

**Submission of a further legal opinion to the Council of Europe’s Committee of Ministers responsible for supervising the execution of judgments of the European Court of Human Rights regarding the measures to be taken by the United Kingdom in relation to the ‘McKerr Group’ of judgments**

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BELFAST

10 AUGUST 2020

*Preface*

*In this submission we suggest that the ‘legacy’ proposals for Northern Ireland in the Stormont House Agreement (‘SHA’) of 23 December 2014 are legally defective. The Northern Ireland Office (NIO) draft Bill of May 2018 (‘draft Bill’) intended to implement the SHA proposals itself contains yet further legal defects.*

*We appreciate and regret that our submission may well be distressing for victims of terrorism and other crime who have waited for far too long for something to be done.*

*The proposed short cuts in justice would, however, cause too much damage to the fair*

*administration of law in Northern Ireland and would perpetrate further injustice on individuals.*

*In the law, context is often everything. We approach the vexed question of legacy with two overriding concerns, which are without prejudice to the constitutional, political and sectarian problems that Northern Ireland faced. Firstly, that maintaining the rule of law is part of the bedrock of any civilised society and secondly that the campaign of terrorist and sectarian violence was not justified as a means of effecting or resisting political change.*

*It is time to tackle this and start anew.*

1. Opening points

1.1 We are lawyers who have spent our careers in the practice of law in Northern Ireland. Peter Smith CBE QC became a barrister in 1969. He was a member of the Patten Commission on Policing in Northern Ireland and supported its reform proposals. Neil Faris is a Belfast solicitor who has written extensively on the legal defects of the Stormont House legacy proposals.

1.2 This submission contains our detailed legal critique of the SHA and draft Bill. As lawyers we are opposed to suggestions of amnesty in respect of any criminal offences perpetrated during the decades of sectarian terrorism in Northern Ireland. Thus, if there is credible evidence against anyone (whether paramilitary, member of the security forces or civilian) of a criminal offence there should be an appropriate police investigation, followed where appropriate by prosecution and determination on guilt by a court.

1.3 It is important that these processes are followed in a scrupulously independent manner by, in their respective roles, police, prosecutors and court. In no way may they be swayed by political or other pressures either ‘for’ or ‘against’ prosecution.

1.4 But we believe that the problems that we identify arise from a serious misunderstanding of the proper administration of criminal justice in Northern Ireland, springing from the fundamental misconception that the process must be ‘victim centred’ or ‘victim focussed’.

1.5 In this submission we set out both our detailed critiques of the provisions of the SHA and draft Bill. These we believe are in no way a proper footing for proposals to address ‘legacy’ in Northern Ireland.

1.6 We also set out our thoughts as to why the ‘victim centred/victim focussed’ approach to the administration of criminal justice is so misconceived. Briefly, and this point will be developed in further detail in paras 3.11 and 4.4 below, we as lawyers, believe that we must be vigorous in our opposition to such an approach. Our position is that, insofar as the pursuit of criminal justice is to be part of the legacy process, (we and almost all the political parties and commentators agree) it must rather be based on the fundamental principle of the presumed innocence of every individual facing a criminal charge.

1.7 We also suggest that the legacy project is misconceived in other significant respects.

1.8 The legacy proposals in SHA, in the Consultation Paper issued by the NIO in May 2018 (‘the Consultation Paper’) and in the draft Bill purport to address the legacy of Northern Ireland’s past. The focus of the documents is, however, solely on the deaths that occurred. The analysis ignores the depravity of the terror campaigns against both the security forces and the civilian population involving, – as well as the deaths – wounding, kidnapping, extortion, intimidation and a massive terrorist bombing campaign against city centres and towns and villages in all parts of Northern Ireland. All this ruined lives throughout the decades of sectarian terrorism.

1.9 This submission does not seek to ignore or downplay the significance of any abuse of power by governments or actions taken outside the law by the security forces, but in any discussion of legacy we suggest that the SHA wrongly reduces Northern Ireland’s ‘past’ to a ‘conflict’: state -v- paramilitary ‘combatants’. This gives spurious legitimacy to the paramilitary ‘combatants’. But, worse, it excludes entirely from the narrative the best endeavours of the democratic politicians and all of civil society – trying to maintain a peaceful society during the decades of sectarian terrorism.

1.10 Furthermore, a true assessment of the ‘Legacy of Northern Ireland’s Past’ would also encompass the constitutional, political and sectarian problems which Northern Ireland faced during those decades of terrorist and sectarian violence.

1.11 Lastly, although the SHA describes its aims as promoting reconciliation, addressing the suffering of victims and survivors and facilitating the pursuit of justice and information recovery, it does not acknowledge that the vast majority of crimes of the decades of sectarian terrorism were perpetrated by members of terrorist organisations. Nor did SHA seek to encourage political parties or individuals who are or have been associated with such organisations to disclose information, which could go at least some way to meet the described aims. This is in spite of the fact that it would be possible to facilitate such disclosure by protecting it from use in proceedings against the person disclosing it or in any proceedings against any person to whom the disclosed information relates in a manner similar to the scheme devised by the UK and Irish in governments relation to the location of victims’ remains.

**2. Brief chronology**

2.1 In December 2014 a number of the political parties in Northern Ireland, with the involvement also of the Governments of the United Kingdom and Ireland, published an ‘Agreement’ (the SHA) setting out their proposals for an overall solution to Northern Ireland’s ‘legacy problem’.

2.2 Then in May 2018, the UK government published the Consultation Paper and a draft Bill purportedly designed to implement the SHA proposals. We set out a Summary of the draft Bill provisions (insofar as relevant to the legal points we develop) in Annex 1.

2.3 In March 2020, however, the UK government announced a broad outline of different proposals (‘the New Proposals’). There is insufficient detail in the March 2020 announcement of the New Proposals to enable specific response to be made at this stage.

**3. Summary of our submission**

Purpose

3.1 The purpose of this submission is to urge that (whatever view may be taken on the new proposals) the Committee of Ministers should not regard reversion to the legacy aspects of the SHA and the draft Bill as appropriate or sufficient.

The draft Bill

3.2 It is welcome in our view that the United Kingdom government is no longer supportive of the implementation of the SHA through the draft Bill. It is our view that:–

* the SHA and the draft Bill contained fundamental legal flaws;
* the focus on victims should not be central insofar as the administration of criminal justice is to be part of the legacy process;
* the SHA and the draft Bill fail to properly address the totality of the depravity of the decades of sectarian terrorism in Northern Ireland;
* the SHA and the draft Bill also fail to encompass the political and sectarian problems which Northern Ireland faced in the decades of sectarian terrorism;
* accordingly, the SHA and the draft Bill would not have ‘solved’ the legacy problem;
* the SHA and the draft Bill would have caused further distress to victims’ families by the overpromise of the delivery of ‘truth and justice’ – followed by the inevitable under-delivery;
* the SHA and the draft Bill would have compromised academic freedom in their controlling provisions for an academic report; and
* the SHA and the draft Bill would have been unjust for those who came under scrutiny of the new bodies which were proposed.

3.3 Accordingly, in this submission we urge that (whatever view may be taken on the New Proposals) there should be no reversion to the flawed provisions of the draft Bill.

Misuse of police powers

3.4 As lawyers, we are particularly concerned about the potential for the misuse of police powers in the legacy proposals – for purposes other than the strict investigation of crime. To confer police powers on officers of the proposed Historical Investigations Unit (‘HIU’) who are not police officers for purposes other than the investigation of crime undermines cardinal democratic freedoms.

3.5 We fully endorse the process of the former PSNI Historical Enquiries Team (HET) of producing family reports giving as much information as possible, while avoiding breach of the rights of anyone to a fair trial as protected by Article 6 and at common law.

3.6 Police officers have extensive powers over everyone. All officers must undergo rigorous training, are bound by a Code of Ethics and are subject to stringent police discipline. These are protective measures designed to safeguard the citizen against abuse of police powers by police officers.

3.7 But the draft Bill would have included:

* the conferral of police powers on people who were not police officers; and
* the conferral on these people of the power not only to investigate certain crimes but also to issue reports criticising individuals.

3.8 The HIU which was proposed in the SHA and draft Bill was not to be part of the Police Service of Northern Ireland (‘PSNI’). The HIU Director would have had police powers and they would also have had the power to appoint HIU officers invested with such powers.

