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Stormont House Agreement: Model Implementation Bill

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ARRANGEMENT OF CLAUSES

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PART 1

PRELIMINARY

Stormont House Agreement founding principles

1 Founding principles

(1) This section sets out principles which are to be considered—

(a) by public authorities in exercising functions under this Act, and

(b) by courts and tribunals in interpreting and applying this Act.

(2) These principles are referred to in this Act as "the founding principles" and may be referred to in other legislation, instruments and documents as "the Stormont House Agreement Founding Principles".

(3) The founding principles are—

(a) That the cause of reconciliation should be promoted.

(b) That the rule of law should be upheld.

(c) That the suffering of victims and survivors should be acknowledged and addressed.

(d) That it is right to facilitate the pursuit of justice and the recovery of information.

(e) That fundamental rights (including the Convention Rights within the meaning of section 1 of the Human Rights Act 1998 and other international standards) must be protected.

(f) That the approach to addressing issues arising from the past of Northern Ireland should be balanced, proportionate, transparent, fair and equitable.

Key concepts

2 "Troubles-related"

(1) A "troubles-related death" is a death which occurred in or after 1966 as a result of or in connection with political conflict in Northern Ireland.

(2) A "qualifying human rights breach" is a breach of Article 2 or 3 of the Convention (within the meaning of the Human Rights Act 1998) which occurred as a result of or in connection with political conflict in Northern Ireland.

(3) For the purposes of this section—

(a) it is immaterial whether a result or connection was direct or indirect; and

(b) it is immaterial how long a person took to die.

3 "Perpetrator"

(1) A person is a perpetrator in respect of an offence which resulted in a troubles-related death or in respect of a qualifying human rights breach if the person—

(a) committed the offence or breach (whether or not jointly with another and whether or not through another person),

(b) ordered, solicited or induced the commission of the offence or breach

(c) knowingly facilitated the commission of the offence or breach, or

(d) in any other way knowingly contributed to the commission of the offence or breach by a group of persons acting with a common purpose.

(2) In this section—

(a) a reference to an offence includes a reference to an attempted offence (in which case the reference to an offence which resulted in a troubles-related death includes a reference to an offence which was intended or likely to result in a troubles-related death);

(b) a reference to facilitating an offence or breach includes a reference to aiding or abetting it, or otherwise doing anything designed to encourage the commission of the offence or breach,

(3) In the application of this section to Part 2 a reference to an offence includes a reference to an act which amounted to professional misconduct (or to an attempted act which would have amounted to professional misconduct).

4 "Investigating bodies"

The following are investigating bodies for the purposes of this Act—

(a) the Police Service of Northern Ireland (including the Historical Enquiries Team);

(b) the Police Ombudsman for Northern Ireland;

(c) the Royal Military Police;

(d) the Royal Ulster Constabulary;

(e) the Police Complaints Board for Northern Ireland; and

(f) the Independent Commission for Police Complaints for Northern Ireland.

PART 2

HISTORICAL INVESTIGATIONS UNIT

Nature and status

5 Establishment

(1) There is to be an independent Historical Investigations Unit ("the HIU") to carry out investigations into troubles-related deaths and qualifying human rights breaches.

(2) The First Minister and Deputy First Minister must appoint a person as Director of the HIU.

(3) Before making an appointment the First Minister and Deputy First Minister must consult the Department of Justice.

(4) The First Minister and Deputy First Minister must—

(a) aim to appoint a person who will be seen as credible by persons with an interest in the exercise of functions under this Part, and

(b) publish a statement of their reasons for thinking that the person appointed satisfies paragraph (a).

(5) The Director of the HIU is a corporation sole.

(6) In making arrangements for staff the Director must aim, so far as is practicable, to secure a gender-balance and the necessary experience and aptitude to provide a gender-sensitive approach to the exercise of the HIU's functions.

(7) The Policing Board shall issue, and may from time to time revise, a Code of Ethics for the purpose of—

(a) laying down standards of conduct and practice for HIU staff;

(b) making HIU staff aware of the rights and obligations arising out of fundamental rights (including the Convention Rights within the meaning of section 1 of the Human Rights Act 1998 and other international standards).

(8) Schedule 1 makes additional provision about the staff, proceedings and the Code of Ethics for the HIU.

6 HIU family support staff

(1) The HIU shall make arrangements for the appointment of dedicated family support staff 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.

(2) Arrangements under subsection (1) are without prejudice to any other rights of family members to involvement in investigations

7 Independence

(1) The HIU must be administered in a way that ensures that persons carrying out or involved in an investigation have no connection with persons whose behaviour is being investigated or might require to be investigated.

(2) In subsection (1) "connection" includes—

(a) present and past connections; and

(b) both actual connections and connections that might reasonably be perceived or suspected.

(3) The reference in subsection (1) to involvement in an investigation includes a reference to the provision of research, archiving and other supporting functions.

(4) The HIU may not employ (in any capacity) a person who—

(a) has at any time been a member of the Royal Ulster Constabulary;

(b) is or has at any time been a member of the security service within the meaning of the Security Service Act 1989;

(c) is or has at any time been a member of any of the armed forces of the United Kingdom (including a voluntary or reserve force);

(d) has been convicted (at any time) of an offence relating to membership of a proscribed organisation contrary to section 11 of the Terrorism Act 2000 or a provision of any of the Northern Ireland (Emergency Provisions) Acts.

(5) Subsection (4) is without prejudice to the generality of subsection (1).

(6) In reflecting the founding principle relating to the protection of fundamental rights the HIU must have regard to any documents dealing with international human rights standards or practice that the HIU considers relevant.

8 Finance

(1) The Treasury must determine—

(a) amounts to be paid to or in respect of the Director of the HIU (by way of or in respect of remuneration, allowances and pension), and

(b) maximum amounts of expenditure by the Director of the HIU in respect of staff and administration.

(2) Amounts paid under subsection (1)(a) and amounts of expenditure incurred under subsection (1)(b) are to be charged on, and paid out of, the Consolidated Fund.

9 Five-year target

(1) The HIU must plan to complete the functions assigned to it by this Part by the end of the period of five years beginning with the date on which this section comes into force.

(2) The Secretary of State may by regulations amend subsection (1) so as to increase the length of the specified period.

(3) The Secretary of State must make provision for an increase under subsection (2) if—

(a) the Secretary of State is satisfied that the increase is necessary in order to ensure compliance with international obligations of the United Kingdom in respect of human rights, or

(b) the increase is requested by the First Minister and Deputy First Minister on the grounds that there is work under this Part which the HIU has not yet completed and which it should be enabled to complete.

Functions

10 Duty to carry out investigations

(1) The function of the HIU is to investigate—

(a) deaths which appear to the HIU to be troubles-related, and

(b) alleged or suspected human rights breaches which appear to the HIU to be qualifying human rights breaches.

(2) In subsection (1)(b)—

(a) "alleged" means alleged in a complaint made to the Police Ombudsman for Northern Ireland or to the HIU, and

(b) "suspected" means suspected by the HIU on reasonable grounds.

(3) The purpose of an investigation must be to—

(a) establish as many as possible of the relevant facts;

(b) identify, or facilitate 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.

(4) In applying the founding principles of balance, fairness and equitableness the HIU must, in particular, investigate with equal rigour irrespective of whether suspected or alleged perpetrators were or were not public authorities.

(5) In giving effect to subsection (3)(d) the HIU must publish a policy on what amounts to collusion; and for that purpose—

(a) the policy must aim to reflect the discussions of the meaning of collusion in the Third Report of Sir John Stevens's inquiry into certain murders published on 17 April 2003 and in the Collusion Inquiry Report of Mr Justice Peter Cory printed by Order of the House of Commons on 1 April 2004 (HC 471),

(b) the policy must identify any other relevant definitions or observations made by judges or others that the HIU takes into account in forming the policy,

(c) the policy must, in particular, include aiding and abetting, and deliberate conspiracy, within the concept of collusion, and

(d) the policy must also, in particular, provide that a person ("P1") colludes in the act or omission of another ("P2") when—

(i) P1 would be able to make a report about, or take some other action in respect of, P2's act or omission, acting in P1's capacity as a member or official of a public authority (within the United Kingdom or elsewhere), and

(ii) P1 takes no action in respect of P2's act or omission, or takes action which is not reasonably likely to be effective.

(6) The HIU must from time to time, at intervals of not more than one year, make a report to the Policing Board as to whether the HIU considers that the functions under this Part should be extended to include the investigation of serious troubles-related injuries; and if the HIU makes a recommendation for extension, the Secretary of State may by regulations—

(a) extend the functions of the HIU to the investigation of serious troubles-related injuries;

(b) define "troubles related" and "serious" in the context of injuries (and those definitions may make provision by reference to the opinion of the HIU);

(c) make consequential amendments of this Act.

11 Cases falling within HIU's jurisdiction

(1) The HIU may investigate the following classes of case—

(a) cases which have not been the subject of an investigation by another investigating body; and

(b) cases which have been the subject of an investigation by another investigating body, where—

(i) the investigation has not been completed;

(ii) the investigation has been completed, but the HIU has reason to believe that the investigation was or may have been flawed in some substantive or procedural respect (which may, in particular, include lack of independence);

(iii) the investigation has been completed, but the HIU has reason to believe that additional matters require to be investigated (whether as a result of the availability of new evidence or otherwise);

(iv) the investigation has been completed, but an interested person requests the HIU to re-investigate and the HIU thinks it appropriate to grant the request.

(2) The HIU may not investigate a case if—

(a) an investigation by another investigating body has been completed, and

(b) in the opinion of the HIU the case does not fall into a class described in subsection (1)(b)(ii) to (iv).

(3) The HIU may investigate a death whether or not it has been the subject of an inquest.

(4) For the purposes of this section "reason to believe" includes reason arising from a decision of a court or tribunal.

Conduct of investigations

12 Priorities

(1) In allocating resources to investigations the HIU must give priority to older cases.

(2) But subsection (1) does not apply where the HIU thinks the order of priority should be varied by reason of special circumstances.

(3) The HIU must from time to time, at intervals of not more than one year, provide a report to the Policing Board giving details of—

(a) the HIU's caseload since the previous report, and

(b) how the HIU has prioritised cases.

(4) In particular, the HIU may give priority to carrying out part of the investigation of a case if the HIU has reason to believe that it may not be possible to carry out that part of the

investigation along with other aspects of the case at a later time (whether because of the age or health of a potential witness or for some other reason).

13 Policing powers

(1) For the purpose of conducting, or assisting in the conduct of, an investigation under this Part, an officer of the HIU has all the powers and privileges of a constable throughout Northern Ireland and the adjacent United Kingdom territorial waters.

(2) Section 32(3) of the Police (Northern Ireland) Act 2000 (interpretation) applies for the purposes of subsection (1).

(3) Section 66 of the Police (Northern Ireland) Act 1998 (offences) applies to a person to whom subsection (1) applies as it applies to a constable.

(4) A person to whom subsection (1) applies is not to be treated as being in police service for the purposes of—

(a) Article 145 of the Trade Union and Labour Relations (Northern Ireland) Order 1995; or

(b) Article 243 of the Employment Rights (Northern Ireland) Order 1996.

(5) The Department of Justice in Northern Ireland must by order provide that any provision of the Police and Criminal Evidence (Northern Ireland) Order 1989 which relates to investigation of offences conducted by police officers (within the meaning of that Order) is to apply, subject to such modifications as the order may specify, to investigations under this Part conducted by persons who are not police officers (within the meaning of that Order).

Reports of investigations' conclusions

14 Report to DPPNI

(1) When the HIU completes an investigation which concerns the commission of a crime it must as soon as reasonably practicable provide a report of the findings (a "prosecution report") to the Director of Public Prosecutions for Northern Ireland ("DPPNI").

(2) The HIU must—

(a) before providing a prosecution report, consult the DPPNI about any evidential issues appearing to the HIU to arise, and

(b) reflect the results of that consultation in the prosecution report.

(3) A prosecution report must include disclosure of all information that is or could be relevant to the decision as to what action, if any, to take as a result of the investigation.

(4) The DPPNI must ensure that consideration of and decisions in connection with a prosecution report are taken without the involvement of any person who was involved in any capacity in any aspect of previous consideration of, or decisions in relation to—

(a) the same case, or

(b) a case concerning some or all of the same people.

(5) In relation to decisions arising from a HIU investigation to—

(a) discontinue proceedings under section 32 of the Justice (Northern Ireland) Act 2002, or

(b) apply the public interest test under the Code for Prosecutors issued further to section 37 of the Justice (Northern Ireland Act 2002,

the DPPNI may not decline to prosecute solely on the grounds that the alleged perpetrator was or may have been acting (or purporting to act) on behalf of a public authority.

15 Report to deceased's family

(1) When the HIU completes an investigation of a death it must as soon as reasonably practicable provide a report of the findings to the deceased's family (a "family report").

