behalf of the Queen’s University – CAJ ‘Model Bill Team’ as model implementation legislation for the SHA.
- HIU-Draft Bill – the draft Northern Ireland (Stormont House Agreement) Bill published for consultation by the Northern Ireland Office in 2018.
- ICIR legacy Act – as per the final Northern Ireland Troubles (Legacy and Reconciliation) Act 2023.

The areas of comparison are relevant in order to consider compliance with the procedural duties under Articles 2 & 3 ECHR to ensure effective and independent investigations. It is important to stress that this is a technical legal comparison and therefore does not assess the equally important issues concerning the respective levels of public confidence and ‘buy-in’ from victims and families that is also essential for their successful functioning of either the HIU or the ICIR.

It should be noted that the 2018 SHA draft bill was one of several drafted by the NIO, with others in 2015 and 2017 that were not officially published. In particular, the leaking of the 2015 bill revealing significant unilateral insertions by the UK government of a Ministerial ‘national security + veto’ over HIU reports was the primary factor which then derailed discussions on the implementation of the SHA. Some differences between the 2015 and 2018 bill are noted in the table below.

It should also be recalled that whilst the ICIR involves the close down of all other mechanisms established by the Package of Measures, the HIU was to run alongside three other complimentary legacy mechanisms namely:

- The Independent Commission for Information Retrieval (ICIR).¹
- Legacy Inquests.
- Civil litigation.

¹ An independent international body established by treaty by the UK and Irish governments based on the analogous mechanism designed to facilitate information coming from armed groups via trusted interlocutors to the ‘Disappeared Commission’ (the Independent Commission for the Location of Victims’ Remains) to facilitate the return to affected families of bodies of people killed and secretly buried by those groups. The ICIR was similarly designed to allow those victims and survivors who wished it to seek and privately receive information about the circumstances surrounding the Troubles-related death of their next of kin. Where an individual requests information through this process, the ICIR would seek to engage with those who may have knowledge of their relative’s death. To facilitate those with such information coming forward, the HIU would not have used information provided for criminal or civil proceedings.

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Area	HIU- (QUB/CAJ) Model Bill	HIU- NIO draft Bill	ICRIR – legacy Act
<i>Appointments, staffing, oversight, finance and principal duties</i>			
<p>Appointments of Key Office Holders</p>	<p>Following the 2015 draft NIO SHA bill (before further negotiations had taken place) the Model Bill provided that the First and deputy First Ministers appoint HIU Director in consultation with Department of Justice and appoint a person seen as credible by those with an interest in HIU functions. HIU Director in appointing HIU staff to aim to secure gender-balance.</p>	<p>The 2018 NIO SHA bill provided that appointments of the HIU Director and two other commissioners be made by the NI Minister of Justice on recommendation of an appointments Panel consisting of: Attorney General for NI; NI Victims Commissioner; Head of NI Civil Service; an experienced investigator appointed by NI Minister of Justice. Panel to follow Code of Practice issued by NI Commissioner for Public Appointments. The HIU Director was to appoint two further commissioners. There were also express provisions on conflicts of interest (“<i>any matter which might reasonably be expected to—(a) give rise to a conflict of interest, or (b) otherwise affect the person’s ability to carry out his or her duties fairly and impartially.</i>”)</p> <p>It should be noted that this differed from the 2015 draft NIO Bill, which vested the appointment of the HIU Director in the First and deputy First Ministers, in consultation with the Justice Minister.</p>	<p>All ICRIR Commissioners appointed by the Secretary of State (SoS). Chief Commissioner to have judicial experience and SoS to consult chief justices. In practice appointment made without advertisement and before bill became law, bypassing Commissioner for Public Appointments regulation and NI Judicial Appointments Commission. (Labour amendments in Lords to reverse this were resisted).</p> <p>The SoS was empowered to ask regarding potential conflicts of interest.</p> <p>The appointed Commissioner for Investigations is a senior former RUC/PSNI officer who ultimately presided over special branch (officially renamed ‘C3’).</p> <p>The recent High Court ruling stated re the Commissioner for Investigations that “<i>Self-evidently, he must recuse himself from any review involving an incident in which he was involved as a former RUC/PSNI officer, or in respect of which there is a personal conflict of interest.</i>” Such a senior officer is clearly however going to have a connection to other officers involved in agent handling or investigation that will be a relevant part of many ICRIR reviews.</p> <p>There are provisions in the Legacy Act (sch 1 para 14) for the Commissioner for</p>