3.9 Where there was sufficient evidence for a prosecution the HIU would have prepared a report for the Public Prosecution Service (‘PPS’) in which it would have identified anyone whom it believed to be guilty of criminal conduct. The HIU would have been able to investigate not only acts of terrorism but also the actions of any member of the police or army whom the HIU believed had committed any crime: whether directly killing or wounding, or by ‘aiding and abetting’ the commission of crime, or by covering up a crime in the course of investigation of a ‘Troubles-related death’.

3.10 This would have satisfied the evident widespread political desire (which as lawyers we share) that perpetrators of crime (from wherever they may come) should be identified and prosecuted.

3.11 Of course, the decision as to whether or not to prosecute would not have rested with the HIU but, as in the case with all crime, with the independent PPS. Note that a decision by the PPS not to prosecute would no doubt in cases be disappointing to victims’ families (particularly if all possibility of review of the PPS decision was exhausted). But the PPS cannot properly permit the concept of satisfaction of victims’ families to be prioritised over the due administration of criminal justice. So in this regard the process cannot properly be described as ‘victim centred’.

3.12 Obviously, there might not be many successful prosecutions, where a conviction is obtained. However, in the sense that the due procedures of the criminal law are properly carried out from investigation onwards, a just process has been followed.

3.13 Apparently, the New Proposals will include some form of ‘sifting’ process to identify cases, which might merit the criminal investigation procedures being implemented. But it is not clear if such new criminal investigations will be carried out by the police – either PSNI or another police service – or by an ‘HIU style’ body whose officers will have police powers, without being police officers of the PSNI or another police service.

3.14 In our view, as lawyers, serious problems will arise if it is proposed to vest police powers in any new form of ‘HIU style’ body.

3.15 A major problem is that it is intended that the new body will – at least at the end of the process – issue a ‘family report’ to victims’ families.

3.16 In the case, of course, where a prosecution is to be brought, the new body will not be able to issue a family report until the conclusion of any court proceedings because of the danger of prejudice to the trial.

3.17 But in the case where there is not to be a prosecution (or where court proceedings have come to an end) it seems to us to be very worrying and problematic if the new body – if it were to have police powers – would be entitled to issue family reports which might identify anyone who was ‘believed’ to be a perpetrator (of any category).

3.18 Such a proposal, improperly in our view, would combine in the new body not only police powers but also the power to make adjudications or findings against individuals in its reports which it would issue to victims’ families.

3.19 To put it simply, the police have the right and duty of investigation and fact finding in respect of crime – for the purpose of making reports to the PPS. But the draft Bill abuses these powers by conferring also on the HIU the power to make adjudications against individuals, whether or not there was any allegation of any criminality.

3.20 We attach as Annex 2 a note of a recent case in the English High Court, which illustrates the necessity for a limitation of police powers.

*Fairness and due process for those under investigation*

3.21 While the draft Bill (rightly) contained many protective and supportive provisions for victims and their families, there were no equivalent protective provisions for anyone who might have been subject to the interrogation and exercise of police powers by the HIU.

3.22 There was no provision for legal advice, for access to documents, or for a right to adduce evidence or test the evidence allegedly supportive of the criticism of that individual. The point of all this is not only fairness for the individual – it provides checks and balances against the abuse of power by any investigator.

3.23 These shortcomings rendered the draft Bill’s proposals a gross violation of the maxim *Audi alteram partem* – a fundamental principle of justice requiring that no one may be judged to have done wrong without a fair hearing including a fair opportunity to challenge the evidence against them.

3.24 We trust that the New Proposals will not include any provision for the new body to include criticism of individuals in family reports without adequate defence rights, as that also would constitute a breach of the European Convention on Human Rights. The European Court of Human Rights has held that where publication compromises the integrity of the reputation of the person concerned there is a breach of Article 8 of the Convention. In the case of Pfeifer v Austria (15 Nov. 2007) the Court declared that “a person’s right to protection of his or her reputation is encompassed by Article 8 as being part of the right to respect for private life.” See also Axel Springer AG v Germany (7 Feb. 2012).

3.25 This right was ignored in the draft Bill and it is of vital importance that this gross error should not be repeated in the New Proposals.

4. Our critical analysis of the draft Bill

 (As stated above, we set out a summary of the draft Bill’s provisions in Annex 1.)

4.1 The controlling General Principles in clause 1 fail to acknowledge the ‘context’ of the decades of sectarian terrorism to which the UK government and its security forces had to respond – in an endeavour to prevent the outbreak of a sectarian civil war in Northern Ireland. The failure to include such ‘context’ set the tone for the implementation of the legacy project – in a distorted manner.

4.2 Furthermore, the Consultation Paper misrepresented the position in its implication that the legacy proposals of the Stormont House Agreement had the consent of all the participating political parties[[1]](#footnote-1)**.**

4.3 The Consultation Paper stated in its title, its purpose to address the legacy of Northern Ireland’s Past. But this was less than fully candid because the proposals were selectively focused on deaths during the years of terrorist and sectarian conflict in Northern Ireland. There was no investigative or adjudicative commitment to anything else, including those who were maimed or seriously injured.

4.4 Para 31 of the SHA asserted that

“Processes dealing with the past should be victim-centred”

Insofar, however, as the administration of criminal justice is to be a component of the legacy proposals (a common position of all the participating parties to the Stormont House Agreement) it was impermissible to put the needs and interests of victims above those of the accused persons made subject to the criminal justice system without serious damage to the over-arching principle that in the criminal justice system the focus must be on the accused to ensure, so far as possible, that no innocent person may be found guilty.

4.5 There was to be a sifting process allowing the HIU Director to select the cases which the HIU will (re)investigate. This choice also of course controls the outcome.

4.6 The HIU was specifically tasked to investigate ‘collusion’ and the provisions in the paragraph 7 of Schedule 3 required careful consideration. Notionally, the PSNI Chief Constable was to control the selection of collusion cases but for reasons (as set out in paras 2.5 to 2.12 of Annex 4) that could have been an illusory limitation and in practice any case which campaigners wished to include in collusion investigation would likely have been so investigated.

4.7 The draft Bill wrongly combined in the HIU the investigative and the adjudicative power.

4.8 The draft Bill wrongly conferred on HIU officers police powers, when there was no requirement that all HIU officers must be police officers.

4.9 The draft Bill wrongly proposed that the HIU in issuing family reports to victims’ families might, with the exercise of their police powers make adverse comments on the actions (or failure to act) of any individuals when there was insufficient evidence to take a prosecution against such person.

4.10 The HIU investigatory and reporting procedures were unfair to the point of being legally defective.

4.11 The provisions for the involvement (at a late stage of the process) of any person likely to be subject to ‘significant criticism’ in any family report were inadequate.

4.12 There was no provision for support and protection for individuals who may be suspected as ‘perpetrators’ or who might have been witnesses to deeply traumatic events in the course of the decades of terrorist and sectarian conflict. Such persons might now be frail or vulnerable by reason of age or infirmity and re-investigation by the HIU might cause mental distress.

4.13 The basis on which the Independent Commission on Information Retrieval (ICIR) was to operate (with its power to make findings against individuals) ran contrary to the rule of law, in particular in its failure to afford natural justice in its processes and by granting the ICIR immunity from suit and legal process[[2]](#footnote-2) thus barring individuals access to the courts and granting the ICIR immunity from relevant legislation such as Freedom of Information, Data Protection and National Archives legislation[[3]](#footnote-3).

4.14 The academic experts who were to prepare an independent report were to be constrained to examine only the documentation set out in the draft Bill and in particular the HIU’s Report to the proposed Implementation and Reconciliation Group (IRG) and the ‘family reports’ from its caseload.

4.15 As the report to the IRG and the family reports originated in the HIU’s caseload, any bias of the HIU in case selection and in its reports would have controlled the academic experts in their production of their ‘independent’ report. This constrained and subverted true academic freedom.

4.16 The provisions for ‘non-criminal police misconduct’ were discriminatory and contrary to the rule of law in their retrospective application to retired police officers.

4.17 There is, in any case, a material question as to whether an HIU investigation of any Article 2 death on its own would legally equate to an adequate investigation for the purpose of compliance with the rulings of the European Court of Human Rights on the carrying out of such investigations in accordance with their requirements in respect of Article 2.

4.18 Annex 3 sets out examples from the United Kingdom and Ireland as to the (elaborate) procedures for carrying out such investigations, which involve direct participation of those under investigation and of victims and an independent adjudicatory element.

4.19 These seem to us to indicate that a much more comprehensive scheme would be required than the HIU’s abridged procedure.