(2) For that purpose "family" means persons who the HIU thinks it is appropriate to treat as the family of the victims; including, as a general rule—

(a) spouses and partners,

(b) former spouses and partners,

(c) parents,

(d) children

(e) siblings, and

(f) any person whom the HIU thinks had a relationship of a family character with the victim.

(3) A family report must include as much information about the investigation and its findings as the HIU believes can be made public without prejudicing the administration of justice.

(4) In particular, a family report must set out the HIU's conclusions on—

(a) the matters specified in section 10(3)(c) and (d) (lawfulness and collusion);

(b) whether the actions investigated had or may have been wholly or partly motivated by racial, religious or other sectarian factors;

(c) whether the actions investigated were or may have been connected with other offences or actions (whether or not already investigated);

16 Report to other victims' families

(1) When the HIU completes an investigation of a death it must as soon as reasonably possible prepare a report (an "other victims report") which it must make available on request to other victims or their families.

(2) For that purpose—

(a) "other victims" means persons who the HIU thinks were killed or injured in the course of the actions considered by the investigation, and

(b) "family" has the same meaning as in section 15(2).

17 Other reports

(1) At any stage during an investigation, the HIU may make interim reports available pending the production of the reports under sections 15 and 16.

(2) The HIU must from time to time, at intervals of not more than one year, provide a report to the Implementation and Reconciliation Group—

(a) recommending themes to be examined by the IRG, and

(b) specifying patterns emerging in information before the HIU which provide the basis for recommendations under paragraph (a).

18 Public statements

The HIU may make a public statement about the results of an investigation.

19 Non-publication of information putting lives at risk

(1) This section applies to a report or statement under sections 15 to 18.

(2) The HIU may omit information from a report or statement if satisfied that inclusion of the information would put an individual's life at risk.

(3) The Director of the HIU—

(a) must designate staff with responsibility for assessing whether subsection (2) should apply in particular cases (and those staff must have operational independence from staff carrying out investigations), and

(b) must make decisions under subsection (2) personally, having regard to the recommendations of the designated staff.

Relationship with other bodies

20 Other investigations

(1) If the HIU notifies an investigating body that the HIU is investigating a case, the investigating body may not begin or continue any investigation into that case.

(2) If the Police Ombudsman for Northern Ireland receives a complaint which in the Ombudsman's opinion could be investigated by HIU—

(a) the Ombudsman must refer to the complaint to the HIU for investigation;

(b) if the HIU thinks it does not have jurisdiction to investigate the complaint, it must decline the referral and the Ombudsman may investigate.

21 International obligations

(1) The Secretary of State may by regulations make provision designed to facilitate compliance with obligations entered into—

(a) by the United Kingdom in respect of cross-border troubles-related deaths or breaches, or

(b) by the government of another State in respect of cross-border troubles-related deaths or breaches.

(2) A death or breach is "cross-border" if an act or omission that was or may have been committed in connection with the death or breach occurred or may have occurred outside the United Kingdom.

(3) Regulations may, in particular—

(a) permit or require the HIU to cooperate with a specified organisation outside the United Kingdom;

(b) permit or require the HIU to disclose information to a specified organisation outside the United Kingdom.

(4) Regulations may make incidental and consequential provision including, in particular, provision modifying the effect of this Act where the Secretary of State thinks it necessary or expedient for the purpose of facilitating compliance with obligations of the kind specified in subsection (1)(a) or (b).

22 Disclosure to HIU

(1) A public authority must comply, within such period as the Director of the HIU thinks reasonable, with a request of the HIU, for the purpose of an investigation under section 10, to—

(a) provide information to the HIU;

(b) allow the HIU to access information kept by the public authority.

(2) The HIU must include a unit consisting of members of staff with responsibility for accessing records kept by other public authorities (and those staff must have appropriate training in confidentiality and the rules of onward disclosure).

(3) A duty or power under this Act to disclose information to the HIU, or to provide access to information for the HIU, has effect despite any provision of—

(a) the Data Protection Acts,

(b) the Freedom of Information Act 2000,

(c) the Official Secrets Acts,

(d) the Regulation of Investigatory Powers Act 2000, or

(e) any other enactment.

(4) A duty or power under this Act to disclose information to the HIU, or to provide information for the HIU, overrides legal professional privilege in respect of advice given to a public authority (but not in respect of advice given to an individual in a personal capacity).

(5) The duty under subsection (1) has effect despite any obligation of confidentiality or other limitation on disclosure (including an obligation or limitation imposed by or by virtue of an enactment).

(6) Where the HIU thinks that a document or class of document, or material of a specified description or class, might become the subject of a request under subsection (1) or a power or duty under this Part, the HIU may direct that it must not be destroyed, damaged or altered; and a public authority must comply with a direction.

23 Transfer of legacy files

(1) The Police Service of Northern Ireland must as soon as reasonably practicable transfer to the HIU—

(a) all files of the Historical Enquiries Team, and

(b) all other information relating to the investigation of matters falling with the jurisdiction of the HIU.

(2) On transfer the HIU is responsible for the management of the files (including disclosure) in a manner that is compatible with the Convention Rights (within the meaning of the Human Rights Act 1998); and, as soon as is reasonably practicable after transfer, the HIU must notify the Police Service of Northern Ireland of the arrangements made by the HIU for that purpose.

(3) The Police Ombudsman for Northern Ireland must as soon as reasonably practicable transfer to the HIU all files relating to the investigation of matters falling with the jurisdiction of the HIU.

24 Failure to cooperate

(1) It is an offence for a person to fail to comply with a duty under this Part to—

(a) disclose information to the HIU, or

(b) provide access to information for the HIU.

(2) It is an offence for a person 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.

(3) An offence under this section is punishable on summary conviction with a fine.

(4) An offence under this section may be committed by an organisation or by an officer or employee of an organisation (or both).

25 Referrals from the DPPNI

The HIU must, at the request of the DPPNI, ascertain and give to the DPPNI—

(a) information about a troubles-related death or qualifying human rights breach appearing to the DPPNI to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland, and

(b) information appearing to the DPPNI to be necessary for the exercise of the DPPNI's functions.

26 Disclosure to the ICIR

(1) The HIU shall provide copies of such information as is requested by the Independent Commission on Information Retrieval ("ICIR") in the exercise of its functions.

(2) In order to facilitate the disclosure provided for in subsection (1), the HIU shall make such arrangements to ensure that—

(a) the HIU disclosure unit referred to in section 22(2) is responsible for providing such information;

(b) no other HIU staff (including investigators) are aware of the content of any request of information from the ICIR.

27 Duties to cooperate with the Coroner

(1) The HIU shall comply with any request of the Coroner to provide information in connection with legacy inquests.

(2) The HIU shall ensure that the HIU disclosure unit referred to in section 22(2) is responsible for providing such information.

(3) The HIU shall establish a Coroner's team to provide investigative services to the Coroner in relation to legacy inquests.

(4) The HIU Director shall ensure the Coroner's team—

(a) is operationally separate from other HIU investigations;

(b) complies with requests from the Coroner for investigative support in connection with inquests into troubles-related deaths;

(c) provides support in a manner that appears to the HIU Director to be appropriate for legacy inquests;

(d) complies with the Convention rights.

(5) In this section "legacy inquests" means inquests into troubles-related deaths.

28 Oversight by the Policing Board

(1) The Police (Northern Ireland) Act 2000 is amended as follows.

(2) In section 3 (general functions of the Board), after subsection (3B) insert—

"(3C) The Board shall—

(a) monitor the exercise of the functions of the Historical Investigations Unit ("HIU");

(b) assess the level of public satisfaction with the performance of the HIU;

(c) make arrangements for encouraging the co-operation of the public with the HIU."

(3) In section 33A (provision of information to Board), after subsection (8) insert—

"(9) This section applies to the Director of the Historical Investigations Unit ("HIU") as it applies to the Chief Constable.

In the application of this section to the Director of the HIU—

(a) each reference to the Chief Constable is to be read as a reference to the Director of the HIU;

(b) the reference in subsection (1) to the exercise of any of the Board's functions is to be read as a reference to the exercise of any of the Board's functions in relation to the HIU."

(4) In section 76A (disclosure of information and holding of inquiries) after subsection (6) insert—

"(7) In relation to disclosure by the HIU the grounds specified in subsection (1)(a) do not apply."

(5) In section 57 (annual and other reports by the Board) in subsection (2), after paragraph (m) insert—

"(n) the exercise of the functions of the HIU;

(o) the level of public satisfaction with the performance of the HIU;

(p) the effectiveness of arrangements made under section 3(3C)(c) for obtaining the co-operation of the public with the HIU."

(6) In section 59 (general duty of Chief Constable to report to Board), after subsection (11) insert—

"(12) The Director of the HIU shall report to the Board on request as to—

(a) how the Director intends a function of the HIU to be exercised; or

(b) whether the exercise of function was in accordance with that intention.

(13) Subsections (2) to (5), but not subsection (3)(a), apply to a report under subsection (12).

(14) In the application of subsections (2) to (5) to a report under subsection (12), each reference to the Chief Constable is to be read as a reference to the Director of the HIU."

(7) In section 60 (inquiry by Board following report by Chief Constable), after subsection (20) insert—

"(21) Where the Board—

(a) has considered a report on any relevant HIU matter submitted by the HIU Director under section 59, and

(b) considers that an inquiry ought to be held under this section into that matter or any related matter disclosed in the report by reason of the gravity of the matter or exceptional circumstances, the Board may, after consultation with the HIU Director, cause such an inquiry to be held.

(22) Subsections (2) to (17) of this section apply to an inquiry which the Board causes to be held under subsection (21) as they apply to an inquiry caused to be held under subsection (1).

(23) In the application of subsections (2) to (17) to an inquiry which the Board causes to be held under subsection (21)—

(a) each reference to the Chief Constable (except the reference in subsection (16)(a)) is to be read as a reference to the HIU Director;

(b) subsection (16) is to be read as including a requirement to send a copy of the report of any inquiry to the HIU Director (as well as to the persons in subsection (16)(a) to (d))."

(8) In Part 6 of Schedule 1 (procedure of the Northern Ireland Policing Board), after paragraph 19A insert—

"Attendance of HIU Director at meetings

19B.—(1) The Director of the HIU must attend a meeting of the Board if the Board gives the Director reasonable notice.

(2) The HIU Director may not be given notice under this paragraph of a meeting that is to be held in accordance with—

(a) paragraph 18, except where section 60 applies in relation to a) a report on any relevant HIU matter submitted by the HIU Director under section 59, or

(b) paragraph 19."

29 Inspection of the HIU

(1) In section 46(1) of the Justice (Northern Ireland) Act 2002 (Chief Inspector of Criminal Justice in Northern Ireland: organisations to be inspected) after paragraph (u) insert—

"(v) The Historical Investigations Unit ("HIU")."

(2) In section 49 of the Justice (Northern Ireland) Act 2002 (reports) for subsection (1A) substitute—

"(1A) In this section "protected information" means—

(a) in relation to inspections of the HIU, information the inclusion of which in a report would put an individual's life at risk, and

(b) in any other case, information the inclusion of which in a report would be against the public interest on the ground of national security."

(3) In section 54 of the Police Act 1996 (appointment and functions of inspectors of constabulary) after subsection (2BA) insert—

"(2C) The Northern Ireland Policing Board may request the inspectors of constabulary to carry out an inspection into the Historical Investigations Unit; and a request under this subsection may include a request for the inspection to be confined to specfied matters of that Unit."

(4) In section 55 of the Police Act 1996 (publication of reports) after subsection (2A) insert—

"(2B) In relation to reports under section 54 (2C) the grounds specified in subsection (2)(a) do not apply."

(5) In section 55 of the Police Act 1996 (publication of reports) after subsection (7) insert—

"(8)In this section in relation to reports under section 54(2C)—

(a) references to the local policing body mean the Northern Ireland Policing Board, and

(b) references to the Chief Officer of Police means the Director of the Historical Investigations Unit."

30 HIU Complaints

In the Police (Northern Ireland) Act 1998 (c 32)—after section 60ZB insert—

"60ZC Historical Investigations Unit

(1) In relation to the exercise of specified powers the Ombudsman and the Director of the Historical Investigations Unit (HIU) shall, with the approval of the Policing Board, establish procedures corresponding or similar to any of those established by virtue of this Part.

(2) "Specified powers" means the policing powers exercised by officers of the HIU provided for under section 13 of the [Model Implementation Bill] and specified in an agreement under subsection (1)."

In section 61(5) (reports), at the end of paragraph (b) insert—

"; and if the report concerns the HIU, to the HIU."

31 Finance of external bodies supporting HIU functions

(1) In relation to the functions discharged by the bodies referred to in sections 27 to 30 in relation to the HIU, the Treasury must determine amounts to be paid to or in respect of expenses incurred in the discharge of functions in this section.

(2) Amounts paid under subsection (1) and are to be charged on, and paid out of, the Consolidated Fund.