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			<p>Investigations to delegate functions to an ICRIR officer or other Commissioners), which could be used in numerous cases where there is a conflict of interest. However, the Commissioner of Investigations would still have hierarchical control over the ICRIR officer to whom the investigation was delegated.</p>
<p>Independence of Investigators</p>	<p>Contained a statutory duty codifying ECHR independence requirements that persons <i>“carrying out or involved in an investigation have no connection with persons whose behaviour is being investigated or might require to be investigated.”</i> Including (a) <i>present and past connections; and (b) both actual connections and connections that might reasonably be perceived or suspected;</i> including supporting functions.</p> <p>Following the practice of the Police Ombudsman and most recent Kenova legacy investigations the Model Bill debarred former RUC, army and intelligence services personnel from employment in the HIU; alongside also anyone with a conflict related conviction). (Note this was not the practice in the HET, contributing to its standing down following the HM Inspector</p>	<p>The 2018 NIO draft SHA bill did not follow the Kenova/Ombudsman Practice of precluding former RUC/military etc from investigative roles.</p> <p>The 2018 SHA bill inserted a provision requiring some of the HIU investigators to have previous NI policing experience. This notably was not in the 2015 draft SHA bill and we understand it to have been the result of political lobbying to include former RUC officers in the HIU.</p> <p>The 2018 Bill at clause 10 contained express provisions on declaring Conflicts of Interest and a duty on the HIU Director to <i>“make arrangements to secure that each of the HIU officers involved in the investigation of a particular death that is within the HIU’s remit does not have, and could not reasonably be perceived</i></p>	<p>The Legacy Act retains the provision inserted into the 2018 draft SHA bill to require a proportion of ICRIR investigators to have previous NI policing experience.</p> <p>The provisions on avoiding ‘conflicts of interest’ and independent units that were contained in the draft SHA bill have been stripped out of the Legacy Act.</p> <p>The provisions in the 2018 SHA bill requiring ECHR Article 2 independence in exercise of investigatory functions have also been stripped out of the Legacy Act.</p> <p>The provisions in the 2018 SHA bill requiring the HIU to exercise its functions in a manner that secures its independence have also been stripped out of the Legacy Act.</p> <p>Whilst the Legacy Act (s13(1)) requires the Commissioner for Investigations to comply with obligations under the Human Rights Act 1998 in conducting ICRIR ‘reviews’ – this (in any case a legal obligation under the HRA itself) has very a limited reach. This is in the context that the position of gvmt, has been to</p>