4.20 Annex 4 contains a more detailed analysis of the legal defects of the draft Bill.

5 Conclusion

We hope that the New Proposals will:–

5.1 Duly respect the cardinal democratic freedoms identified by the judge in the Miller case (see our note in Annex 2) and so will preclude the conferral of police powers on those who are not police officers.

5.2 Not countenance the misuse of police powers to permit the police to make adjudications against anyone who is not duly found guilty of any crime.

5.3 Duly recognise the distinction between investigation and adjudication and ensure that these functions are separately carried out.

5.4 Ensure that anyone who may be criticised by any new body is entitled to fair procedures throughout the investigation.

5.5 Afford to those under investigation, protective and supportive measures equivalent to those for victims’ families.

5.6 Eliminate any perversion of police power which would mark (under the guise of ‘addressing legacy’) a drift into police authoritarianism in Northern Ireland.

5.7 Ensure full protection for academic freedom, including in particular the right of academic experts to consult whatever sources and publications that they in their independent professional opinion deem appropriate.

5.8 Ensure that the perversions of justice proposed for the operation of the ICIR are fully eliminated.

# **Peter Smith CBE QC and Neil Faris, Solicitor, Belfast**

**ANNEX 1**

**Summary of the investigatory provisions of the 2018 draft Bill**

NB The draft Bill drew an apparent distinction in providing that some of the investigatory functions were to be carried out by the HIU – while others were to be carried out by the Director of the HIU. It is necessary to bear in mind the degree of operational control reserved to the Director, personally.

References to clause numbers are to clauses in the 2018 draft Bill

1. **The General Principles**

1.1 Clause 1 provided that any references in the Bill to ‘General Principles’

meant that:

1. reconciliation should be promoted;
2. the rule of law should be upheld;
3. the suffering of victims and survivors should be acknowledged;
4. the pursuit of justice and the recovery of information should be facilitated;
5. human rights obligations should be complied with;

 and

1. the approach to dealing with Northern Ireland’s past should be balanced, proportionate, transparent, fair and equitable.

1.2 In regard to HIU investigations, the General Principles were to apply in the exercise of its functions – see clause 7 (1) below.

**2. The remit of the HIU – to investigate ‘Troubles-related deaths’**

2.1 Clause 5 and Schedule 3 set out HIU’s deaths’ remit which comprised:

* those deaths in the caseload of the HET and the Police Ombudsman’s Historical Investigations Directorate (HID) which required further investigation by HIU,

and

* deaths between 11 April 1998 and 31 March 2004,

and

* deaths which required further investigation

2.2 Schedule 3 provided for a certification process by the Chief Constable and the Police Ombudsman that the relevant deaths were part of their respective caseloads and they must also certify that the investigations of the deaths had not begun before the certifying date, or had begun but not been completed before that date.

2.3 There was also provision for the DPP to refer deaths to the HIU where under para 1 of Schedule 6 the DPP believed new evidence might be found.

2.4 Under Schedule 3 there were two categories of deaths where the investigatory process had been completed but which required further investigation:

* Paragraph 6: there was new evidence relating to the death. There were complex provisions under sub-paragraphs (1) to (10) specifying under the categories of ‘Ground A’ or ‘Ground B’ what was ‘new evidence’ for this purpose.
* Paragraph 7: This paragraph contained important provisions entitling HIU to re-open closed cases in the circumstances relating to the conduct of a person (‘P’) where:

Ground C

1. the Chief Constable had reasonable grounds for believing that the death was the direct use of force by P,

and

1. was satisfied that conduct by P required further investigation.

or

Ground D

1. The Chief Constable had reasonable grounds for suspecting that P –
2. facilitated an offence or avoidance of justice relating to the death,

and

1. did so with the intention of achieving an unlawful or improper purpose,

 and

1. either –
2. the Chief Constable had reasonable grounds for suspecting that, by doing so, P committed a criminal offence,

or

1. the Chief Constable considered that the HIU should investigate the death because of the gravity of P’s conduct or because there were exceptional circumstances,

and

1. the Chief Constable was satisfied that the conduct by P mentioned in para (a) (i) or (ii) required further investigation.

2.5 Furthermore, in deciding whether the conduct by P in respect of a death required further investigation, the Chief Constable was to have particular regard to the report of the inspectors of constabulary entitled ‘Inspection of Police Service of Northern Ireland Historical Enquiries Team’ published 3 July 2013.

2.6 Paragraph 7 (6) of Schedule 3 contained further provision as to whether P facilitated an offence or avoidance of justice relating to a death and paragraph 7 (7) specified some particular circumstances where Ground C or Ground D might not apply.

**3. HIU’s duty to investigate**

3.1 Under clause 6 (1) the HIU was to investigate deaths within its remit but note carefully that under clause 6 (2) this duty (and other duties imposed by the clause) were subject to the other provisions of Part 2, in particular clause 9. As will be seen, the HIU Director was to have operational control of the investigatory function. This meant that not all deaths within the remit would in fact be investigated (or re-investigated)

3.2 Under clause 6 (3) and (4) the Director was to issue a statement setting out the manner in which the HIU was to exercise its investigatory function and this was to include how HIU was to exercise such function so as to secure:

1. that its Article 2 obligations were complied with;
2. that its other human rights obligations were complied with;
3. that the order in which deaths are investigated was in accordance with clause 8.

3.3 Clause 6 (7) required the HIU to produce a report on each death which it investigated suitable for provision to members of the family of the deceased person and clauses 17 to 21 (see further below) made further provision in regard to these reports.

**4. Exercise of functions by HIU**

Clause 7 (1) required the HIU to exercise its functions in a manner which was–

1. consistent with the General Principles;
2. fair and impartial;
3. proportionate;
4. effective and efficient;

and

1. calculated to secure –
2. the independence of the HIU,

and

1. the confidence of the public in the HIU.

**5. Exercise by HIU of its investigatory function**

Under clause 8 the investigation by HIU of any death within its remit (‘Troubles-related deaths’) was to include

1. The investigation of any criminal conduct relating to the death;

and

1. The investigation of any ‘non-criminal police misconduct’ relating to the death.

**6. How cases, within the HIU remit, were to be selected for further investigation**

6.1 Under clause 9 (1) the HIU Director was to have operational control over the exercise of the investigatory function of the HIU.

6.2 Under clause 9 (2) the HIU Director (amongst other aims) was to have regard to the aim of completing the investigatory function within 5 years from the day specified by the Secretary of State by regulations in accordance with clause 67.

6.3 Under clause 9 (3) the Director’s operational control included the power to decide:

1. The extent to which it was necessary for the investigatory function to be exercised in relation to a particular death;

 and

1. The manner in which the investigatory function was to be exercised in relation to a particular death.

6.4 Under clause 9 (4) the investigatory function was not to be exercised unless one of the conditions set out in sub-clauses (6), (7) or (8) was met viz:

* Condition A: there was new evidence relating to the death and the Director had reasonable grounds for believing that the new evidence was capable of leading to:
1. the identification of a person involved in the death;
2. the prosecution of a person for a criminal offence relating to the death; or
3. [relates to historic ‘non-criminal police misconduct’ cases – see further below]
* Condition B: the Director had reasonable grounds for believing that a criminal offence relating to the death had been committed and that there were reasonable investigative steps which the HIU could take which were capable of leading to:
1. the identification of a person who committed that criminal offence,

or

(b) the prosecution of a person for that criminal offence.

* Condition C: the Director –
1. decided that there are reasonable investigative steps that the HIU could take which are capable of leading to –
2. the identification of a person whose conduct constitutes non-criminal police misconduct in relation to the death;

or

 (ii) the initiation of disciplinary proceedings against a person for non-

 criminal police misconduct relating to the death;

and

1. considered it is appropriate to investigate the misconduct because of –
2. the gravity of the misconduct,

 or

1. exceptional circumstances.

6.5 Under clause 12 the HIU was to make arrangements to carry out separately the conduct of criminal and police misconduct investigations.

6.6 Under clause 9 (13) the Director – when considering whether new evidence or reasonable investigative steps might be capable of leading to the identification of a person, the prosecution of a person or the initiation of disciplinary steps against a person – was not to be prevented from proceeding by reason of:

1. that person’s physical or mental health at any time;
2. that person’s absence from the jurisdiction at any time;
3. the death of that person since the time when the criminal offence or non-criminal police misconduct occurred;
4. the death of any other person since that time;
5. the period that has elapsed since that time.