PART 3

INDEPENDENT COMMISSION ON INFORMATION RETRIEVAL

32 Establishment

(1) In this Act "the ICIR" means an independent organisation established by an agreement ("the Founding Agreement"), made in connection with the affairs of Northern Ireland between Her Majesty's Government in the United Kingdom and the Government of the Republic of Ireland, to establish an Independent Commission on Information Retrieval to enable victims to seek and privately receive information about troubles-related deaths of members of their families.

(2) The text of the Founding Agreement is set out in Schedule 2.

(3) The Secretary of State and the First Minister and Deputy First Minister shall take any necessary steps and make any necessary arrangements to—

(a) ensure that the ICIR has the independence and autonomy provided for in the Founding Agreement, and

(b) comply with the obligations of Her Majesty's Government in the United Kingdom under the Founding Agreement.

(4) This section shall come into force on such day as the Secretary of State, after consulting the Minister for Justice and Equality of the Republic of Ireland, may by order made by statutory instrument appoint.

(5) This section and sections 33 to 35 shall cease to have effect at the end of the period of five years beginning with the date on which this section comes into force; but—

(a) the Secretary of State, after consulting the Minister for Justice and Equality of the Republic of Ireland, may by order made by statutory instrument extend or revive this section and sections 33 to 35 for a period specified in the order, and

(b) an order under this subsection may include such transitional provisions as appear to the Secretary of State to be expedient.

(6) The Secretary of State shall make regulations for the decommissioning of the ICIR in accordance with this section; and the regulations must, in particular—

(a) incorporate arrangements determined by the Commission for the archives to be maintained and protected from disclosure for the period of 50 years beginning with the date on which this section ceases to have effect, and

(b) provide for or continue provision for offences or other provisions designed to ensure that persons engaged in the work of the ICIR do not disclose information obtained by the ICIR.

33 Capacity, immunities and finance

(1) The Secretary of State may by regulations—

(a) confer on the ICIR the legal capacities of a body corporate;

(b) confer on the ICIR, in such cases, to such extent and with such modifications as the regulations may specify, any of the privileges and immunities set out in Part I of Schedule 1 to the International Organisations Act 1968 (and the regulations must, in particular, provide immunity from proceedings for judicial review);

(c) confer on members and servants of the ICIR and members of their families who form part of their households, in such cases, to such extent and with such modifications as the regulations may specify any of the privileges and immunities set out in Parts II, III and V of that Schedule;

(d) make provision about the waiver of privileges and immunities.

(2) In subsection (1) "servants of the ICIR" includes agents of, and persons carrying out work for or giving advice to, the ICIR.

(3) Regulations under subsection (1)—

(a) may make different provision for different cases (including different provision for different persons);

(b) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(4) The Secretary of State must—

(a) make payments to the ICIR or to members of the ICIR;

(b) provide for the ICIR such premises and facilities, and the services of such staff, as the Secretary of State thinks appropriate;

(c) defray expenses of the ICIR in accordance with the Founding Agreement; and

(d) as soon as reasonably practicable after the commencement of this section, publish arrangements for the matters specified in paragraphs (a) to (c) that comply with any requirements of the Funding Agreement for ensuring the operational independence of the ICIR.

(5) Amounts paid or incurred by virtue of this section are to be charged on, and paid out of, the Consolidated Fund.

34 "Victims and survivors"

(1) In this Part "victims and survivors" means the family of deceased persons whose deaths were troubles-related.

(2) For that purpose "family" means persons who the ICIR thinks it is appropriate to treat as the family of the deceased; including, as a general rule—

(a) spouses and partners,

(b) former spouses and partners,

(c) parents,

(d) siblings,

(e) children, and

(f) any person who the ICIR thinks had a relationship of a family character with the deceased.

35 The work of the ICIR

(1) The Secretary of State must make regulations conferring immunities or other protection on persons in respect of or in connection with communication or cooperation with the ICIR.

(2) The Secretary of State must make regulations enabling the ICIR to require all public authorities (including the HIU) to provide information.

(3) Information provided to the ICIR is not admissible as evidence in criminal or civil legal proceedings.

(4) The Secretary of State must make regulations about information provided to the ICIR that is designed to amplify or give effect to subsection (3), and to give effect to provisions of the Founding Agreement about—

(a) confidentiality and non-disclosure, and

(b) inadmissibility in criminal and civil proceedings, and

(c) ensuring that a person providing information does not become liable to criminal or civil proceedings, or administrative sanctions, by reason only of providing the information.

(5) The Secretary of State must make regulations prohibiting—

(a) the provision of false information to the Commission by a person who knows the information to be false;

(b) obstruction of the work of the ICIR (including the destruction by public authorities of information likely to be required by the ICIR);

(c) the disclosure of information by members or staff of the ICIR in contravention of regulations under subsection (4)(a).

(6) Regulations under this section—

(a) may apply an existing enactment with or without modifications;

(b) may confer a discretionary function;

(c) may create an offence.

(7) The ICIR must conduct its proceedings in accordance with any Code of Practice adopted and published by it.

PART 4

IMPLEMENTATION AND RECONCILIATION GROUP

Definitions

36 Definitions

In this Part—

(a) "the IRG" has the meaning given by section 37(1);

(b) "the IRG analysts" means the research analysts and experts engaged by the IRG to compile the evidence base;

(c) "the academic experts" means the independent academic experts commissioned by the IRG to produce the report on themes;

(d) "the archives" means the Oral History Archive ("the OHA") and other existing oral history archives with which the OHA works in accordance with section 63(1);

(e) "the evidence base" means the evidence base established by the IRG to facilitate the report on themes;

(f) "information recovery" means the process conducted by the ICIR to enable victims to seek and privately receive information about troubles-related deaths of members of their families;

(g) "the legacy institutions" means the HIU, the ICIR and the OHA;

(h) "the report on themes" means the report on themes commissioned by the IRG from the academic experts;

(i) "Stormont House Agreement" means the agreement between the political leaders of Northern Ireland, the Government of the United Kingdom and the Government of the Republic of Ireland published on 23 December 2014;

(j) "themes" means patterns and themes relating to or arising from the political conflict in Northern Ireland;

(k) "the two Governments" means the Government of the United Kingdom and the Government of the Republic of Ireland.

Nature, status and organisation

37 Establishment

(1) There shall be a body corporate to be known as the Implementation and Reconciliation Group ("the IRG").

(2) The members of the IRG shall be appointed as soon as practicable after the entry into force of this section and in accordance with nominations under this section.

(3) The IRG shall consist of 11 members nominated in accordance with the following provisions.

(4) The First Minister and Deputy First Minister shall nominate as Chair of the IRG a person who appears to them to be independent and of international standing.

(5) Of the other members—

(a) three shall be nominated by the Democratic Unionist Party;

(b) two shall be nominated by Sinn Fein;

(c) one shall be nominated by the Social Democratic and Labour Party;

(d) one shall be nominated by the Ulster Unionist Party;

(e) one shall be nominated by the Alliance Party;

(f) one shall be nominated by the Government of the United Kingdom of Great Britain and Northern Ireland; and

(g) one shall be nominated by the Government of the Republic of Ireland.

(6) A person who in the opinion of the First Minister and Deputy First Minister, acting jointly, holds a public elected position, shall not be eligible for appointment as a member of the IRG.

(7) The First Minister and Deputy First Minister, acting jointly, shall encourage the persons responsible for making nominations to work together (in accordance with their respective domestic laws) with the aim of ensuring a gender-balance within the IRG.

(8) The First Minister and Deputy First Minister, acting jointly, shall encourage the persons responsible for making nominations to ensure that each member—

(a) has qualities and experience which are likely to command the respect and confidence of all those dealing with the IRG, including victims and other bodies concerned with troubles-related deaths;

(b) will act independently and impartially as a member of the IRG, free from any political interference;

(c) has experience and skills which are relevant to the functions of the IRG;

(d) neither has nor expects to have any financial or other interests that are reasonably likely to conflict with the exercise of the functions of a member.

38 Chair of the IRG

(1) The Chair of the IRG shall be appointed for the duration of the IRG, subject to the provisions of this section.

(2) If the Chair resigns by notice in writing to the First Minister and Deputy First Minister, they shall appoint a replacement as soon as reasonably practicable.

(3) If the First Minister and Deputy First Minister are satisfied that the Chair is no longer able, willing or fit to perform the functions of the office, they may dismiss the Chair; and they shall appoint a replacement as soon as reasonably practicable.

(4) For the purposes of subsection (3)—

(a) a person is no longer fit to perform the functions of the Chair if, in particular, the person no longer satisfies the criteria for appointment set out in section 37(8); and

(b) before the First Minister and Deputy First Minister dismiss the Chair under subsection (3), they must consult the Secretary of State.

(5) Proceedings of the IRG shall not be invalidated by reason of a vacancy or irregularity in the office of Chair.

39 Other Members of the IRG

(1) Members of the IRG, other than the Chair, shall be nominated for a term of three years, which shall be renewable, subject to subsection (2).

(2) Upon completion of the mandate of the IRG, the appointment of any remaining members lapses.

(3) If a member resigns by notice in writing to the body who nominated the member in accordance with section 37(5), that body shall nominate a replacement as soon as reasonably practicable.

(4) If the Chair considers that a member is no longer able, willing or fit to perform the functions of the office, the Chair may dismiss that member; and the original nominating body shall nominate a replacement as soon as reasonably practicable.

(5) For the purposes of subsection (4)—

(a) a person is no longer fit to perform the functions of the office of a member if the person no longer satisfies the criteria for appointment set out in section 37(8); and

(b) before the Chair dismisses a member under subsection (4), the Chair must consult the First Minister and Deputy First Minister and the original nominating body.

(6) Proceedings of the IRG shall not be invalidated by reason of a vacancy or irregularity in the membership.

40 Remuneration and allowances

The Chair, in consultation with the First Minister and Deputy First Minister and the two Governments, shall determine the terms of appointment of members including, in particular, whether members shall work for the IRG on a full-time or part-time basis (according to the requirements of the IRG from time to time).

41 Secretariat

(1) The IRG shall appoint a Secretariat to provide professional and administrative support to the IRG, including the IRG analysts.

(2) The IRG shall appoint the Chief Executive and other staff of the secretariat.

(3) In appointing staff the IRG shall aim to ensure that each member of the Secretariat satisfies the principles set out in section 37(8) in respect of members of the IRG.

(4) Staff may be (but need not be) appointed on secondment from a public authority.

42 Funding

(1) The Treasury must determine—

(a) amounts to be paid to or in respect of the Chair of the IRG and other members (by way of or in respect of remuneration, allowances and pension), and

(b) maximum amounts of expenditure by the Chair of the IRG in respect of staff and administration.

(2) Amounts paid under subsection (1)(a) and amounts of expenditure incurred under subsection 1(b) are to be charged on, and paid out of, the Consolidated Fund.

43 Annual report

(1) The IRG shall publish at intervals not less than a year a report on its activities.

(2) The report may—

(a) include recommendations to groups and bodies in Northern Ireland, including the legacy institutions, and to the two Governments for further work on implementation and reconciliation within the scope of its mandate;

(b) comment on the level of co-operation between the legacy institutions.

44 Governance

(1) Subject to subsection (2), the IRG shall take decisions by a simple majority of its members present and voting.

(2) The approval of at least seven members of the IRG shall be required for the decision to commission the report on themes.

45 Duration

(1) The IRG shall exercise its functions, or as many of them as have not otherwise expired, until the end of the period of six months beginning with the date of publication of the report on themes.

(2) The Secretary of State may by regulations made by statutory instrument amend subsection (1) so as to increase the length of the specified period.

Objective and functions

46 Objective and functions

The IRG shall—

(a) oversee the archives and information recovery so as to ensure fulfilment of the objectives of the Stormont House Agreement;

(b) at the end of the period of five years beginning with the date of publication of the Stormont House Agreement, commission a report on themes and oversee its production;

(c) encourage and support other initiatives which contribute to reconciliation, better understanding of the past and reducing sectarianism; and

(d) encourage consideration of statements of acknowledgement from any individual or group or body participating in the conflict in Northern Ireland, including the two Governments.

47 Exercise of functions

(1) The IRG shall have full independence (including complete operational autonomy).

(2) The IRG shall conduct the process of the report on themes with sensitivity and rigorous intellectual integrity, devoid of any political interference.

(3) The IRG shall conduct its proceedings in accordance with any Code of Practice adopted and published by it.

Relationship with other bodies

48 Relationship with other bodies

(1) To facilitate its oversight of themes, archives and information recovery, the IRG shall at intervals not less than a year receive separately from the OHA and the ICIR a report—

(a) suggesting themes for analysis, and

(b) describing the progress of the work of the institution.

(2) Upon receipt of the report in subsection (1), the IRG may make recommendations to the OHA and the ICIR as to their future activities.