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	<p>of Constabulary report. The HET, whilst operating separate teams had not in practice been able to isolate itself from support functions where there were specific conflicts of interest relating to former RUC and special branch officers and was deemed not to be in compliance with Article 2 ECHR requirements on independence.</p>	<p><i>as having, a conflict of interest in relation to that investigation.”</i> The HIU Director was also under a statutory duty to organise the HIU into separate units including “<i>at least one investigation unit does not include any HIU officer who has, or could be perceived as having, a work-related conflict of interest in respect of the investigation of any of the deaths within the HIU’s remit.”</i> And to consult family members in allocating investigators.</p> <p>The Policing Board was also to be consulted on investigator appointments. The HIU Director is also required (clause 6) to issue a Statement which sets out how the HIU will exercise its investigatory functions, a mandatory element of this is compliance of the independence obligations under ECHR Article 2 relating to conflict of interest protections.</p> <p>The HIU (clause 7) is also under a mandatory (‘must’) statutory duty to ensure it exercises its functions in a manner to secure inter alia “(i) the independence of the HIU, and (ii) the confidence of the public in the HIU.”</p>	<p>limit the application of the HRA on a legal technicality to cases post-1990, thus excluding the majority of the Troubles. Notably Ministers also resisted a Labour Lords amendment that would have instead required ICIR reviews to have been compatible with the ECHR rather than the HRA.</p> <p>As set out in the previous section a particular problem is created by the ICIR Commissioner for Investigations having a conflict of interest in cases involving allegations of wrongdoing on the part of state actors or state agents operating within paramilitary groups.</p>
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<p>Primary duties and principles of HIU / ICRIR</p>	<p>The SHA contained “founding principles” including promoting reconciliation; upholding the rule of law; addressing suffering of victims and survivors; right to justice and information recovery; protection fundamental rights; and balance and fairness in legacy.</p> <p>The Model Bill (c1), provides that public authorities and courts <u>must</u> consider the SHA Founding Principles when exercising functions under the Act. In light of the founding principle on protecting fundamental rights (c7(6)) the HIU was also under a duty to abide by independence requirements of relevant international human rights standards. A duty ((c10)4) to ensure equality of rigor in investigations regardless of categories of suspects/ victims.</p> <p>There are also duties (c7(1)) to ensure HIU investigators have no connection to those under investigation; duties (c10) to carry out ECHR compatible investigations; and duties on comprehensive reports to families (see below).</p>	<p>SHA principles are reproduced in c1 of the bill, and the HIU is required to comply with them under c7(1).</p> <p>HIU Director must issue Statement which sets out how the HIU will exercise its investigatory functions (c11) including compliance with human rights obligations.</p> <p>However, 7(2) then adds a duty- not contained in SHA – on that the HIU must “not do anything” that might “prejudice the national security interests of the United Kingdom”. There are also qualifications on prejudicing the interests of justice and putting lives at risk.</p> <p>There is no definition of national security.</p> <p>3(6) references principle of equitable investigation with reference to HIU staffing.</p>	<p>The SHA principles are not part of the Legacy Act.</p> <p>The Legacy Act states that the principle objective of the ICRIR is to ‘promote reconciliation’ (s2(4)). This appears to be declaratory and no definition of reconciliation is provided.</p> <p>The ICRIR is also to ‘have regard’ to the general interests of victims and survivors (2(6)).</p> <p>The general national security qualification inserted into the SHA bill is replicated in the Act that the ICRIR “must not do anything which—would risk prejudicing, or would prejudice, the national security interests of the United Kingdom,” (as well as risking life and the interests of justice).</p> <p>There is no definition of national security.</p>
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<p>Oversight</p>	<p>The Model Bill contained detailed provisions to ensure the HIU was accountable to the Policing Board, Criminal Justice Inspector and the Police Ombudsman; and that the consolidated fund would resource these bodies accordingly for their HIU work to ensure their oversight functions were effective.</p> <p>HIU Officers were also to be bound by a code of ethics, issued by the Policing Board which would include rights and obligations arising out of the ECHR and other obligations.</p>	<p>The 2018 SHA Bill also required the HIU to be accountable to the Policing Board, inspection and the Police Ombudsman and for the issuing by the Policing Board of a binding Code of Ethics on HIU Officers concerning conduct and human rights obligations.</p> <p>This would ensure the HIU meets the policing accountability standards put in place as part of the architecture of the peace process and agreements.</p>	<p>All of these accountability arrangements are stripped out of the Legacy Act, save that re complaints the SoS may make the ICRIR amenable to the Ombudsman.</p> <p>The only ‘oversight’ per se is provided for by the SoS rather than independent bodies.</p> <p>SoS also has the power to wind up the ICRIR at any point, after which there will be a <i>de facto</i> blanket amnesty for all conflict-related crimes that would have fallen within its remit.</p>
<p>Control of Budget</p>	<p>Model Bill provided that HIU be funded under the Consolidated Fund, requiring a vote in Parliament for the relevant figures. This was designed to ensure a level of independence in funding, given the past practice of thwarting legacy investigations by the Package of Measures mechanisms by withholding necessary resources. This was to ensure HIU independence was not compromised by manipulation from a sponsor department.</p>	<p>NI Department of Justice must pay the Policing Board amount which appears for the Department to meet the expenses of the HIU for the financial year in question. The Policing Board must put that resource at the disposal of the HIU.</p>	<p>Control of the ICRIR budget vested in the Secretary of State.</p>