6.7 Under clause 13 (1) and (2) when the HIU had finished any criminal investigation the responsible officer was to produce a ‘criminal investigation report’ and the HIU was to give a copy to the DPP.

6.8 Clause 13 (3) provided that this duty applied whether or not the investigation concluded that any criminal offences were committed; but if the report concluded that criminal offences were committed the HIU was to give the DPP (along with the report) a statement of those offences.

6.9 Clauses 14 and 15 contained provisions for the procedure in police misconduct investigations.

7. Investigation reports

7.1 Under clause 16 (1) on completion of an investigation into a death the HIU was to produce an ‘investigation report’ which under clause 16 (2) was to include:

1. any criminal investigation report under clause 13,

and

1. any misconduct report under clause 14.

7.2 By virtue of clause 16 (3) a single report might combine the investigation reports relating to different deaths.

8. Family reports

8.1 Clause 17 provided for ‘comprehensive family reports’. Clause 17 (1) referred back to clause 6 (7) which required the HIU to produce for each person’s death which it investigated a report on the death of that person which was suitable for provision to members of the family of a deceased person (‘a family report’).

8.2 Clause 17 (1) went on to provide that each family report must be as comprehensive as possible having regard to the need for the report to be accessible to members of the family of the deceased person.

8.3 Clause 17 (2) contained provisions requiring the HIU to take into account the context in which the investigations (whether by PSNI or by the Police Ombudsman’s HID (under clauses 5(1) (a), (b) or (c)) took place and it is also provided that the context in which the original investigation of the death took place includes procedures followed in police investigations at the time of the investigation.

8.4 Under clause 17 (3) before the HIU produced a family report it must confirm whether the investigatory function was exercised in relation to the death –

1. in compliance with HIU’s Article 2 obligations (within the meaning of clause 6),

and

1. in compliance with HIU’s other human rights obligations;

and

the family report must then include a statement of what has been confirmed.

8.5 Clause 17 (4) to (12) then provided detail of how family reports (including interim reports) were to be provided to various categories of family members.

8.6 Clause 18 (1) to (4) contained provisions relating to disclosures proposed by HIU which are prohibited by the Secretary of State under Schedule 10.

8.7 Clause 18 (5) contained provisions relating to information given by the Government of Ireland (or by any person recognised by that Government as an appropriate authority to give such information).

9. ‘Significant criticism’

9.1 Clause 18 (6) and (7) applied where the HIU was proposing to include in any family report any material which in HIU’s view constituted significant criticism of an individual who was involved in preventing or investigating an event of which the death forms part. In such case the HIU –

1. was required to notify such individual that it was proposing to include such material in the report; and
2. was required, in producing the report, to have regard to any representations about that material made by the individual within the period of 30 days beginning on the day on which the HIU notified the individual.

9.2 The HIU might extend the period beyond 30 days if the HIU was satisfied that there was good reason to do so.

10. Provision of reports to injured persons

10.1 The HIU might under clause 19 (5) provide, upon request from a person injured in the ‘event’ of which the death formed part, a copy of a family report if the HIU considered it appropriate to do so.

10.2 However, under clause 19 (2) when any such request was made, HIU must take reasonable steps to obtain representations about such provision from family members of the deceased person and have regard to any such representations made within a 30 day period, with provision to extend the 30 day period if HIU considered it reasonable to do so.

10.3 But under clause 19 (6) the HIU must not provide the report to the injured person if to do so would run contrary to the provisions of clauses 7 (2) and 7 (3) namely if the publication might:

1. prejudice the security interests of the United Kingdom,
2. put at risk the life or safety of any person,

or

1. have a prejudicial effect on any actual or prospective –
2. criminal proceedings in the United Kingdom or Ireland,

or

1. police disciplinary proceedings in respect of a member of the Police Service or the Reserve.

In this context, ‘prospective’ meant if in the view of the HIU the proceedings were likely to be brought within a reasonable period after the publication.

10.4 The HIU was not to provide the report if it contained disclosure of information identified by the Secretary of State as ‘protected international information’ under clause 27 (2).

10.5 Under clause 19 (7) the HIU might remove from the copy of the report provided to any injured person any information which (if not removed) might cause distress to a family member from whom HIU sought representations.

11. Publication

11.1 Under clause 20 (1) the HIU might publish family reports in any manner which it considered appropriate.

11.2 But Clause 20 (2) provided that publication might not take place if to do so would run contrary to the provisions of clauses 7 (2) and 7 (3) namely if the publication might:

1. prejudice the security interests of the United Kingdom,
2. put at risk the life or safety of any person,

or

1. have a prejudicial effect on any actual or prospective –
2. criminal proceedings in the United Kingdom or Ireland,

or

1. police disciplinary proceedings in respect of a member of the Police Service or the Reserve.

In this context, ‘prospective’ meant if in the view of the HIU the proceedings were likely to be brought within a reasonable period after the publication.

11.3 But before arranging publication the HIU was to take reasonable steps to obtain representations about the report from family members of the deceased and from any injured persons (who had under clause 19 requested a copy of the family report) and have regard to any such representations made within a 30 day period, with provision to extend the 30 day period if HIU considered it reasonable to do so.

11.4 Under clause 20 (6) the HIU might remove from the published report any information which (if not removed) might cause distress to a family member or injured person from whom HIU sought representations.

12. Reports to be provided by HIU to the IRG

12.1 Under paragraph 6 (1) of Schedule 16 the HIU was to provide the IRG with a written report on –

1. patterns and themes it had identified from its work,

and

1. the level of co-operation it had received in carrying out its work.

12.2 Under paragraph 6 (2) the HIU might provide an interim report to the IRG.

12.3 Paragraph 6 (3) provided that the HIU was to deliver its report to the IRG on the last working day of the five year period specified for the operation of the HIU.

12.4 Paragraph 6 (4) specified that the HIU report was to be given to the Chair of the IRG alone and must not be disclosed by the HIU unless –

1. the report had been shared by the IRG Chair with other members of the IRG under clause 61 and the IRG Chair had authorised the HIU to disclose the Report.
2. The academic report commissioned in accordance with clause 62 had been produced.

13. Reports to be considered by the academic experts

13.1 Under clause 61 the IRG obtained reports from the various legacy bodies (including the HIU, as explained above).

13.2 Then under clause 62 (1) the IRG was to commission academic experts (‘the academic experts’) to identify and then report to the IRG on the patterns and themes in the matters dealt with in all the reports (including the HIU reports referred to above.)

13.3 Clause 62 (2) provided that to assist in identifying and reporting on those patterns and themes –

1. the academic experts might (to the extent, if any, that they thought it appropriate to do so) take account of information from the sources listed in clause 62 (3);
2. but they might not take account of such information unless it had lawfully been made available in the way referred to clause 62 (3).

13.4 Clause 62 (3) listed a variety of sources (all of an ‘official’ nature) from which the academic experts might obtain information. These included:

1. the HIU family reports that were made publicly available or made available to the academic experts ‘by the family members concerned’;
2. the HIU’s reports produced in accordance with paragraphs 1 to 3 of Schedule 16 (annual reports, reports to the Policing Board, Secretary of State or Department of Justice);
3. to (k) a variety of other reports from the PSNI HET, the Police Ombudsman HID, the other legacy bodies, decisions of criminal courts in the UK and Ireland that were publicly available, judgments of civil courts in the UK and Ireland that were publicly available and conclusions reached and findings made before coroners in the UK and Ireland and under Scottish legislation relating to fatal accidents and sudden deaths that were made publicly available.

13.5 Under clause 62 (4) the academic experts in identifying and reporting on the patterns and themes were to act –

1. independently of any other persons,
2. free from political influence, and
3. in such a way as to secure public confidence in their reports.

13.6 Under clause 62 (6) the IRG was to give copies of any academic report that is produced to the First Minister and deputy First Minister (‘FMdFM’), the Secretary of State and the Government of Ireland and copies were to be given to all the recipients at the same time.

13.7 Clause 62 (7) required that the IRG Chair must ensure that any academic report so produced does not contain any information which –

1. might put at risk the life or safety of any person;
2. would contravene the Data Protection Act 1998

if it were published.

13.8 Finally, under clause 62 (8) FMdFM acting jointly were to lay the academic report so produced before the Northern Ireland Assembly and were to publish it in any manner which they, acting jointly, considered appropriate.