Report on themes

49 Report on themes

(1) In accordance with section 46(b) the IRG shall commission the report on themes from academic experts.

(2) The IRG shall decide the themes to be included in the report, after consultation with—

(a) the legacy institutions; and

(b) victims and organisations representing their interests.

(3) The academic experts must, in the opinion of the IRG—

(a) be of proven academic standing in their field;

(b) be capable of and committed to acting with sensitivity and rigorous intellectual integrity;

(c) be capable of and committed to acting independently, free from any political interference.

(4) The IRG may commission the report on themes with a flexible structure so that—

(a) different academic experts or groups of experts may work on separate themes;

(b) studies of separate themes may constitute separate sections of a composite report.

(5) The IRG shall aim to ensure completion of the report on themes within three years of its commission.

(6) The IRG shall aim to publish the report on themes within one year after its completion.

(7) In the context of the publication of the report, the IRG shall consider making recommendations for activities of outreach and reconciliation, including statements of acknowledgement.

50 Evidence base

(1) To facilitate the report on themes, the IRG shall prepare an evidence base.

(2) The IRG may engage suitably qualified and vetted research analysts and other experts to compile the evidence base.

(3) The legacy institutions shall provide the IRG analysts with reports and summaries of cases and access to other data relevant to the evidence base.

(4) The evidence base may include both open source and confidential material.

(5) Where the legacy institutions pass confidential information to the IRG analysts, those institutions may specify conditions as to its storage, use and publication.

(6) The IRG may enter into agreements with other public authorities in respect of the provision of information.

(7) The two Governments shall facilitate the provision of information relevant to the evidence base.

PART 5

ORAL HISTORY ARCHIVE

Definitions

51 Definitions

In this Part –

(a) "collectors" means persons collecting oral history material on behalf of the OHA;

(b) "contributors" means persons contributing oral history material to the OHA;

(c) "the OHA" has the meaning given by section 52(2);

(d) "oral history material" includes recordings of interviews and related documentation;

(e) "PRONI" means the Public Records Office of Northern Ireland;

(f) "the Secretariat" means the Secretariat of the OHA established in accordance with section 60;

(g) "Stormont House Agreement" means the agreement between the political leaders of Northern Ireland, the Government of the United Kingdom and the Government of the Republic of Ireland published on 23 December 2014;

(h) "the Troubles" means the troubles which occurred in or after 1966 as a result of or in connection with political conflict in Northern Ireland;

(i) "the two Governments" means the Government of the United Kingdom and the Government of the Republic of Ireland.

Establishment and operation

52 Establishment

(1) The First Minister and Deputy First Minister, acting jointly, shall establish a resource designed to provide a central place for people from all backgrounds throughout the United Kingdom and Ireland to share experiences and narratives related to the Troubles.

(2) The resource shall be known as the Oral History Archive (and in this Part is referred to as the OHA).

(3) The First Minister and Deputy First Minister, acting jointly, shall determine the location of the OHA.

53 Principles of operation

(1) The First Minister and Deputy First Minister, acting jointly, shall make arrangements to ensure that the OHA operates independently, free from political interference, in accordance with the Stormont House Agreement.

(2) The OHA shall have regard to the founding principles in the exercise of its functions.

54 Code of Practice

(1) The OHA shall prepare and publish, in consultation with relevant stakeholders, a non-statutory Code of Practice to provide guidance on the exercise of its functions in accordance with international best practice.

(2) The Code of Practice must, in particular—

(a) include a Code of Ethics which will regulate the collection of oral history material and rights and safeguards for contributors;

(b) outline appropriate measures to facilitate contributions from victims and survivors;

(c) require the OHA to take reasonable steps to protect information that appears to the OHA to be sensitive or confidential, within the limits of the law;

(d) require OHA staff to ensure that collectors and contributors are made aware that oral history material may be admissible as evidence in criminal or civil legal proceedings (including proceedings initiated by the HIU);

(e) include provision designed to ensure that contributors and collectors appreciate the potential legal consequences of providing information.

Nature and status

55 Capacity

The Secretary of State may by regulations confer on the OHA the legal capacities of a body corporate.

56 Immunity from suit

(1) No action lies against a person who is –

(a) a member of the Executive Board of the OHA;

(b) a member of the Advisory Board of the OHA;

(c) a member of the Secretariat or other staff of the OHA;

(d) an agent of, or a person carrying out work for or giving advice to, the OHA,

in respect of any act or omission occurring in the execution or purported execution of the person's functions in connection with the OHA (but not an act or omission in bad faith).

(2) For the purposes of the law of defamation, qualified privilege under Part 1 of Schedule 1 of the Defamation Act 1996 attaches to—

(a) any statement made by a contributor by way of contribution to the OHA; and

(b) any record or publication of that statement by the OHA.

Governance

57 Appointment of Executive Board and Advisory Board

(1) The OHA shall be governed by an Executive Board, assisted by an Advisory Board.

(2) The Executive Board shall consist of three executive Directors.

(3) The Chair of the Executive Board and one other executive Director shall be appointed by the First Minister and Deputy First Minister, acting jointly.

(4) One Executive Director shall be appointed by the Secretary of State, in consultation with the Government of the Republic of Ireland.

(5) The Advisory Board shall assist the Executive Board by commenting on strategy and policy, recommending objectives and priorities, overseeing complaints, ensuring financial supervision and submitting annual reports to the IRG.

(6) The Advisory Board shall consist of seven members, of which—

(a) the Chair shall be appointed by the First Minister and Deputy First Minister, acting jointly, in consultation with the two Governments;

(b) three members shall be appointed by the First Minister and Deputy First Minister;

(c) one member shall be appointed by the Secretary of State;

(d) one member shall be appointed by the Secretary of State, in consultation with the Government of the Republic of Ireland;

(e) one member shall be the Deputy Keeper of the PRONI *ex officio.*

(7) Persons appointing or nominating members of the Executive Board and the Advisory Board shall aim to appoint or nominate persons who—

(a) have experience of—

(i) the management of public bodies;

(ii) the administration of archives;

(iii) the practice of oral history;

(iv) relevant academic work; or

(v) working with victims and survivors;

(b) have qualities which are likely to command the respect and confidence of contributors and other persons likely to engage with the OHA, including victims and survivors;

(c) are impartial, and perceived to be impartial, by contributors and other persons likely to engage with the OHA, including victims and survivors;

(d) have experience and skills which will assist the OHA in handling sensitive information and making judgements about the circumstances and timing of contributions being made public;

(e) neither have nor expect to have any financial, professional or other interests that are reasonably likely to conflict with the exercise of their functions.

(8) The Secretary of State, and the First Minister and Deputy First Minister, acting jointly, shall encourage the persons responsible for making appointments and nominations to work together (in accordance with their respective domestic laws) with the aim of ensuring a gender-balance within the OHA.

58 Tenure of Executive Directors

(1) In this section "Director" means an Executive Director of the OHA.

(2) The appointment of a Director is for five years, subject to the following provisions, and may be renewed.

(3) Where an Executive Director resigns by notice in writing to the person who appointed the Director, that person shall appoint a replacement as soon as is reasonably practicable.

(4) If the First Minister and Deputy First Minister, acting jointly, are satisfied that a Director is no longer able, willing or fit to perform the functions of the office, they may dismiss the Director (and a replacement shall be appointed as soon as is reasonably practicable in the same manner as the original appointment).

(5) For the purposes of subsection (4) a person is no longer able or fit to perform the functions of the office of Director if, in particular, the person no longer satisfies the criteria for appointment set out in section 57(7).

(6) The validity of proceedings of the OHA shall not be affected by a vacancy in the office of Director or by an irregularity in the appointment of a Director.

59 Tenure of members of Advisory Board

(1) In this section "member" means a member of the Advisory Board of the OHA.

(2) The appointment of a member is for five years, subject to the following provisions, and may be renewed.

(3) Where a member resigns by notice in writing to the person who appointed the member, that person shall appoint a replacement as soon as is reasonably practicable.

(4) If the First Minister and Deputy First Minister, acting jointly, are satisfied that a member is no longer able, willing or fit to perform the functions of the office, they may dismiss the member (and a replacement shall be appointed as soon as is reasonably practicable in the same manner as the original appointment).

(5) For the purposes of subsection (4) a person is no longer able or fit to perform the functions of the office of member if, in particular, the person no longer satisfies the criteria for appointment set out in section 57(7).

(6) The validity of proceedings of the OHA shall not be affected by a vacancy in the office of a member or by an irregularity in the appointment of a member.

60 Secretariat

(1) There shall be a Secretariat to provide research, archival, interviewing and other professional and administrative support to the OHA.

(2) The Executive Directors shall appoint the staff of the OHA.

(3) In appointing staff the Executive Directors shall aim to ensure that the Secretariat has experience and knowledge of—

(a) the potential for memory to provoke psychosocial and traumatic harm;

(b) gender sensitivity;

(c) handling sensitive information and making judgments about its suitability for public release; and

(d) the need to satisfy the principles set out in section 57(7) above.

(4) Staff may be (but need not be) appointed on secondment from a public authority, including PRONI.

Finance

61 Remuneration and allowances

(1) The Executive Directors shall be paid such remuneration and allowances as the First Minister and Deputy First Minister, acting jointly shall specify.

(2) The Executive Directors shall determine the remuneration and allowances of staff of the OHA subject to the provisions of section 62(1).

62 Funding

(1) The Secretary of State must, in consultation with the Executive Directors of the OHA—

(a) make payments to the OHA or to staff of the OHA;

(b) make payments of expenses to the members of the Advisory Board;

(c) provide for the OHA such premises and facilities, and the services of such staff, as the Secretary of State thinks appropriate;

(d) defray expenses of the OHA, including expenses of the Secretariat; and

(e) as soon as reasonably practicable after the commencement of this section, publish arrangements for the matters specified in paragraphs (a) to (d), together with a statement of the ways in which the arrangements ensure the operational independence of the OHA.

(2) Amounts paid or incurred by virtue of this section and section 61 are to be charged on, and paid out of, the Consolidated Fund.

Work of the OHA

63 The work of the OHA

(1) The OHA shall aim to—

(a) collect from people from all backgrounds and from throughout the United Kingdom and Ireland new oral history material; and

(b) draw together and work with existing oral history projects.

(2) For the purpose of achieving the objectives in subsection (1), the OHA must—

(a) conduct research for the purpose of identifying priorities for the acquisition of new oral history material, taking full account of existing oral history collections;

(b) consult stakeholders (nationally and internationally) for the purpose of publicising the work of the OHA, refining priorities for the acquisition of oral history material, and securing the trust of a wide spectrum of contributors;

(c) consult victims and survivors and organisations representing their interests for the purposes of providing appropriate facilities and support in relation to their contributions to the OHA;

(d) establish, in consultation with the IRG, a policy for the acquisition of oral history material designed to further the cause of reconciliation and to secure the participation of people from all backgrounds and from throughout the UK and Ireland;

(e) provide a central training programme designed to train people from across the UK and Ireland to collect interviews in their communities and organisations for deposit in the OHA and to ensure that collectors comply with the Code of Practice;

(f) make arrangements for interviews to be conducted across the United Kingdom and Ireland;

(g) make arrangements for reviewing contributions, including the transcription of interviews;

(h) make arrangements for follow-up with interviewees in order to finalise transcripts and the terms and conditions of the deposit;

(i) process and preserve recordings and relevant supporting data in a secure and confidential format;

(j) take all reasonable steps to safeguard contributions which are to be kept confidential;

(k) prepare and make available catalogues of oral history material;

(l) facilitate free public access to oral history material;

(m) make reports to the IRG at least annually about the progress of the OHA and identifying themes for consideration by the IRG.

(3) In pursuit of its aim of drawing together and working with other oral history projects, the OHA must—

(a) establish a comprehensive strategy for outreach to existing oral history projects;

(b) conduct research for the purpose of taking full account of other projects and liaising with stakeholders;

(c) appoint a designated member of the Secretariat to lead on this aspect of the work;

(d) offer the opportunity, where appropriate, to include in training programmes staff of existing oral history projects;

(e) provide technical support, including digitisation and the provision of digital copies in respect of contributions to the OHA;

(f) provide appropriate administrative support to enable the OHA, where appropriate, to accept, safeguard and provide access to existing oral history material concerning experiences and narratives related to the Troubles;

(g) to the fullest extent possible respect the terms of the original deposit and the wishes of existing oral history projects.

64 Arrangements with PRONI

The OHA and PRONI shall cooperate in making such arrangements as they see fit for the sharing of facilities, equipment and expertise.

65 Engagement with contributors

(1) In engaging with contributors the OHA shall take all reasonable steps to ensure that contributors understand that their engagement is voluntary and that they may withdraw from the process at any time.

(2) The OHA shall take all reasonable steps to ensure that contributors appreciate in advance potential legal consequences of engagement with the OHA.

(3) The OHA shall take all necessary steps to avoid identifying persons who have provided sensitive or confidential oral history material.