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Caseload and investigative function			
Initial caseload	<p>The SHA provides that the HIU will “take forward outstanding cases from the HET process and the legacy work of OPONI” (Paragraph 30). This provides separately in Paragraph 34 that the HIU will consider all cases where the HET and PONI have not completed their work, including HET cases identified as requiring re-examination. (This is a reference to the Royal Military Police (RMP) case which the HMIC held had not been properly investigated by the HET).</p> <p>There is also a provision to reopen cases where there is new evidence.</p> <p>Section 11 of the Model Bill seeks to bring together these examples in a legally consistent and effective manner.</p>	<p>Clause 5(1) reflecting the SHA sets up the cases within the remit of the HIU.</p> <p>These include the deaths: within the remit of the HET that require further HIU investigation; deaths in the ombudsman legacy case load requiring further investigation; and other conflict-related deaths up to 2004. (the relevance of 2004 related to the PSNI not being able to stand over murder investigations prior to that point.)</p> <p>“Requires further investigation” is then defined (sch 3 para 3); it includes HET and Ombudsman investigations which had not commenced or been completed.; it also includes completed investigations where there is no evidence.</p> <p>This includes deaths dealt with by the HET in Royal Military Police (RMP) cases which the HMIC found had not met investigatory standards.</p>	<p>There is no initial case load of the ICRIR.</p> <p>The SHA and previous PSNI commitment to reinvestigate the RMP cases, along with other outstanding investigations is removed from being a mandatory part of the legacy case load.</p>
Power to open cases	<p>The HIU itself is empowered to open cases that fall within its remit on its own motion. This is in light of the principle in ECHR</p>	<p>The HIU is duty bound to investigate deaths within its remit. The legislation sets up its initial</p>	<p>Close family members or the SoS can request reviews of deaths. For family members this is restricted to when deaths are <i>directly</i> caused by the Troubles. The SoS has broader powers</p>

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	<p>jurisprudence of carrying out investigations on own motion as part of the state’s legal duty to investigate rather than same being reliant on next of kin (although HIU also required to respond to well founded requests from families or other interested parties).</p>	<p>case load on the basis of the above.</p> <p>There is then operational control vested in the HIU Director as to the extent it is necessary to exercise the investigative function regarding each death; there is also provision in the bill for (largely chronological) prioritisation.</p>	<p>relating to requesting reviews where <i>indirectly</i> caused by the Troubles.</p> <p>There is no own motion power of the ICRIR itself to open a ‘review’.</p> <p>In some circumstances other office holders can request a ‘review’ (e.g. coroners whose inquests are closed down).</p> <p>In relation to conflict-incidents causing ‘serious physical or mental harm’ a victim or the SoS can request open cases. There is no own motion power for the ICRIR.</p> <p>In relation to other physical or mental harm incidents the SoS alone can trigger a review of a case.</p> <p>The SoS rather than the legacy body itself is granted significant powers therefore to shape the ICRIR caseload.</p>
<p>Consideration of previous investigations</p>	<p>Clause 10(1) would empower the HIU to investigated cases which have not been previously investigated but also those, subject to past incomplete or flawed investigations (including where there was a lack of independence).</p>	<p>HIU Director must take into account a previous investigation, and should not duplicate a previous investigation but is entitled to do so if Director decides it is necessary to do so.</p>	<p>The Commissioner for Investigations is subject to similar provisions as the HIU Director regarding previous investigations.</p>
<p>Scope of investigative function</p>	<p>Whilst the SHA focused the HIU on deaths in light of the SHA duties for human rights compliance the Model Bill proposed extending the</p>	<p>The HIU is restricted to deaths.</p>	<p>The ICRIR covers deaths and conflict-incidents causing ‘serious physical or mental harm’. There is a detailed definition of this</p>