ANNEX 2

Limit to the exercise of police powers

1. A recent, widely reported, judgment in the High Court in London in favour of a Mr Harry Miller is relevant. Mr Miller was interviewed by the police following a complaint that he had engaged in Twitter in hate language in tweets on the transgender issue. The police recorded his tweets as constituting a ‘non-crime hate incident’ and then interviewed him, warning him that if he ‘escalated’ matters in his tweets they might take criminal action.
2. The judge gave careful, detailed consideration to the lawfulness of the police action under their ‘Hate Crime Operational Guidance’. He concluded that police had acted lawfully in their investigations, in the sense of intelligence gathering.
3. However, the judge then went on to hold that the actual police treatment of Mr Miller was unlawful, as he had not committed any crime and they had no basis for considering him even potentially guilty of any crime.
4. There are similarities here with the attempt in the draft Bill to vest the HIU with police powers and then to empower it to make findings against individuals who had not committed any crime and where the HIU had no proper basis (in the absence of a prosecution and conviction in court) for considering such individuals even potentially guilty of any crime.
5. Of course, it is legitimate for society to require investigation of matters of public importance – such as legacy and, for instance, the Renewable Heat Incentive (RHI) ‘problem’ in Northern Ireland. The investigation of such matters is, however, properly carried out by a body such as the RHI Tribunal which demonstrably included not only ‘due process’ but also transparency between its fact finding and its adjudication.
6. Other means of doing this are available – the RHI Tribunal is not the only model – but what is not permissible, under the rule of law in a democratic society, is to vest in the police (or others such as the new body, if it is to be granted police powers) both the role of investigation and also the role of adjudication.
7. In essence in the *Miller*case the judge ruled that it was a perversion for the police to involve themselves with imputing blame to citizens who have not committed any crime and where the police have no basis for considering any citizen even potentially guilty of any crime.
8. The judge was not prepared to minimise the effect of the police turning up at Mr Miller’s place of work, when there was no evidence or grounds for suspecting that he had committed any criminal offence. He commented:

“The effect of the police turning up at Mr Miller’s place of work because of his political opinions must not be underestimated. To do so would be to undervalue a cardinal democratic freedom. In this country we have never had a Cheka, a Gestapo or a Stasi. We have never lived in an Orwellian society.”

ANNEX 3

The process of investigation and adjudication in Article 2 cases – some examples

*MA BB and Secretary of State for the Home Department*[[4]](#footnote-4)

1.1 A BBC TV Panorama programme of 7 September 2017 had reported (with undercover camera work) very serious abuses by staff of detained immigrants in the Brook House Detention Centre (for immigrants) at Gatwick Airport.

1.2 Article 3 of the European Convention on Human Rights prohibits states from carrying out torture or inhuman or degrading treatment or punishment.Article 3 is deemed to include (as does Article 2) an investigative duty on the state for independent investigation when allegations of abuse under the Article are raised.

1.3 Accordingly, in light of the Brook House allegations, the Home Secretary had appointed the Prisons and Probation Ombudsman in England (‘PPO’) to carry out an ‘Article 3’ investigation.

1.4 The abuses had been the subject of criminal investigation by Sussex Police but on 7 November 2018 the Crown Prosecution Service directed that no criminal charges were to be brought.

1.5 Various investigations were carried out but deemed not to be ‘Article 3 compliant’, so it was referred to the PPO. The judicial review was to establish what rights the complaining detainees might have in PPO’s Article 3 investigation.

1.6 So it is somewhat analogous to the draft Bill’s provisions that the HIU would firstly carry out a police style criminal investigation of ‘Troubles-related deaths’ but where criminal charges cannot be brought [the vast majority of cases] an ‘Article 2 compliant’ investigation will be carried out by HIU in all cases where there is allegation of ‘state involvement’ of any form.

1.7 The judgment in this judicial review strongly suggests that an Article 2 or 3 investigation cannot adequately be carried out by a single investigatory body such as the PPO without considerable procedural safeguards. (While this judicial review applies of course only in the case of Article 3 investigations it seems clear that its requirements should apply also to the HIU (in the case of its Article 2 investigation work).

1.8 In the judicial review it was held that:

1. the PPO must have powers of compulsion to call witnesses before it – principally required of course against the Brook House staff against whom the allegations of abuse are made;
2. it would be for the PPO to determine which hearings should be held in public ‘ so as to secure full accountability and to ensure that MA and BB’s interests are fully protected’; and
3. MA and BB must be afforded ‘properly-funded representation at least to enable them to review and comment on witness evidence and to direct lines of enquiry for the PPO and her team to follow up’.

1.9 There is no discussion in the judicial review of the rights of those ‘accused’ of the abuse – but it seems that the judge had in mind that there should be an investigatory process along the lines of the recent RHI Inquiry with which we in Northern Ireland are familiar – albeit not necessarily all in public – see Annex 2, para 5.

1.10 On that basis it is clearly legally defective to confer (as the draft Bill proposed) the investigatory power on the HIU, without provision for representation or input by and on behalf of those who may be accused in the investigation and those who may be witnesses.

*Robbery and death at Ashford, County Wicklow, Ireland*

2.1 On 1 May 1998 a gang (apparently Real IRA members) were planning to carry out an armed robbery on a cash-in-transit van in Ashford. But the robbers’ two vans had themselves been under Gardai surveillance. Thirty members of the Garda National Surveillance Unit (NSU) were on the scene, and the raid was thwarted.One of the gang members, Ronan MacLochlainn (28 years of age), attempted to escape in a hi-jacked car but three Garda NSU officers shot at MacLochlainn and he was fatally wounded.[[5]](#footnote-5)

2.2 Mr MacLochlainn’s partner, Grainne Nic Gibb, through her solicitor, claimed that “Gardai could have stopped the attempted robbery beforehand and arrested MacLochlainn but instead ‘went for the spectacular’.”[[6]](#footnote-6)

2.3 This is of course redolent of allegations of ‘shoot to kill’, so we suggest it is relevant to show what were the follow up investigatory processes in our neighbouring jurisdiction in respect of this incident.

2.4 The initial investigation was carried out by a Detective Chief Inspector and Chief Superintendent and an inquest was held in 2010. Of course, the Garda investigation did not meet the requirements of Article 2 of the European Convention on Human Rights for independent investigation when a death occurs as a result of action of the state (in this case that of the Garda officer who shot Mr MacLochlainn and the surrounding circumstances of the Garda action at the scene).

2.5 Accordingly, Ms Nic Gibb subsequently made application to the European Court of Human Rights under Article 2. However the Irish Government gave an undertaking to the Court that a fully independent investigation would be carried out and the Court accordingly struck out the application.

2.6 Consequently, the Government appointed an independent commission of enquiry carried out by Mary Rose Gearty SC who heard 60 days of evidence and then issued a draft report. Submissions were made to the Commission on the draft report on behalf of Ms Nic Gibb. Ms Gearty then issued her amended report on 13 May 2016. In the report it was accepted that there was a conflict of evidence (on the position of the green Mazda vehicle hi-jacked by Ronan MacLochlainn at the time a Garda vehicle overtook it) and that it was not possible to resolve this conflict of evidence.

2.7 The legislation under which the enquiry was held entitled Ms Nic Gibb to make application to the High Court in Dublin in respect of the findings in Ms Gearty’s Report. Ms Nic Gibb duly made such application. She asked the Court ‘to delete the Commission’s finding of lawful killing from its May 2016 final report on the basis that it was unsafe because of the Commission’s alleged failure to address a range of issues and unexplained gaps in the evidence’[[7]](#footnote-7).

2.8 The matter was heard before Ms Justice Mary Flaherty who considered the report and the submissions of Ms Nic Gibb[[8]](#footnote-8) and reserved judgment. She handed down her judgment (98 pages) on 16 February 2018. She held ‘she was not persuaded, in finding that the killing was lawful, that the Commission failed to have regard to expert evidence concerning the conduct of the Garda operation and that the assessment of such evidence was for the Commission and not for the Court’[[9]](#footnote-9). She also concluded that there was no procedural frailty to require the Court to direct the Commission to amend its final report or to take further evidence.

**ANNEX 4**

**Analysis of legal defects of the draft Bill**

1. **The General Principles**

1.1 Clause 7(1)[[10]](#footnote-10) required the HIU to exercise its functions in accordance with the General Principles.

1.2 But the list of these principles did not include any direction that exercise of functions by the HIU (or any of the other legacy bodies) should in ‘dealing with the past’ recognise the context of the immense pressures of the terrorist and sectarian conflict that was raging throughout the years under investigation.

1.3 The lack of any such ‘contextual’ provision fundamentally skewed the entire legacy project, as will be demonstrated below.