(4) The OHA will where possible provide all contributors with a copy of the final version of the oral history material which they have contributed.

Handling of information

66 Obtaining and holding information

(1) The OHA shall take steps to avoid taking possession of information relating to specific offences or alleged offences that have not been fully dealt with by the courts of all relevant jurisdictions.

(2) The OHA shall ensure that information received by it is kept in a secure manner that, in particular, ensures that the information is not used in a manner that breaches a person's rights under the European Convention on Human Rights.

67 Publication of information

(1) Subject to the provisions of this section, oral history material shall be publicly available.

(2) The OHA shall subject all material accepted by it to a review of its sensitivity to consider whether a contribution should be kept confidential for a specified period.

(3) The OHA may keep a contribution confidential for a specified period where—

(a) the contributor so requests; or

(b) in the absence of such a request, the OHA considers that publication would present a substantive risk to an individual.

(4) Where a contributor makes a request under subsection (2), the OHA shall discuss with the contributor the appropriateness of the period requested.

(5) After such discussion, the OHA shall—

(a) comply with that request;

(b) agree with the contributor a different period; or

(c) where the OHA considers that publication would present a substantive risk to an individual, decide that the contribution shall be kept confidential for a longer period than the contributor specified.

(6) Where the OHA proposes to take any decision under subsection (2)(b) or subsection (4)(c), it must—

(a) consult the contributor on its proposal and explain its reasoning;

(b) take account of the wishes of the contributor;

(c) ensure that such a decision is taken by or on the advice of properly trained staff; and

(d) comply with international best practice.

(7) A contribution may be kept confidential for a period longer than 30 years only if the OHA is satisfied that publication of the contribution or the relevant part would continue to present a substantive risk to an individual.

(8) The Data Protection Acts and the Freedom of Information Act 2000 shall not apply to—

(a) oral history material provided to the OHA or any of its servants or agents during the process of a contributor making a contribution and before that contribution is finalised by the OHA; and

(b) any contribution which the OHA keeps confidential in accordance with this section.

(9) If a court orders the OHA to disclose or provide access to a contribution, the OHA shall immediately notify the relevant contributor (or next of kin) and provide them with an opportunity to make representations to the relevant authority.

(10) For the purposes of this section—

(a) a "contribution" means a contribution of oral history material made by a contributor to the OHA and may include any part thereof;

(b) a "substantive risk to an individual" means, in relation to publication of a contribution, that publication is likely to cause substantial damage or distress to a living individual or might put an individual's life at risk.

Arrangements with the Republic of Ireland

68 Arrangements with the Republic of Ireland

(1) For the purpose of ensuring that the OHA provides a central place for people from all backgrounds throughout the United Kingdom and Ireland to share experiences and narratives related to the Troubles, the OHA may make such arrangements with bodies in the Republic of Ireland as it sees fit.

(2) The Northern Ireland Executive and the Secretary of State, as appropriate, shall facilitate this process, if necessary by the conclusion of arrangements between the two Governments.

PART 6

GENERAL

69 Interpretation

(1) In this Act—

"Coroner" means a coroner appointed under the Coroners Act (Northern Ireland) 1959;

"the founding principles" has the meaning given by section 1;

"the Historical Enquiries Team" means the Historical Enquiries Team established in September 2005 by the Police Service of Northern Ireland;

"the HIU" has the meaning given by section 5;

"information" includes documents, information held or recorded in any form and oral testimony provided to the ICIR;

"investigating bodies" has the meaning given by section 4;

"perpetrator" has the meaning given by section 3;

"public authority" has the same meaning as in section 6 of the Human Rights Act 1998 (acts of public authorities);

"troubles-related death" has the meaning given by section 2(1);

"troubles-related human rights breach" has the meaning given by section 2(2).

(2) References in this Act to Ministers and Departments are to Northern Ireland Ministers and Departments (except where the contrary is stated).

70 Regulations and orders

(1) Regulations under this Act shall be made by statutory instrument.

(2) Regulations may not be made under section [ ] unless a draft has been laid before and approved by resolution of each House of Parliament.*

(3) Regulations under sections 9(2), 21(1), 32(6), 33(1), 35(1), 35(2), 35(4), (35(5) and 55 shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(4) Regulations may—

(a) make provision that applies generally or only in specified cases or circumstances;

(b) make different provision for different cases or circumstances;

(c) include incidental, consequential and transitional provision.

(5) An order under section 13(5) is to be treated for all procedural purposes as if it were an order under section 56(2) of the Police (Northern Ireland) Act 1998.

* This section is left open to allow the balance between negative and affirmative resolution to be determined during enactment discussions.

SCHEDULES

SCHEDULE 1

STAFF AND PROCEEDINGS OF THE DIRECTOR OF THE HISTORICAL INVESTIGATIONS UNIT

This detailed schedule is not included in the Model Bill. The schedule would contain the details of information such as arrangements for staff pensions and conditions, applicability of a Code of Ethics and other matters.

SCHEDULE 2

TEXT OF THE AGREEMENT BETWEEN THE UNITED KINGDOM AND IRELAND ON THE ESTABLISHMENT OF THE INDEPENDENT COMMISSION ON INFORMATION RETRIEVAL

The British and Irish Governments:

Welcoming the provisions on The Past in the Stormont House Agreement reached on 23 December 2014 by themselves and the parties to the Northern Ireland Executive;

Reaffirming their commitment to the long-term peace and stability of Northern Ireland;

Remembering the victims and survivors of violence and the suffering of the families of those victims;

Recognising that the proposed Independent Commission on Information Retrieval will create the possibility for people to come forward with information that is not available from other sources;

HAVE AGREED as follows:

The Commission

1. Establishment

The States Parties to this Agreement agree that there shall be a Commission to be known as the Independent Commission on Information Retrieval, established in accordance with the provisions set out in this Agreement.

Objective and functions

2. Objective

The objective of the Commission shall be to enable victims and survivors to seek and privately receive information about troubles-related deaths of members of their families.

3. Guiding principles

In exercising its functions the Commission must aim to apply the guiding and additional principles set out in paragraphs 21 and 50 of the Stormont House Agreement.

4. Specific functions

For the purpose of achieving its objectives in accordance with the guiding principles, the Commission must—

(a) prepare, in consultation with relevant stakeholders, a non-statutory Code of Practice to provide guidance on the exercise of its functions in accordance with applicable international human rights standards;

(b) undertake outreach and other activities designed to publicise the work of the Commission and give individuals and organisations the necessary confidence to approach the Commission to provide information or to receive it;

(c) conduct research for the purpose of eliciting information or checking information received;

(d) work with victims and survivors, and organisations representing their interests, to provide appropriate support for those who engage with the Commission, including the regular provision of information about progress;

(e) make arrangements to take statements from individuals or organisations volunteering the provision of information;

(f) make arrangements for collating and analysing information received;

(g) compile reports for victims and survivors (which may provide evidence of institutional or organisational, but not individual, responsibility for deaths);

(h) recommend thematic lines of investigation to be commissioned by the IRG;

(i) compile and retain information in a secure and confidential form during the work of the ICIR and ensure the archives are maintained inviolably and confidentially for 50 years following the completion of its work, in a form that prevents information gathered by the ICIR being disclosed to law enforcement, intelligence agencies or other persons during this period.

(j) make reports to the IRG about progress of the Commission (which may identify classes of person who have or have not cooperated with the Commission).

The Commissioners

5. Appointment

(1) The Commission shall consist of five Commissioners.

(2) The Chair shall be appointed by joint decision of—

(a) Her Majesty's Government in the United Kingdom, having consulted the Office of the First Minister and Deputy First Minister in Northern Ireland, and

(b) the Government of Ireland.

(3) Two Commissioners shall be appointed by joint decision of the persons mentioned in sub-paragraph (2), on the nomination of the First Minister and Deputy First Minister in Northern Ireland.

(4) The persons mentioned in sub-paragraph (2) must publish a statement of their reasons for thinking that the person appointed satisfies sub-paragraph (8), and with respect to the Chair, sub-paragraph (7).

(5) One Commissioner shall be appointed by Her Majesty's Government in the United Kingdom.

(6) One Commissioner shall be appointed by the Government of Ireland.

(7) The Chairperson must be a person of international standing and reputation.

(8) Each Commissioner must—

(a) have qualities and experience which are likely to command the respect and confidence of all participants in the functions of the Commission, including victims and survivors, governments, security services and former members of paramilitary organisations;

(b) be independent, and perceived to be independent, of all persons likely to be subject to information retrieval procedures;

(c) be impartial, and perceived to be impartial;

(d) have experience and skills which make the Commissioner suitable to handle sensitive information and to make judgements about its reliability;

(e) neither have nor expect to have any financial or other interests that are reasonably likely to conflict with the exercise of their functions as Commissioner.

(9) The persons responsible for making appointments and nominations shall work together (in accordance with their respective domestic laws) with the aim of ensuring that the membership of the Commission includes at least two women.

6. Tenure

(1) The appointment of a Commissioner continues for the duration of the Commission, subject to the following provisions.

(2) Where a Commissioner resigns by notice in writing to the person who appointed or nominated the Commissioner in accordance with paragraph 4, that person may appoint or nominate a replacement.

(3) If Her Majesty's Government in the United Kingdom and the Government of Ireland, are satisfied that a Commissioner is no longer able, willing or fit to perform the functions of the office, they may dismiss the Commissioner (and a replacement shall be appointed in the same manner as the original appointment).

(4) For the purposes of sub-paragraph (3)—

(a) a person is no longer able or fit to perform the functions of the office of Commissioner if the person no longer satisfies the criteria for appointment set out in paragraph 5(8); and

(b) before taking action Her Majesty's Government in the United Kingdom must consult the Office of the First Minister and Deputy First Minister in Northern Ireland.

7. Remuneration and allowances

(1) Commissioners must be available to work for the Commission on a full-time basis.

(2) The Commissioners shall be paid remuneration and allowances in accordance with provision to be specified in legislation of the United Kingdom and in legislation of Ireland.

Administration

8. Secretariat

(1) There shall be a Secretariat to provide research and other professional and administrative support to the Commissioners.

(2) The Commissioners shall appoint the Chief Executive and other staff of the secretariat.

(3) In appointing staff the Commissioners shall aim to ensure that—

(a) the Secretariat has experience and knowledge of psychosocial and trauma counselling (including gender sensitivity),

(b) the Secretariat has experience of handling sensitive information and making judgments about its reliability, and

(c) that each member of the Secretariat satisfies the principles set out in paragraph 5(8) above.

(d) Staff may be (but need not be) appointed on secondment from a public authority.

(e) The expenses of the Secretariat shall be paid in accordance with provision to be specified in legislation of the United Kingdom and in legislation of Ireland.

9. Funding

(1) The States Parties to this Agreement undertake to provide the Commission with the resources reasonably necessary to perform its functions.

(2) The accounting procedures of the Commission shall be transparent, and designed to promote confidence in its independence, impartiality and integrity.

Operational

10. Independence

(1) The Commission shall have full independence (including complete operational autonomy).

(2) Immunities and privileges shall be conferred on the Commission, the Commissioners and the Secretariat by legislation of the United Kingdom and legislation of Ireland.

(3) The Commission may—

(a) undertake investigations into matters whether or not they are being or have been investigated by the HIU or other public bodies, and

(b) may require the provision of information by the HIU or other public bodies for the purpose of assessing the reliability of information provided to the Commission.

(4) The Commission (subject to provisions below about confidentiality) shall at intervals of not less than a year make, and publish, a report to the Implementation and Reconciliation Group—

(a) suggesting themes for analysis, and

(b) describing the progress of the work of the Commission.

11. Commencing an information retrieval process

(1) The ICIR may commence an information retrieval process in response to—

(a) requests from victims and survivors that a process be opened, or

(b) requests from persons with information that a process be opened.

(2) Information retrieval processes can be opened regardless of whether they relate to a case that has previously been investigated or is in the process of being investigated by—

(a) the Police Service of Northern Ireland;

(b) the Police Ombudsman for Northern Ireland;

(c) the Royal Military Police;

(d) the Royal Ulster Constabulary;

(e) the Independent Police Complaints Commission; and

(f) the HIU.

12. Engagement with victims and survivors

(1) In engaging with victims and survivors the Commission shall take all reasonable steps to ensure that victims and survivors understand that their engagement is voluntary and that they may withdraw from the process at any time.

(2) The Commission shall take all reasonable steps to ensure that victims and survivors appreciate in advance potential legal consequences of engagement with the Commission.

(3) The Commission shall provide victims and survivors and other persons who engage with the Commission with such kinds of support as the Commission thinks reasonably necessary or helpful—

(a) during the information recovery process, and

(b) in dealing with the consequences of that process.

13. Reports to victims and survivors

(1) The Commission shall comply with any request from victims and survivors for the making of a written report in relation to a troubles-related death addressed by the Commission, detailing the steps taken in the information recovery process, including—

(a) steps taken to test the reliability of information received, and

(b) new information that has been revealed in respect of the case.