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	<p>HIU investigative remit beyond deaths to qualifying human rights breaches defined as incidents engaging the investigative duties under Article 2 ECHR but also Article 3 ECHR. This was to ensure the HIU would also discharge the UKs ECHR obligations to also investigate breaches of Article 3 (torture) – whether by state or non-state actors, as well as deaths. The HIU would also have to report to the Policing Board at least annually on the desirability of extending the HIU remit to also cover serious troubles-related injuries.</p> <p>The Model Bill also sought to close a gap whereby the deaths of persons who died as an <i>indirect</i> result of a conflict-related incident, for example after suffering a heart attack on witnessing an incident or as a result of injuries sustained in an incident, might otherwise not be included in the remit of the relevant mechanism.</p>		<p>concept which risks not covering all incidents relating to ECHR Article 3 obligations.</p> <p>It is also solely within the power of the SOS to request ICRIR reviews of other conflict incidents causing (‘non-serious) harm. Such reviews however could not lead to criminal enforcement action by virtue of the automatic amnesty under s41 of the Act for non serious offences. This means the ICRIR could not also exercise police powers in such reviews.</p>
<p>Conduct of investigations.</p>	<p>Clause 10 of the Model Bill codifies the purpose of the investigation to the elements required by an ECHR compliant investigation: (a) <i>establish as many as possible of the relevant facts; (b) identify, or facilitate</i></p>	<p>The SHA Bill codifies that investigations must include investigation of any criminal offences and any grave or exceptional RUC misconduct relating to a death (the latter</p>	<p>It is entirely discretionary as to whether an ICRIR review will or will not be a criminal investigation. The Commissioner for Investigations ((s13(7)) has discretion to decide not to conduct a criminal investigation and instead just conduct a general review.</p>

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	<p><i>the identification of, the perpetrators; (c) establish whether any relevant action or omission by a public authority was lawful (including, in particular, whether any deliberate use of force was justified in the circumstances); (d) establish whether any action or omission of a perpetrator was carried out with the knowledge or encouragement of, or in collusion with, a public authority; (e) obtain and preserve evidence; (f) identify material which is or may be relevant to motive (including, in particular, racial, religious or other sectarian motive); (g) identify acts (including omissions; and including decisions taken by previous investigators or other public authorities) that may have prevented the death from being investigated or a perpetrator being identified or charged; and (h) take any other action that the HIU thinks appropriate.</i></p> <p>There is also a duty regarding the SHA “founding principles of balance, fairness and equitableness” to ensure the HIU investigate with equal rigour irrespective of whether suspected or alleged perpetrators were or were not public authorities.</p>	<p>replicates powers in the Police Ombudsman.)</p> <p>The HIU Director must issue a Statement which sets out the manner in which the HIU is to exercise its investigatory function as to secure compliance with ECHR Article 2 and other human rights obligations.</p> <p>There is operational control over the investigation by the Director.</p>	<p>There is no obligation that ICIR Reviews must comply with the ECHR. A Labour amendment to this end was rejected by Government.</p> <p>ICIR reviews must comply with the HRA, however this should be read in line with the temporal restrictions established meaning procedural duties (independence, effectiveness, etc) will not apply to pre-1990 cases. (i.e. most of the Troubles).</p>
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<p>Time limit on legacy body functions.</p>	<p>In light of the SHA the Model Bill sets the HIU a five year target to complete its investigations but the SoS by regulation is to increase this where still required by the UKs international human rights obligations.</p>	<p>The HIU investigatory functions 9c37) would cease to be exercisable after five years; but the SoS can extend same further on an annual basis, and is under a duty to consult specified bodies on same.</p>	<p>There is a time limit of five years to request an ICRIR Review (s9(8)) and 10(3)) after which there will be a de facto amnesty for all conflict related incidents. Under s37 the SoS may also wind up the ICRIR before this time.</p>
<p>Family involvement and support</p>	<p>Express provision is made in the Model Bill for HIU Family Support Staff, who are to “(a) involve the victims’ family from the beginning of an investigation, and (b) provide them with advice and other necessary support throughout the process.”</p>	<p>Express provision is made in a statutory duty on the HIU to give support and assistance to family members (c6(8)). This is further codified in c 20-21 providing for contact points and specific support for family members and a duty on the HIU to produce a statement, consulting with the victims commissioner, setting out how this function will be exercised.</p>	<p>All of these provisions for family involvement and support were stripped out of the Legacy Act.</p> <p>At a late stage an amendment to the Act, allowed victims to make a personal statement to the ICRIR and for it to be published subject to a national security veto and other restrictions over its content.</p>
<p><i>Reports from legacy investigations/reviews</i></p>			
<p>Powers of Disclosure</p>	<p>The Model Bill states that public authorities must require with requests from HIU Director to provide information to the HIU or allow the HIU access to information held by it, for the purposes of an investigation. This is not qualified. There is provision overriding other considerations (e.g. official secrets act) to ensure disclosure.</p>	<p>c25 provides for ‘full disclosure to the HIU’ whereby relevant public authorities must make available information and documents etc that the HIU may reasonably require for its functions.</p> <p>The HIU can agree or direct the manner in which this is received. The provision overrides any obligation of confidence or other restriction.</p>	<p>c5 of the Legacy Act largely replicates the disclosure powers in the draft SHA bill, with the formulation of ‘reasonably require’ retained.</p> <p>During Parliamentary passage concerns were raised that this formulation may lead to mischief of non disclosure over determinations of reasonableness. Opposition amendments were tabled to remove this qualification but resisted.</p>