**The remit of the HIU – to investigate ‘Troubles-related** **deaths’**

The term of years

2.1 There is debate as to the full term of years in which **‘**Troubles-related deaths**’** occurred should be investigated, including in particular whether such deaths that occurred between 10 April 1998 and 31 March 2004 should be included in the HIU’s investigatory remit.

2.2 But it is important to understand that – whatever the length of years included in the remit – this does not mean that all ‘Troubles-related deaths’ in those years would have been investigated.

2.3 Note the complex provisions as set out in the Summary on this in Annex 1.

2.4 Note in particular the provisions in paragraph 7 of Schedule 3 (where investigation has been completed but which require further investigation).

Collusion

2.5 ‘Ground D’ in this paragraph is the ‘collusion’ provision. ‘Collusion’ would have required investigation where the Chief Constable had reasonable grounds for suspecting that ‘P’ has facilitated an offence of avoidance of justice relating to a death and did so with the intention of achieving an unlawful or improper purpose. (Technically, ‘P’ could have been any person, but in practice, obviously, would have meant a retired RUC officer or army veteran.)

2.6 It is the case that this was a power to be conferred on the Chief Constable to refer any such collusion cases to the HIU: the provision was not framed as a duty requiring such referral.

2.7 But there could not have been any doubt that where ‘campaigners’ alleged there was such collusion and asserted that the Chief Constable must have ‘reasonable grounds’ for suspecting it, the Chief Constable, in default of making such referral, would have faced political and media protest and no doubt a judicial review on the point.

2.8 Furthermore, the Chief Constable in the decision making process on this was required to have particular regard to the Inspection Report on the HET carried out in 2013 (‘the Otter Report’).

2.9 Firstly, it is highly unusual that a statute should make reference to a report of this nature. The proper way to proceed, if it is the intention that findings, or recommendations, of any report should be incorporated in legislation, is for the specific matter to be set out, for certainty in the statute itself, or, possibly, for a rule making power to be included so that the specific provisions are set out in regulations duly made under the power conferred by the statute.

2.10 Secondly, of course, the Otter Report itself was controversial and had been the subject of considerable criticism by senior police officers and others – most recently by Sir Hugh Orde, retired PSNI Chief Constable, reported in the Irish Times 5 August 2019.

2.11 Observe the importance of the General Principles. They do not contain any principle as suggested above, that in ‘dealing with the past’ everyone must recognise the immense pressures of the terrorist and sectarian conflict that was raging throughout the years under investigation. If the General Principles contained a ‘context’ provision , then ‘context’ would be duly taken into account in the decision making process: for instance as to whether anything ‘improper’ was done by a police officer in all the circumstances at the time.

2.12 So the omission of this principle made it easier to make a colourable allegation of collusion and more difficult to defend the propriety of the conduct of the police officer at the time.

**3. HIU’s duty to investigate**

3.1 Note that the HIU Director was to issue a statement setting out how the investigatory functions were to be exercised so as to secure human rights compliance. Article 2 (the right to life) was specifically mentioned but the HIU was also to comply with its other human rights obligations.

3.2 Those other obligations would have included obligations under Article 8 of the ECHR (the right to protection of reputation). Article 8 does come into play in regard to any purported ‘identification’ of ‘suspects’ (including of course retired RUC officers and security force veterans) by HIU in its family and public reports.

3.3 There is then a legal question (open to debate) as to whether the human rights compliance duty required in clause 6 (3) and (4) in regard to investigations also applies to HIU’s reports after the conclusion of the investigations?

3.4 Of course, perhaps the point is moot, in that HIU, as a public body, must have been subject to duties of human rights compliance which under the Human Rights Act 1998 include observance in all its functions (reporting as well as investigation) with the provisions of ECHR including Article 8.

3.5 But the question that is left is what was the specific purpose of clause 6 (3) and (4)?

3.6 It is suggested that a recent judicial review in England[[11]](#footnote-11) is instructive as to how the investigatory process is to be carried out when the case is not suitable for reference to the DPP for prosecution but the HIU Director believes a perpetrator or retired RUC officer or army veteran may be ‘identified’ as a ‘suspect’ and a note on this is set out in Annex 3.

3.7 A judicial review judgment of the Irish High Court in February 2018 illustrates the proper approach to creation of an Article 2 compliant enquiry and a note on this is also set out in Annex 3.

3.8 This is not to assert that the HIU process should have been an exact copy of either the PPO process in the *MA BB* judicial review in England or the process followed in Ireland. But there should have been an Article 2 compliant process, in whatever form, and the HIU proposals demonstrably failed the test.

3.9 Several questions still arise:

* First of all a decision must be made as to whether the case requires an ‘Article 2 compliant’ investigation;
* If so, then the procedures to be carried out by HIU should be analogous to those contemplated by the Judge in the *MA BB* judicial review
* If the particular ‘Troubles-related death’ under investigation does not require to be ‘Article 2 compliant’ (because there is no allegation of ‘state involvement’ or any category of alleged ‘collusion’) then what is the procedure properly to be adopted by HIU?
* Presumably it may not need to involve the whole procedural panoply that Art2/Art3 compliant investigations properly require but what is the ‘minimum’ level of procedural protection required?

3.10 Surely, if there were not enough evidence for the DPP properly to bring a prosecution, then the HIU would not have been entitled to ‘name names’ or ‘name and shame’ on the sole basis of an HIU investigator’s case work, and just because they as HIU director disagrees with the DPP decision not to prosecute?

1. **General exercise of functions by HIU**

Bias

4.1 Note here that HIU was to exercise its functions in accordance with the General Principles. But as already indicated, the list of principles in clause 1 did not include any principle that in ‘dealing with the past’ the HIU (and other legacy bodies) must recognise the context of the immense pressures of the terrorist and sectarian conflict that was raging throughout the years under investigation.

4.2 The investigators to be recruited (in substantial numbers) by the HIU would perforce come from other jurisdictions and no doubt in general of a younger generation than the retired RUC officers and army veterans who served in all the years of the terrorist and sectarian conflict in Northern Ireland. Generally, such newly recruited investigators would have had little appreciation of what went on in Northern Ireland in those now far off decades. So it seems that a very serious problem would have arisen in that such recruits might well have been minded to make unfair assessments in regard to the actions of the police and army in the years of the terrorist and sectarian conflict. This is not to say that they would necessarily be actively biased, but simply their incomprehension would have led to the danger of serious misjudgement and injustice.

4.3 No doubt, assurances would have been proffered that all the HIU investigators would receive full induction and training (albeit, who would have selected and trained the trainers?)

4.4 But the lack of any contextual provision from the General Principles meant that throughout the work of the HIU and the other legacy bodies there would have been this real (even if unperceived) bias.

Where the life or safety of any person may be put at risk

4.5 Under clause 7 (2)of the draft Bill, the HIU was not to do anything in carrying out its functions which might put at risk the life or safety of any person.

4.6 So it might have been possible to make the case that the identification of someone (such as a retired RUC officer or an army veteran) might create a security risk of putting the life of such individual at risk.

4.7 But there does not appear to be anything in the draft Bill which affords any retired RUC officers or army veterans (or anyone else who may be at risk) any special protection in this regard.

4.8 So, unless the HIU were willing in a specific case to withhold identification, then the individual would have no other recourse but to apply to court for an order against identification. It is probably the case that each such application would be fact sensitive and the applicant would have had to establish to the satisfaction of a court, where the HIU was unwilling to withhold identification, that a non-identification order should be issued.

4.9 Given that the HIU had myriad duties towards victims it was likely to be the case that it would have adopted and implemented a policy, in the interests of victims, to seek to resist any such non-identification orders, save in the ‘clearest’ cases of danger to life. Perhaps also the courts might have been unwilling to strike down any HIU disclosure decision unless there was some specific evidence that the life of any individual is actually at risk.

4.10 All in all, the anxiety and stress on any retired RUC officer or army veteran who might have been subjected to HIU investigation should not be underestimated.