(2) Reports given by the Commission to victims and survivors are not to be publicised by the Commission.

(3) The Commission need not comply with a request under sub-paragraph (1) unless satisfied that the information recovery process on the case concerned has reached its conclusion; but this sub-paragraph does not prevent the Commission from issuing interim reports.

(4) A report must not identify individuals who have provided information to the Commission in confidence; and the Commission shall take all necessary steps to avoid identifying persons who have provided information.

(5) A report may identify organisations that appear to be responsible for acts or omissions discussed in the report.

(6) In preparing a report the Commission must take all necessary steps to ensure that the provision of the report to victims and survivors does not infringe any person's rights under Article 2 of the European Convention on Human Rights.

(7) Persons providing information to the Commission shall benefit from privileges and immunities provided by legislation of the United Kingdom and legislation of Ireland.

14. Expenses

(1) The Commission may defray expenses incurred by victims and survivors or other persons communicating or otherwise cooperating with the Commission.

(2) The Commission may provide other support as it thinks fit.

15. Obtaining information

(1) Legislation of the United Kingdom and legislation of Ireland shall ensure that the Commission has the power to require the production from public authorities of any information that it requires in the exercise of its functions.

(2) The Commission may enter into agreements with public authorities in respect of the provision of information.

(3) The Commission may request the provision of information from public authorities outside the United Kingdom and Ireland (and Her Majesty's Government in the United Kingdom and the Government of Ireland shall support and facilitate any request).

(4) The Commission shall not take possession of articles used to commit offences.

16. Holding and disclosing information

(1) The Commission shall ensure that information received by it is kept in a secure manner that, in particular, ensures that the information is not used in a manner that breaches a person's rights under the European Convention on Human Rights.

(2) The Commission shall not disclose to law enforcement agencies or other public authorities—

(a) information received by it, or

(b) information that might lead to the identification of persons who provided information to it.

17. Use of information

(1) Legislation of the United Kingdom and legislation of Ireland shall ensure that information provided to the Commission is not admissible in criminal or civil proceedings.

(2) Sub-paragraph (1) is without prejudice to—

(a) any use by a public authority of information in its possession which it provides to the Commission, or

(b) the prosecution of a person in reliance on evidence obtained otherwise than as a result of the provision of information to the Commission.

(3) The Commission shall ensure that a person providing information does not become liable to administrative sanctions, by reason only of providing the information.

18. Offences

Legislation of the United Kingdom and legislation of Ireland shall provide criminal penalties for—

(a) the provision of false information to the Commission by a person who knows the information to be false;

(b) otherwise obstructing the work of the Commission (including the destruction by a public authority of information likely to be required by the Commission);

(c) the unlawful disclosure of information by members or staff, or former members or staff, of the Commission (including after the Commission has ceased to exist).

19. Entry into Force

(1) The States Parties shall notify, in writing and through diplomatic channels, the completion of the legal formalities required for the entry into force of this Agreement.

(2) The Agreement will come into force on the first day of the second month after receipt of the last notification.

20. Duration of the Agreement

(1) This Agreement shall continue in force until terminated by mutual agreement of the two Governments.

(2) After termination this Agreement shall continue to have effect in so far as necessary for meeting liabilities of the Commission or disposing of remaining assets of the Commission, as provided for in the agreement of termination.

NILQ 67(1): 37–66

Clause by clause: the reasoning in the Stormont House Agreement 'Model Bill' on dealing with the past in Northern Ireland

Kieran McEvoy, Anna Bryson, Brian Gormally, Daniel Greenberg, Jeremy Hill, Daniel Holder, Louise Mallinder and Gemma McKeown*

Introduction

1. These explanatory notes relate to the Model Implementation Bill for the Stormont House Agreement prepared by a drafting committee led by Professor Kieran McEvoy comprised of representatives from Queen's University Belfast, Ulster University and the Committee on the Administration of Justice. These notes have been prepared in order to assist the reader of the Model Bill and to help inform debate on it (referred to as 'the Act' in the text of the Model Bill).

Summary and background

2. The Model Bill would, if enacted, give legislative effect to particular elements of the Stormont House Agreement (SHA), which was published on 23 December 2014 following negotiations between the British and Irish governments and the political parties in the Northern Ireland Executive. In addition to the provisions relating to 'The Past', the Stormont House Agreement contains provisions on: finance and welfare; flags, identity, culture and tradition; parades; institutional reform; outstanding commitments; and review and monitoring. These provisions are not contained in this Model Bill and will not, as we understand it, be included in the UK government's planned legislation which will focus exclusively on the past-related elements of the Agreement.

3. The drafting committee was keen that the government's draft Bill should not be the only starting point for public debate. We wished to ensure that civil society in Northern Ireland had a full opportunity to contribute to the legislative process; to ensure full compliance with the UK's international obligations, particularly Article 2 of the European Convention on Human Rights (ECHR); and to follow closely the principles in paragraph 21 of the SHA:

> . . . an approach to dealing with the past . . . which respects the following principles: promoting reconciliation; upholding the rule of law; acknowledging and addressing the suffering of victims and survivors; facilitating the pursuit of justice and information recovery; is human rights compliant; and is balanced, proportionate, transparent, fair and reasonable.

* The authors would like to acknowledge the financial assistance of the Arts and Humanities Research Council (Grant Reference AH/J013897/1) and the Queen's University Belfast Business Alliance. The authors' affiliations are as follows: Kieran McEvoy and Anna Bryson, Queen's University Belfast; Brian Gormally, Daniel Holder and Gemma McKeown, Committee on the Administration of Justice; Daniel Greenberg, barrister specialising in legislation and the legislative process; Jeremy Hill and Louise Mallinder, Ulster University.

We believed that drafting this Model Bill, in addition to the various other policy outputs produced by the team over the past number of years would enhance that process.

4. The SHA contains much less detail than the proposals on the past put forward by Dr Richard Haass and Professor Meghan O'Sullivan (Haass-O'Sullivan proposals) during the earlier negotiating process which ended in late 2013. There are many issues where the SHA has left the detail of implementation for later resolution. Our Model Bill, which we wish to focus more directly on Article 2 compliance and the 'paragraph 21 principles' in the SHA, proposes alternative solutions to the leaked Westminster draft Bill on some of these issues.

Overview

Part 1 Preliminary

5. This Part sets out the 'founding principles' (which are to be found in paragraph 21 of the SHA) and how they are to be applied and provides definitions for some key concepts that will be used throughout the Model Bill.

Part 2 Historical Investigations Unit

6. This Part deals with the establishment, functions, powers and all other aspects of the Historical Investigations Unit (HIU).

Part 3 Independent Commission on Information Retrieval

7. This Part deals with the establishment, functions and powers of the Independent Commission on Information Retrieval (ICIR) and implements the proposed text of the international Agreement between the UK and Ireland.

Part 4 Implementation and Reconciliation Group

8. This Part deals with the establishment, functions and powers of the Implementation and Reconciliation Group (IRG). It makes provision for the report on themes and determines the IRG's relations with other legacy bodies.

Part 5 Oral History Archive

9. This Part establishes the Oral History Archive (OHA) and makes provision for the collection of new oral history material and collaboration with existing oral history projects. It also makes provision for the confidentiality of contributions in certain cases.

Part 6 General

10. This Part deals with interpretation of various terms and the procedure for regulations.

Schedule 1 Staff and Proceedings of the Director of the HIU

11. This detailed schedule is not included in the Model Bill. The schedule would contain the details of information such as arrangements for staff pensions and conditions, applicability of a Code of Ethics and other matters. Section 5 makes reference to this schedule.

Schedule 2 Text of the Agreement between the United Kingdom and Ireland on the Establishment of the Independent Commission on Information Retrieval

12. This is the proposed text for an inter-state treaty between the UK and Ireland which will be necessary to establish the ICIR as an international body with jurisdiction throughout the UK and Ireland.

Commentary on sections

PART 1 PRELIMINARY

Section 1 Founding principles

13. Section 1 deals with the principles which the SHA states (paragraph 21) must be respected in the approach to dealing with the past. Sub-section (1) requires that the principles be considered by public authorities exercising functions under the Act and by courts and tribunals in interpreting it.

14. Sub-section (3) codifies the principles in a form suitable for legislation. Sub-section (3)5 interprets the reference to human rights compliance in the SHA as the need to protect the rights guaranteed by the ECHR as defined by the Human Rights Act and other international standards. These latter include a range of principles and guidelines relating to investigations and justice for victims, but will also include relevant texts such as the Convention on the Elimination of Discrimination Against Women, UN Resolution 1325 on the role of women in peacebuilding and the Convention on the Rights of the Child. The stronger language in 3(5) providing that fundamental rights 'must' be protected reflects the nature of such rights as international obligations.

Section 2 Definition of 'troubles-related'

15. Section 2 seeks to define 'troubles-related' in the context of deaths and human rights breaches. troubles-related deaths is the term used in paragraph 30 of the SHA. Various bodies have adopted different start dates for the beginning of 'the Troubles'. However, the Victims and Survivors (Northern Ireland) Order 2006 (2006 No 2953) defines 'conflict related incident' as an incident appearing to the Commissioner (for Victims and Survivors) to be a violent incident occurring in or after 1966 in connection with the affairs of Northern Ireland. Sub-section (1) adopts the same start date and refers to deaths which occurred in connection with political conflict in Northern Ireland. No end date is specified in the SHA and is therefore not provided for in the Model Bill. The SHA does provide that the initial case list of the HIU will be made up of outstanding cases from the Police Service of Northern Ireland (PSNI) Historical Enquiries Team and legacy branch of the Police Ombudsman, both of which have a timeframe finishing in 1998. Whilst this will constitute the bulk of the HIU caseload, it does leave open the opportunity for families to bring new cases to the HIU, where there is new evidence, for which this cut-off date does not apply. This leaves open the possibility of the various mechanisms provided for by the SHA examining some cases that may be seen as transitional between the conflict and the contemporary justice system.

16. The founding principle of human rights compliance requires that any investigative obligation imposed by international standards, and particularly by the ECHR, be carried out by the appropriate mechanism established by this legislation. Sub-section (2) defines a 'qualifying human rights breach' as a breach of Articles 2 or 3 of the ECHR in connection with political conflict in Northern Ireland. Article 2 ECHR imposes investigative obligations on the state in the case of deaths and Article 3 imposes obligations in cases of harm occasioned through torture or inhuman or degrading treatment. The effect of this will be to bring qualifying conflict-related cases of attempted murder or serious injury relating to the Troubles within the purview of the HIU. They will be qualifying cases where they have involved a breach (i.e. a violation) of human rights by the state (such as a breach of the investigative obligation of Article 3 ECHR). The inclusion of this provision reflects the reality that there otherwise would be a group of cases that the state must investigate to meet ECHR requirements, but would

otherwise have no competent institution to conduct such investigations. The Police Ombudsman can only investigate the actions of police officers, and the PSNI lacks the necessary independence to investigate state involvement cases. Whilst it would be open to the state to establish an entirely separate body to the HIU which mirrors its powers and independence, it would appear more practical to extend the HIU's remit to deal with such cases.

17. Sub-section (3)(a) and (b) seek to close a gap whereby the deaths of persons who died as an indirect 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. Sub-section (3) also intentionally does not contain a geographical limitation on where the death or qualifying human rights violation must have occurred. The intention is that such matters where related to the Northern Ireland conflict, and hence the conspiracy or other actions relating to them will have taken place within UK jurisdiction, can be investigated by the HIU. This would cover situations whereby deaths occurred in the Republic of Ireland or Great Britain but also the smaller number of cases elsewhere. The disclosure powers of the HIU will only extend to UK public authorities, and its policing powers to Northern Ireland, yet it is intended the HIU can seek the cooperation of police forces in Great Britain in the same manner as the PSNI and cooperation with authorities in other jurisdictions through existing arrangements. There is specific explicit provision for this in the SHA in relation to the Irish authorities.

Section 3 Definition of 'perpetrator'

18. Section 3 follows international standards, and in particular Article 25(3) of the Rome Statute, which established the International Criminal Court, in positing a definition of perpetrator which goes beyond the person who physically carried out the killing etc. Sub-section (1)(b) and (c) include a person who ordered or knowingly facilitated an offence which resulted in a death in the definition of perpetrator. Sub-section (2)(a) provides that an offence includes an attempted offence and that facilitating an offence includes doing anything designed to encourage the commission of the offence. For the avoidance of doubt the definition of perpetrator includes 'state actors', namely those acting in some capacity on behalf of a public authority.

19. Sub-section (3) provides that, for the purposes of the HIU, an offence includes professional misconduct. This is to enable HIU to investigate cases transferred from the Office of the Police Ombudsman for Northern Ireland where the alleged behaviour of police officers may amount only to misconduct rather than criminality. In compliance with the SHA principle of fairness and equality this provision covers misconduct by any institution rather than solely the police.