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	<p>HIU also has powers to issue binding directions on public authorities not to destroy, damage or alter specified classes of documents in their possession.</p> <p>The Model Bill makes it an offence not to provide requested disclosure to the HIU or to “conceal, alter or destroy information where the person knows or ought to have known that the information was or might have been relevant to an investigation that the HIU was conducting or might wish to conduct.” The offence is punishable by a fine.</p> <p>The Model Bill also provides for transfer of files from the PSNI and Ombudsman.</p>	<p>There is no offence for failing to comply with disclosure requests.</p>	<p>There is no offence for failing to comply with disclosure requests.</p>
<p>Reports to families general content</p>	<p>The Model Bill provides for family reports that must “include as much information about the investigation and its findings as the HIU believe can be made public without prejudicing the administration of justice.” Including matters required to ensure ECHR compliance.</p> <p>The Model Bill also provides for ‘prosecution reports’ to the DPP;</p>	<p>The HIU must provide ‘comprehensive family reports’ with the legislation stipulating that they must be “as comprehensive as possible” (c17(1)).</p> <p>There is also specific provision for investigation report and provision of reports to injured persons.</p> <p>Family or interim reports also to include a statement of disclosure</p>	<p>The ICRIR Chief Commissioner is to produce a final report into the findings of an ICRIR review.</p> <p>Provisions that such reports must be as ‘comprehensive as possible’ have been removed and do not form part of the Act.</p> <p>The reports are to include a statement setting out how the review was conducted and where practicable (s15) responses to questions asked when the review was requested.</p>

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	<p>‘other victims reports’ (for example for persons injured in a conflict-related incident under HIU investigation); public statements; and a report to the SHA Implementation and Reconciliation Group on patterns emerging in HIU investigations.</p>	<p>and a statement regarding cooperation given by the Irish authorities to the HIU (in cross-border dimension cases).</p>	
<p>Redactions of Family reports</p>	<p>The Model Bill provides that, following current practice and the text of the SHA, the HIU may redact information out of a report which would put the life of an individual at risk. The HIU itself is the decision maker (as is presently the case with legacy investigations) and is to have dedicated staff to make assessments.</p>	<p>As alluded to above the SHA Bill controversially contained a ‘national security +’ power for ministers to redact HIU reports This means material can be excluded on general national security grounds, or on grounds it originates with covert policing bodies. This provision can be used (and is undoubtedly designed) to conceal improper and unlawful conduct by state agents.</p>	<p>The ministerial ‘national security +’ veto is replicated for the ICRIR meaning reports can have material removed where relating to the actions of RUC special branch, military intelligence or the security services.</p> <p>This is a significant departure from present practice (Kenova or Police Ombudsman) which have identified and provided accountability for covert policing practices.</p>