1. **Exercise by HIU of its investigatory function – criminal investigations**

Note that the HIU was to investigate any criminal conduct relating to the death. Presumably, this would have included:

* investigation to make the perpetrators of each murder amenable to prosecution;
* investigation of those who might have participated in any way in each murder, whether in planning, or other assistance, before the event or in assisting the offenders to escape justice afterwards;
* investigation of those RUC officers and army veterans who were deemed responsible for the original police, or other security action in relation of the murder, whether before or after the event, if any such action, or failure to act, comprises a criminal offence; and
* collusion investigations in particular would have been carried out wherever the PSNI Chief Constable had ‘certified’ collusion under paragraph 7 of Schedule 3 (see paras 2.5 to 2.12 of this Annex)
1. **Exercise by HIU of its investigatory function – ‘non-criminal police misconduct’**

6.1 Note also that, even where criminal action on the part of the police was not alleged (or alleged, but not sustained in the HIU investigation), the police (but not other security services) might be investigated for ‘non-criminal police misconduct’ relating to the death. So even where there was no evidence of criminality on the part of the police, the officers concerned might still be investigated.

6.2 There is much that could be written about the unfair, retrospective imposition on long retired RUC officers of this new ‘misconduct’ charge proposed to be created by the draft Bill.

6.3 However, there is indication that the NIO was not in any case minded to proceed with this element of the draft Bill – even before they changed tack with the New Proposals (for instance, see the section on ‘non-criminal police misconduct’ on page 20 of the NIO ‘Analysis’ document published in July 2019 on consultation responses). So for the moment more space is not devoted to this.

6.4 But also note that, even if ‘non-criminal police misconduct’ is withdrawn the HIU under the draft Bill would have retained its power to investigate retired RUC officers for any alleged criminality in connection with any murder. When to this is added the wide power the HIU would have had to investigate ‘collusion’ (see paras 2.5 to 2.12 of this Annex) it is clear that much of the work of the HIU would have been directed against retired police officers, rather than terrorist perpetrators.

1. **How cases, within the HIU remit, were to be selected for further investigation**

7.1 Note that extensive operational control was to be vested in the HIU Director. He or she would have been the new ‘legacy police chief’ and it should cause great concern that so much power was to be vested in such a ‘police chief’.

7.2 Generally, where police, initially considering whether they should investigate or re-investigate any crime, reasonably foresee that there are no realistic prospects of any investigation being capable of leading to prosecution, they will not proceed, if only on the grounds of not wasting police resources.

7.3 In considering this, the police have to consider whether any evidence that might be collected is capable of leading to the proper presentation of a file to the Director of Public Prosecutions (‘DPP’).

7.4 For instance, when the only available evidence against a ‘suspect’ is local, second-hand gossip, hearsay and rumour, then there is no credible ‘evidence’ worthy of being presented to the DPP and so the investigation should be dropped, pending the possible, future emergence of any credible evidence.

7.5 But even where the evidence was not sufficient to ground a prosecution, the HIU Director could have determined to press on with investigation on the basis that such ‘evidence’ as had been gathered could, nevertheless, be used to lead to the identification of a ‘suspect’. In such case the DPP would have no independent monitoring control. In short, the danger would have arisen that the HIU Director could have determined to carry out further investigation in order to identify when it would not be possible to prosecute.

7.6 It should worry everyone that the draft Bill proposed to confer such arbitrary power on any ‘police chief’.

7.7 Thinking further, it seems to us one should separate out quite distinct functions of the HIU and its Director:

* First of all, and for all ‘Troubles-related deaths’ (which fall within the sifting processes ofclause 5 and Schedule 3) the HIU was to carry out a criminal investigation;
* Then if it uncovered evidence that could be the basis for prosecution, it was to report to the DPP;
* The DPP then would have made an independent decision as to whether or not there should be a prosecution;
* If there was to be a prosecution, the matter then would ultimately be determined in the criminal courts;
* If a prosecution was not to be brought, then the HIU/Director was then to determine whether there was any state involvement in the death, in which case an ‘Article 2 compliant’ investigation had then to be carried out:
* If a prosecution was not to be brought, and the HIU/Director determined in any Article 2 investigation there was no illegal state involvement in the death, then nevertheless investigation might proceed in order to ‘identify’ any perpetrator (including those who may have carried out, or participated in the murder).

7.8 But a further (very harsh) provision in clause 9 (13) is that the HIU might proceed to carry on with an investigation notwithstanding the health or even death of the person under investigation.

8. Family reports

8.1 The detail of this is set out in section 8 of the Summary in Annex 1.

8.2 But note in particular that clause 17 (10) provided that in any family report provided to any family member (other than a close family member, as defined) the HIU might remove from the copy provided any information which (if not removed) would cause distress to close family members[[12]](#footnote-12).

8.3 But how does this marry with the provision of the family reports in the other circumstances set out in the draft Bill viz:–

* the full family report provided to close family members under clause 17 (5); and
* the family reports provided to the academic experts under clause 62 (3) (a)?

8.4 Was it intended that these versions of the family report would contain the potentially distressing material? If so, then clearly distress might be caused to close family members and the protection offered by clause 17 (10) would have been illusory.

8.5 But if, for this reason, family reports were to be produced to the academic experts in redacted form only, then less than the full ‘truth’ would have been in the public domain.

8.6 In regard to the publication of family reports, under clause 20 (6) the HIU might remove distressing material from the published version. But this also left the prospect of different versions of the same report being in circulation.

8.7 Certainly, no decent person would have wished any family member to be distressed by the full brutal details of the death of their loved one, but that brutality is surely part of the truth to be evaluated by the academic experts, if their report was to be full and credible?

8.8 This demonstrates the irreconcilable conflict between the promise of the Stormont House Agreement and the draft Bill of ‘truth’, ‘justice’ and ‘reconciliation’.

9. Unfair investigative procedure

9.1 The problem is that the proposals vested too much uncontrolled power in the HIU. There was no provision for legal advice and assistance for those under HIU investigation. There was no procedure to afford those under investigation to have put to them the case against them and to have full opportunity to test any evidence or allegations against them and to state their own case – all before the HIU investigators made any decision as to any further action to be taken.

9.2 In all the context of the legacy project (as conceived by the Stormont House Agreement participants) it is clear that retired RUC officers were the target in terms of the HIU’s ‘misconduct’ and ‘collusion’ investigatory powers. So while these provisions might apply to others targeted by HIU (such as army veterans), the following paragraphs deal with how the provisions would have operated against retired RUC officers subjected to HIU investigations.

9.3 In any such case where such ‘significant criticism’ was intended the HIU would have been required to give the retired RUC officer 30 days written notice of intention to include the material in its report. The HIU was also required to have regard to any representation made by that person within the 30 day period. There was power to extend the 30 day period, but only if the HIU were satisfied that there was good reason to do so. But the HIU was not obliged to change its report or to enter into any discussion with the retired police officer who was to be the target of the significant criticism.

9.4 There were severe limitations on the rights of the retired RUC officer who might be subjected to such ‘significant criticism’:–

* The retired officer had no right to obtain any of the evidence or other material on which the ‘significant criticism’ was based;
* There were no challenge rights – for instance, if a third party had made allegations against the retired officer and the HIU decided that the family report should, accordingly, contain ‘significant criticism’ of the retired officer, he or she would have had no right of challenge by way of cross-examination of the person making the allegation;
* The retired officer might well have found it difficult, if not impossible, to dislodge the HIU from the investigative bias which it already must have formed in its decision to include the ‘significant criticism’ in the family report; and
* The retired officer would have been placed under severe pressure to respond within the 30 day period in regard to an allegation of ‘significant criticism’ which might relate to an event or events of several decades previously of which the retired officer might have little or no recollection. (Though the 30 day period might be extended, this was to be at the discretion of the HIU and the targeted retired officer would have been uncertain as to whether the period would or would not be extended.)

9.5 Furthermore, this protection, limited as it was, applied only to cases where the HIU was minded to include ‘significant criticism’ of an individual in a family report.

9.6 In any case where the HIU intended to include ‘criticism’ but not (in its view ‘significant criticism’) then the retired officer was not entitled to any prior notification nor to the (limited) right of response conferred in the ‘significant criticism’ provision.

9.7 A fortiori where a retired officer was named in a family report, albeit without any criticism, he or she would have no rights in regard to the family report, even if the report were inaccurate in regard to the actions of that officer.

9.8 The underlying problem seemed to be that the Stormont House participants failed to realise (or sought to ignore?) the essential distinction between the investigatory role and the adjudication role. It is always difficult to establish workable and effective procedures in this regard, but that problem does need to be tackled in order that injustice will not be perpetrated on individuals in all the operation of the legacy proposals.

9.9 Above all, there was no understanding of the trauma that any HIU investigation might cause to a retired police officer, army veteran or anyone else who might be subjected to HIU investigation in respect of their involvement in any of the horrific events of the decades of the terrorist and sectarian campaign.