Section 4 Definition of 'investigating bodies'

20. Section 4 lists the organisations covered by the term 'investigating bodies' in the Model Bill.

PART 2 HISTORICAL INVESTIGATIONS UNIT

Section 5 Establishment of HIU

21. The drafting committee understands that the official Stormont House Implementation Group has agreed that the First and Deputy First Ministers should appoint the Director of the HIU in consultation with the Department of Justice; sub-sections (2) and (3) would implement this decision. The SHA does not specify this process and alternative arrangements ensuring an independent and effective appointment could be entered into.

Sub-section (4) seeks to ensure that the appointee has credibility with relevant stakeholders, including victims' groups, and that a public statement evidencing the qualifications of the appointee for the post is made.

22. Sub-section (5) specifies that the Director of the HIU is to be a corporation sole. This is the same status as the Police Ombudsman and Director of Public Prosecutions and means that the Director in person possesses the characteristics of a body corporate. This means that the obligations, powers and decision-making capacity of the organisation are vested in the Director as an individual rather than in a group or committee of people. The drafting committee believes that this is the legal construction most likely to facilitate the independence of the HIU.

23. Sub-section (6) places a statutory duty on the HIU Director to take reasonable steps to secure a gender balance in HIU staff and that HIU staff have the expertise and aptitude to take a gender-sensitive approach. The former provision is similar to that provided for in legislation for bodies such as the Parades and Human Rights Commissions which is aimed at securing that the composition of Commissioners bodies is reflective of community background in Northern Ireland. We have not replicated a similar provision on the basis of community background in recognition that, given the requirements of independence, many HIU staff will be persons from outside of Northern Ireland. The second provision in relation to gender expertise draws on international standards. Sub-sections (7) and (8) make provision for the Policing Board to issue a Code of Ethics setting out standards for HIU staff, including compliance with ECHR and other human rights standards. This is similar to the existing code for PSNI officers. Sub-section (8) defers the detail of this and other staffing matters to Schedule 1.

Section 6 Family support staff

24. Section 6 provides for the appointment of the HIU family support staff in accordance with paragraph 33 of the SHA. Sub-section 2 makes clear that this is a complementary role to the rights of next of kin to be involved in an investigation. This is aimed to, for example, preclude a scenario whereby access to and engagement with investigators is actually curtailed or limited on grounds of the existence of family support staff.

Section 7 Independence

25. Independence is a key element of the investigative obligation established under Article 2 (right to life) of the ECHR; sub-section (1) formulates the basic principle that there must be no connection between those investigating and those whose behaviour is being, or may be investigated, in the light of Article 2 jurisprudence. The legal meaning of 'persons' includes organisations and institutions as well as individuals.

26. Sub-section (2) clarifies that 'connection' includes past as well as present connection and also reasonably perceived or suspected as well as actual connection.

27. Sub-section (3) specifies that it is not just the investigating officers on the ground who must have no connection with those potentially being investigated, but also all those who may be engaged in the provision of research, archiving or other support functions.

28. Sub-section (4) specifies that persons that have been members of organisations which were engaged in the conflict, lawfully or not, and which therefore might come under investigation, would be debarred from employment by the HIU. The debarring of members and ex-members of the Royal Ulster Constabulary and the British Army is similar to the position adopted by the Police Ombudsman in its legacy cases. It also precludes persons who have paramilitary convictions. The purpose of this provision is to avoid doubt

and legal challenge to decisions made under sub-section (1). Sub-section (5) notes that sub-section (4) does not affect the generality of sub-section (1).

29. Sub-section (6) explicitly links the founding principle of human rights compliance to the HIU and provides that it must have regard to the broad range of human rights instruments (both 'hard' and 'soft' law) which relate to the independence and other desirable characteristics of investigative mechanisms.

Section 8 Finance

30. Section 8 seeks to ensure that the independence of the HIU is not compromised by the manipulation, deliberate or due to general austerity, of the budget by a sponsoring department. The specifications that the UK Treasury must determine the HIU's budget and that it must be paid out of the Consolidated Fund mean that Parliament would decide the figures and they could only be changed by a relevant vote in Parliament.

Section 9 Five-year target

31. Section 9 provides for a five-year target for the HIU to complete its work as referenced in the SHA, though beginning when the legislation comes into force rather than at the date of the Agreement. If that timeframe does not prove viable, sub-section (2) gives a power to the Secretary of State to amend the completion date by regulation.

32. Sub-section (3) states that the Secretary of State must make provision for such an increase if one of two conditions is satisfied. Sub-section (3)(a) states as the first condition that the Secretary of State is satisfied that international human rights obligations demand a continuation of the work of the HIU. This circumstance is most likely to arise if there are outstanding cases to which the Article 2 investigative obligation applies and there is no suitable alternative mechanism available to carry out the investigations. Sub-section (3)(b) states as the second, alternative condition, that the First and Deputy First Ministers believe there is uncompleted work which the HIU should be allowed to finish.

Section 10 Duty to carry out investigations

33. This section sets out the basic investigative duty of the HIU. Sub-section (1)(a) specifies the duty to investigate troubles-related deaths. Sub-section (1)(b) specifies the duty to investigate alleged or suspected troubles-related human rights breaches (limited by section 2(2) to breaches of Article 2 or 3 ECHR). As noted in paragraph 16 of these explanatory notes, Article 3 ECHR (freedom from torture and inhuman and degrading treatment), as well as Article 2 (right to life), imposes an investigative duty on the state. In the absence of an alternative mechanism, and in accordance with the founding principle of human rights compliance, the HIU must be able to investigate breaches of Article 3 as well as of Article 2. This provision also has the effect of enabling the HIU to investigate breaches of the investigative obligation of either Article 2 or 3 even in cases where investigation of the death or injury itself is nugatory, for example, because of the subsequent death of the identified perpetrator.

34. Sub-section (2) specifies that human rights breaches may only be investigated where such a breach is alleged in a complaint to the Police Ombudsman or is suspected by the HIU itself on reasonable grounds.

35. Sub-section (3) has the effect of placing the various elements of the investigative obligation under Articles 2 and 3 ECHR developed in the jurisprudence of the European Court of Human Rights (ECtHR) on the face of the legislation. This is important for a number of reasons. First, while the jurisprudence of the ECtHR is actually clear, various elements have

been disputed from time to time and, for the avoidance of doubt and to reduce vexatious legal challenges, it is better to express the investigative duty clearly and explicitly in the founding legislation of the HIU. Second, there is a risk that the HIU investigative function might be interpreted narrowly on the basis of the references in paragraphs 34 and 36 SHA to 'criminal investigation' and in paragraph 34 SHA to 'evidence relevant to the identification and eventual prosecution of the perpetrator'. These references should not prevent the HIU having broader investigative functions, covering all the processes required by human rights obligations. State involvement investigations have usually gone beyond the threshold of identifying individual criminality or misconduct to findings on institutional liability, including whether the state acted unlawfully, in particular on ECHR grounds. Third, previous investigative mechanisms, particularly the Historical Enquiries Team (HET), displayed weaknesses in investigative methodology and approach and it is therefore prudent to detail the investigative process in the legislation itself.

36. Sub-section (4) makes clear, in accordance with the SHA founding principles, that state-involvement cases must be treated with the same rigour as any other cases. This is designed to ensure that there is no repeat of the example of the unlawful HET practice of giving more favourable treatment to suspects in state-involvement cases.

37. Sub-section (5) provides that the HIU must produce a policy which provides a definition of collusion. The sub-section is formulated to ensure that attempts to restrict the definition of 'collusion' cannot be binding on the HIU, which must ensure that its own definition incorporates a number of specific matters as well as drawing on the existing definitions developed in the Stevens and Cory collusion inquires. The definition is required as collusion is a term used in the jurisprudence of the ECtHR and part of the investigative duty codified in sub-section (3)(d).

38. The SHA (paragraph 30) specifies that the HIU will investigate 'outstanding troubles-related deaths'. As noted above, in order to be human rights compliant, the HIU will also have to investigate breaches of the investigative obligations under Articles 2 and 3 ECHR. That still leaves a gap, however, in relation to other outstanding (not properly investigated) troubles-related serious injuries. Sub-section (6) requires the HIU to make at least an annual report to the Policing Board on whether it recommends an extension of its remit to deal with serious injury cases. The Secretary of State is given a permissive power to make relevant amendments to the Act if the HIU recommends an extension.

Section 11 Cases falling within HIU's jurisdiction

39. The SHA provides that the HIU will 'take forward outstanding cases from the HET process and the legacy work of OPONI' (paragraph 30). It 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. Families can apply for new cases to be considered 'for criminal investigation' where there is new evidence 'not previously before the HET which is relevant to the identification and eventual prosecution of the perpetrator'. Section 11 seeks to bring together these examples in a legally consistent and effective manner.

40. Sub-section (1) gives jurisdiction to the HIU to investigate cases which have not been investigated by other investigating bodies or which have not been completed or which have been completed but there are good reasons to re-investigate, which explicitly include a lack of independence in the original investigation. Note that section 4 lists the organisations covered by the term 'investigating bodies' to include the PSNI (including HET), OPONI, the Royal Military Police, the Royal Ulster Constabulary and the Independent Commission for Police Complaints. Sub-section (3) makes it clear that an inquest having been held does not debar HIU from investigating a case.

41. Sub-section (1)(b)(ii) to (iv) lays out the conditions for the HIU taking on cases which may have been formally completed. The decision in each case is that of the HIU since it is a principle of ECtHR jurisprudence that the state must carry out its investigative duties 'of its own motion' rather than in response to action by, for example, the next of kin. The first category includes cases where the HIU has reason to believe that a previous investigation was flawed in a substantive or procedural respect; the latter may include an investigation carried out by an organisation or group which lacked the requisite Article 2 independence. Sub-section (4) specifies that the 'reason to believe' may include the decision of a court or tribunal. The second category includes cases where there is new evidence, but also where there may be other reasons to investigate 'additional matters'. The third category gives the HIU the option to respond positively to well-founded requests from interested persons, who might, for example, be the next of kin, legal representatives, non-governmental organisations or officials of any public authority.

42. Sub-section (2) makes it clear that the HIU may not investigate a case which does not fall into any of the categories detailed in sub-section (1).

Section 12 Priorities

43. Section 12 provides that the prioritisation of cases should be chronological, except when the HIU believes there are special circumstances. These may well include where the next of kin or other people important to the investigation are elderly or unwell, or when it is more efficient to investigate certain cases together in the light of links between them.

44. In order to ensure transparency over the HIU's prioritisation methodology, sub-section (3) provides that the HIU must issue an annual report, or more regular reports if it wishes, to the Policing Board, providing a breakdown of both the HIU's caseload and how it has prioritised cases. Sub-section (4) makes clear that part of an investigation, such as taking a statement, can be carried out out of sequence, if needed in circumstances whereby, for example, a potential witness is elderly or in ill health.

Section 13 Policing powers

45. This section gives full policing powers to officers of the HIU. Sub-section (1) grants such officers the powers and privileges of a constable in Northern Ireland and adjacent UK waters. The sub-section of the Police (Northern Ireland) Act 2000 referred to in sub-section (2) simply defines the powers of constables as those pertaining for the time being under common law or any statutory provision and defines UK territorial waters.

46. Section 66 of the Police (Northern Ireland) Act 1998 details offences such as assault on or obstruction of constables. Sub-section (3) has the effect of extending the offences concerned to an officer of the HIU.

47. Sub-section (4) makes it clear that the exclusion of police officers from certain trade union and employment rights does not apply to officers of the HIU.

48. Sub-section (5) provides that all relevant powers in the Police and Criminal Evidence (Northern Ireland) Order 1989 should be granted to officers of the HIU. It is noted that paragraph 36 SHA provides: 'In respect of its criminal investigations, the HIU will have full policing powers. In respect of the cases from PONI, the HIU will have equivalent powers to that body.' This might imply a difference in substance between HIU powers when dealing with former HET and former Police Ombudsman cases. In practice, there is little material difference between the powers of police officers and those of officers of the Police Ombudsman, but this provision ensures that officers of HIU will have all the relevant powers they need.

Section 14 Report to the Director of Public Prosecutions for Northern Ireland

49. Sub-section (1) provides that in all cases which concern the commissioning of a crime the HIU must provide a report of its investigation to the Director of Public Prosecutions for Northern Ireland (DPPNI). This is to ensure that it is the Public Prosecution Service (PPS) not the HIU that takes the decision on whether there is sufficient evidence to mount a prosecution. When a HIU investigation does not concern the commissioning of a crime (but may cover professional misconduct), there is no prospect of prosecution and hence no role for the DPPNI.

50. Sub-section (2) provides that the DPPNI must be consulted about evidential issues and that any advice should be reflected in the prosecution report. This is designed to ensure that the expert opinion of the PPS on evidential matters is able to guide the HIU in its preparation of case details. Sub-section (3) reinforces this by providing that the HIU must include all relevant information in the prosecution report.