10 Provision of reports to injured persons

The detail of this is set out, we believe adequately, in section 10 of the Summary in Annex 1.

11. Publication

The detail of this is set out, we believe adequately, in section 11of the Summary in Annex 1.

12. Reports to be provided to the IRG

12.1 As set out in section 12 of the Summary in Annex 1, at the end of a five year period the HIU was to provide to the IRG a report identifying the patterns and themes identified in its work and the level of co-operation it had received. The IRG was also to receive such reports from the other legacy bodies.[[13]](#footnote-13)

12.2 Thereafter, the IRG was to be required under clause 62 (1) to commission academic experts:

“to identify, and then report to the IRG on, the patterns and themes in the matters dealt with by all the reports . . .”

12.3 This clearly circumscribed and limited the function of the academics. We do not see how, in the terms of the draft Bill, they might identify and then report on any other aspects of all the years of the sectarian conflict in Northern Ireland which were not already set out in the ‘patterns and themes’ of the reports from the legacy bodies.

12.4 So a statutory structure was to have been erected to constrain the academics from taking full and fair account of the context of the whole circumstances of the years of sectarian conflict in Northern Ireland.

12.5 It is also important to understand that the academics were to be severely constrained in the documentation and evidence that they might take into account in preparation of the academic report: they might consider only the ‘main’ reports from the new bodies and a closed list of supplementary material as set out in the draft Bill[[14]](#footnote-14)*.*

12.6 To amplify on this: under clause 62 (2):

“To assist in identifying and reporting on *those* patterns and themes”[[15]](#footnote-15)

the academics might take account of information from the sources identified in clause 62 (3) (a) to (k) of the draft Bill [the various categories of family reports and other reports from the legacy bodies together with court judgements and law reports].

12.7 The question arises: were these exclusionary or inclusionary provisions?

* Were the academics precluded from considering any information whatsoever, other than in the above categories? or
* Might they, as is the academic wont, range more widely with literature searches and so forth in compiling their report so long as they complied with the requirement to consult at least the above categories?

12.8 Our view is that, in the context of control and limitation of the entire statutory scheme, the statutory intent was control and limitation on the academics – to prevent them from ranging more widely into consideration of the sectarian conflict in its entire context.

12.9 Of course, there was explicit commitment that the academics be professionally appointed, in accordance with ethical standards for the appointment of academics, and were to be independent in all respects – and in particular be independent of any political interference. But, in truth, the process would already have been tainted by reason of the academics’ work to be confined to the reports from the legacy bodies which themselves were tainted by their own terms of reference.

12.10 The HIU was required to provide to the IRG a report on:

* the patterns and themes it identified from its work; and
* The level of co-operation it had received in carrying out its work[[16]](#footnote-16).

12.11 Several points to note:

*Firstly,* the sifting process already described would have determined the focus of the HIU’s report. This meant that the ‘patterns and themes’ that could be identified by HIU for the purpose of this report could be only those which had emanated from the HIU’s selected case-load.

*Secondly,* there was no provision for anyone who may be subjected to any criticism in any such HIU report to the IRG to be able to challenge the report before it was delivered to the IRG.

*Thirdly,* it was problematic that anyone should be subjected to criticism for mere ‘failure to co-operate’ with any public body. Public bodies are vested with extensive powers to obtain information from individuals. Anyone who improperly obstructs any such public body in the due performance of its duties can rightly be subject to prosecution. But, on the other side of the coin, anyone, for instance, who seeks legal advice before responding to requests or demands from the HIU, may in the view of the HIU be thwarting its work and failing to co-operate with it. But surely that should not have been a proper ground of complaint by HIU to be repeated by it in its report to IRG?

13. Denial of citizens’ right of access to the courts for redress against abuse of power by the ICIR

13.1 The ICIR is to be an independent ‘international’ commission appointed by the governments of the United Kingdom and Ireland. The idea is that perpetrators will make protected disclosures to ICIR which will then assess the credibility of the disclosure and (at the request of the family concerned) issue to them a ‘family report’.

13.2 The problem that obviously arises is when a perpetrator makes a ‘confession’ of involvement in an act or acts of terrorist violence but seeks to implicate and identify others as involved in such terrorism.

13.3 How can ICIR deal properly and fairly with such allegations against others?

13.4 Under clause 43 (3) of the draft Bill the ICIR was to be prohibited from disclosing the name or the identity of:

* 1. Anyone from whom the ICIR had received any information about a death – so this would have been an informer’s charter;
	2. Anyone who might have been responsible for the death or for any act from which the death resulted – so this would have protected those who planned or ‘commissioned’ any death from being named or identified, as well as protecting anyone ‘who pulled the trigger’ from being named or identified.

13.5 So presumably, in any family report the ICIR would have had to redact from any confession (to be published in the family report) all names and all information capable of leading to the identification of:

* the confessor:
* the perpetrator (if other than the confessor);
* others who might have been involved in any direct or subsidiary role;

and

* others such as those who planned or ‘commissioned’ the crime.

13.6 With all such redaction from any confession it seems to us that families would rightly feel that the entire exercise amounted to a ‘cover up’. They would be left deeply unhappy that the full ‘truth’ had not been disclosed to them.

13.7 Para 8.3 of the Consultation Paper asserted in regard to the family reports:

**“**The ICIR would not be expected to verify information to the same standard of testing that would be expected in the criminal justice system. It would, however, take appropriate steps to evaluate the credibility of the information received before reporting to families. This could include use of a variety of information sources, interview and analytical techniques.” **[[17]](#footnote-17)**

13.8 It just seems to us that this in no way provides adequate protection for the rights of the individual.

13.9 In these circumstances, it is horrifying that by reason of the legal immunity in clause 44 (1) the ICIR would not be subject to judicial review: every individual should be entitled to the protection of our independent courts by way of judicial review, whenever powers might be exercised to the detriment of the individual by arbitrary or oppressive action by any public body or in circumstances where the public body has, even innocently, misunderstood or exceeded its powers.

13.10 For instance, absent our courts, what is to prevent or restrain the ICIR Commissioners engaging in arbitrary or oppressive action in taking:

‘*appropriate steps* to evaluate the credibility of the information received’[[18]](#footnote-18)?

13.11 It cannot be acceptable that the mantle of an international organisation (conferred on ICIR by the two Governments) can be used in this way to deprive the individual of the right of access to the courts for protection against any abuse of power.

13.12 ICIR would also be protected from scrutiny under Freedom of Information, Data Protection or National Archives legislation in the UK or Ireland[[19]](#footnote-19). It seems very dubious that such blanket immunity should be conferred on ICIR. If particular immunities are properly required by ICIR for the due performance of its functions, these should be itemised and the reasons for immunities justified.

1. Consultation Paper, para 5.1 [↑](#footnote-ref-1)
2. Draft Bill clause 44 [↑](#footnote-ref-2)
3. See SHA clause 47 [↑](#footnote-ref-3)
4. While this relates to Article 3 (rather than Article 2) of the European Convention on Human Rights, it is submitted that the investigatory requirements set out apply equally to Article 2 investigations as they do to Article 3 investigations [↑](#footnote-ref-4)
5. The officer who fired the fatal shot made a statement at the time but subsequently died. [↑](#footnote-ref-5)
6. *Irish Times* 17 February 2018 ‘Judge refuses to overturn verdict of lawful killing’ [↑](#footnote-ref-6)
7. *ibid* [↑](#footnote-ref-7)
8. Neither the Garda Commissioner nor Ms Gearty, a notice party, were represented [↑](#footnote-ref-8)
9. *Irish Times* 17 February 2018 ‘Judge refuses to overturn verdict of lawful killing’ [↑](#footnote-ref-9)
10. References to clauses, schedules and paragraphs relate to the draft Bill [↑](#footnote-ref-10)
11. [2019] EWHC 1523 (Admin) [↑](#footnote-ref-11)
12. The provisions also apply to family reports provided to injured persons under clause 19 and to publication of family reports under clause 20 (6) [↑](#footnote-ref-12)
13. Draft Bill clause 61 [↑](#footnote-ref-13)
14. Draft Bill clause 62 [↑](#footnote-ref-14)
15. Emphasis added [↑](#footnote-ref-15)
16. Draft Bill Schedule 16, para 6 (1) [↑](#footnote-ref-16)
17. Consultation Paper, para 8.2, p. 41 [↑](#footnote-ref-17)
18. Emphasis added [↑](#footnote-ref-18)
19. Consultation Paper, para 8.2, p. 41 [↑](#footnote-ref-19)