51. Sub-section (4) provides that the DPPNI must ensure the independence of the decision-making in any case by preventing the involvement of anyone who was involved in any previous consideration of the case, or in a case involving all or some of the same people.

52. Sub-section (5) is designed to make it completely clear that the fact that an alleged perpetrator was a state actor or informant is not a reason in itself to decline to prosecute in a case.

Section 15 Report to deceased's family

53. It is likely that reports to the deceased's family will be one of the main outcomes of the work of the HIU; sub-section (1) directs that this should be done in every completed investigation of a death. Sub-section (2) gives a broad definition of the term 'family.'

54. Sub-section (3) requires the HIU to give as much information as it can 'without prejudicing the administration of justice'. In practice, this is likely to mean avoiding prejudicing any potential prosecution of any person.

55. Sub-section (4) specifies certain aspects of the investigative conclusions that must be included in a family report, including whether there were any connections with other cases. These provisions are designed to ensure that victims receive clear conclusions on some of the vital issues that are likely to concern them.

Section 16 Report to other victims' families

56. People injured, or the families of those who were killed, in the same incident under investigation deserve a full report if they wish to receive one. This section ensures that the HIU will prepare such a report.

Section 17 Interim reports

57. This section gives HIU the power to issue interim reports pending the production of family reports or other victims' reports.

58. Sub-section 2 provides that the HIU will provide at least an annual report to the IRG recommending subjects for thematic investigation by the IRG and setting out the HIU's evidence base for making such recommendations. This is to fulfil the provision in paragraph 51 of the SHA that the other legacy mechanisms refer such material to the IRG.

Section 18 Public statements

59. The SHA provides that in cases transferred from the Police Ombudsman the HIU will have the same powers as the Ombudsman would have had in such cases, which would therefore include the Ombudsman's power to issue public statements. In light of the SHA principle of fairness, we have extended this power to other HIU cases.

Section 19 Non-publication of information putting lives at risk

60. It is important to balance the family's and other victims' right to full information with restrictions on the disclosure of information that could put someone's life at risk. Sub-section (1) provides that this section applies to family, other victims' and interim reports and to public statements.

61. Sub-section (2) specifies that information may be omitted from reports if its inclusion might put someone's life at risk. This is a clear test and is similar to the restriction placed on the disclosure of information by the Police Ombudsman.

62. Sub-section (3) provides that the necessary risk assessment is carried out by qualified staff of the HIU, not any outside body, and that the Director of the HIU take decisions on the necessary editing and redactions personally. This would prevent the misuse of Article 2 ECHR which has, in some instances in the past, been pleaded to redact non-sensitive material.

Section 20 Other investigations

63. This section ensures that the HIU has primacy vis-á-vis other investigative bodies in cases that come within its jurisdiction as defined in this legislation. Sub-section (1) prevents any other body from investigating a case that the HIU is investigating and sub-section (2) deals with cases involving future complaints to the Police Ombudsman about alleged past police misconduct or criminality.

Section 21 International obligations

64. Paragraphs 39 and 55 of the SHA recognise the need for cooperation with the Irish authorities in general and with respect to cross-border incidents. This section gives the Secretary of State the power to make regulations to facilitate this. The section is worded generally, rather than specifically referring to the Irish authorities, since cooperation with other states might be necessary.

65. Sub-section (1) gives the power to make relevant regulations to the Secretary of State to give effect to any international obligations entered into by the UK government or another state in respect of cross-border troubles-related deaths or breaches. The implication is that such arrangements will be made by international agreement or treaty, or by the application of any existing agreements on cooperation in, for example, criminal justice or policing.

66. Sub-section (2) defines the concept of 'cross-border' as acts or omissions connected with a death or breach which occurred or may have occurred outside the UK. Sub-section (3) singles out the possibility of making regulations to allow cooperation with or disclosure of information to specified non-UK organisations (for example, the Garda Síochána). Sub-section (4) provides that regulations may modify the effect of the Act in order to facilitate cooperation.

Section 22 Disclosure to HIU

67. Paragraph 37 of the SHA says: 'The UK Government makes clear that it will make full disclosure to the HIU.' This is an unqualified commitment; this section seeks to give practical effect to that commitment.

68. Sub-section (1) puts an unequivocal obligation on public authorities to comply with a request for information by the HIU, but also to allow the HIU to itself access any information kept by it. It also allows the HIU to set a reasonable timeframe for the request to be complied with.

69. Sub-section (2) provides that the HIU must have a unit with responsibility for accessing and processing information from other public authorities. The implication is that this unit will be security vetted and capable of handling, keeping secure and editing for onward disclosure any information, including highly classified material, which it receives or accesses, in exactly the same way as a comparable PSNI unit or the similar unit within the Police Ombudsman's office. This removes the necessity for any external oversight by any existing security or policing body or the need for prior assessment, editing or redaction.

70. Sub-section (3) overrides the named and any other enactments (for example, the Official Secrets Act 1989) and prevents them being used as an obstacle to disclosure. Sub-section (4) fulfils the same function in respect of legal professional privilege except where it is claimed for advice given to an individual in a personal capacity. This provision would prevent any excuse of 'competing legal obligations' being used to frustrate disclosure to the HIU. Sub-section (6) grants the HIU a power to direct that public authorities do not alter or destroy documents or specified materials they hold which may be required for HIU investigations.

Section 23 Transfer of legacy files

71. This section deals specifically with the files of the HET and other material held by the PSNI and Police Ombudsman relating to legacy cases. Sub-section (1) says that the PSNI must 'as soon as reasonably practical' transfer such material to the HIU. In practice, this will not necessarily mean the physical movement of the material, but it must mean the transfer of 'ownership' of the files, together with the unfettered right to access them and any legal obligation that possession and control of the material may entail.

72. Sub-section (2) makes clear that the HIU will be responsible for the management of the transferred files in all respects and that they must inform the PSNI of the arrangements that they have made to accomplish this. This makes it clear that all responsibility, including onward disclosure (for example, to inquests), transfers from the PSNI to the HIU. The PSNI would have no oversight power in this respect, but the requirement to inform it of the arrangements made by the HIU would enable the latter to profit from any relevant advice from the PSNI.

73. Sub-section (3) puts a similar obligation to transfer relevant material on the Police Ombudsman.

Section 24 Failure to cooperate

74. This section makes if an offence, which might be committed by an individual, an organisation or both, to fail to comply with a duty to disclose or provide access to information for the HIU. Sub-section (2) also makes it an offence to conceal, alter or destroy information that might be relevant to a HIU investigation.

Section 25 Referrals from the DPPNI

75. This section replicates the existing power of the DPPNI to refer cases to the PSNI for investigation to also refer cases to the HIU for investigation. Without such a power the DPPNI would only have the option of referring cases to the PSNI that in fact do not fit within its remit, but rather the remit of the HIU. The prioritisation of such cases for investigation will be a matter for the HIU.

Section 26 Disclosure to the ICIR

76. This section obliges the HIU to share on request copies of information it holds or obtains with the ICIR. Such requests will largely relate to verifying information provided to the ICIR. In order to firewall such requests and knowledge of them away from HIU investigators, the clause provides only copies are to be provided and that requests will be undertaken by the dedicated HIU disclosure unit and no other HIU staff will be made aware of them.

Section 27 Duties to cooperate with the Coroner

77. This section establishes two duties on the HIU to cooperate with the Coroner in connection with inquests into troubles-related deaths ('legacy inquests').

78. Sub-sections (1) and (2) place duties on the HIU through the HIU disclosure unit to share on request information it holds or obtains in relation to legacy inquests.

79. Sub-sections (3) and (4) relate to the HIU providing investigative services to the Coroner for legacy inquests. The Director is to establish a specialist Coroners team, separate from standard HIU investigators, for this purpose. The operational separation of the teams is both in recognition that Coroners' investigations are broader and different to criminal/professional misconduct investigations undertaken as the main work of the HIU, and also to help ensure the existence of such a role does not risk inquests being subsumed in other HIU work. Such separation is not intended to preclude cooperation between investigating teams. A specific duty is provided for to ensure such work is done in a manner compatible with ECHR rights.

Section 28 Oversight by the Policing Board

80. Section 28 is designed to make the HIU accountable to the Policing Board in a similar manner to the PSNI. The provision is similar to the provision made for the National Crime Agency in relation to its oversight by the Policing Board. In relation to duties on the HIU Director to provide information to the Board, the national security caveat placed on the PSNI Chief Constable is disapplied in relation to the HIU, given the express removal and absence of such a caveat in the SHA. Other provisions such as the HIU not having to comment on live investigations remain. As with the PSNI, this would not preclude post-investigation accountability to the Board in relation to a particular case.

Section 29 Inspection of the HIU

81. Section 29, sub-section (1), adds the HIU to the list of bodies carrying out criminal justice functions which are to be subject to inspection by the Chief Inspector of Criminal Justice for Northern Ireland (CJINI).

82. Sub-section 2 disapplies the national security caveat placed on CJINI in relation to the HIU, given the express removal and absence of such a caveat in the SHA.

83. Sub-sections (3)–(5) add the HIU to the list of police-type bodies which can be subject to the inspections by HM Inspectors of Constabulary (HMIC). It is not intended that HMIC carry out annual or routine inspections of the HIU, given the role of CJINI who themselves can call on HMIC for assistance. Rather, the provisions in relation to HMIC empower the Policing Board to call in HMIC on an ad hoc basis to inspect a specific matter of HIU practice. HMIC can publish reports but must redact them not to endanger individuals. A national security caveat in relation to HMIC reports is disapplied, given the provisions of the SHA.

Section 30 HIU complaints

84. This section places the exercise of particular police powers of the HIU under the complaints remit of the Police Ombudsman for Northern Ireland. It is not intended that the Police Ombudsman be able to investigate complaints about all aspects of the HIU's work, some of which would be expected to be dealt with by an internal process. It is recognised that, in particular, there may be conflicts of interest if the Police Ombudsman were to review HIU investigations which had originated with the office. However, it is intended that the exercise of certain police powers by the HIU, such as those of arrest, search, seizure etc. are subject to Ombudsman oversight. In a manner similar to the existing provisions for the Police Ombudsman for immigration officers, the clause provides that a memorandum of understanding be developed by the Ombudsman and HIU, and approved by the Policing Board, which will specify the range of policing powers exercised by the HIU which will be subject to the Ombudsman's complaints remit.

Section 31 Finance of external bodies supporting HIU functions

85. This section is intended to ensure the above oversight and inspection bodies are not precluded from their role in relation to the HIU, which is additional to existing functions, by lack of resourcing. In order to ensure independence and in recognition that the HIU functions constitute an international obligation, this section, as with the HIU, provides that such functions are resourced from the UK Treasury Consolidated Fund.

PART 3 INDEPENDENT COMMISSION ON INFORMATION RETRIEVAL

86. Paragraph 41 of the SHA states:

> A new body, which will respect the sovereign integrity of each jurisdiction, will be established by the UK and Irish Governments, called the Independent Commission on Information Retrieval (ICIR), building on the precedent provided by the Independent Commission on the Location of Victims' Remains. The objective of the ICIR will be to enable victims and survivors to seek and privately receive information about the (Troubles-related) deaths of their next of kin.

This Part seeks to implement that intention.

87. Since the establishment of this body is envisaged as a joint enterprise by the UK and Irish governments, it will require an Agreement, with the status of an international treaty, between the UK and Ireland. The suggested text of such an Agreement is included at Schedule 2; the suggested UK legislation required to implement it is included in this Part. Legislation will also be required in Ireland to implement the agreement.

88. The ICIR, as described in the SHA, will be a novel institution with many complexities necessarily arising in its work and many sensitive issues will need to be negotiated. Perhaps in recognition of this, paragraph 50 of the SHA includes the additional principles of independence and rigour which are to apply to the operations of the ICIR. The drafting

committee is of the view that the full nature and method of operation of the ICIR will have to be expressed at four levels: the Agreement between the UK and Ireland, primary legislation in the UK and Ireland, regulations that may be made by statutory instrument, and a statutory Code of Practice or guidance. These explanatory notes will endeavour to indicate where the drafting committee feels issues should be dealt with by subordinate forms of regulation.

Section 32 Establishment ICIR

89. Sub-section (1) refers to the ICIR as a body established pursuant to the Agreement ('the Founding Agreement') between the UK and Ireland and describes its objective as laid out in the SHA. Sub-section (2) notes that the text of the Agreement is to be found in Schedule 2.

90. Sub-section (3) puts an obligation on the Secretary of State and the First and Deputy First Ministers to implement in practice the provisions of the Agreement and in particular to ensure that the ICIR has independence and autonomy, as detailed in the Agreement.

91. Sub-sections (4) and (5) deal with the period of existence of the ICIR. In the first place it shall exist for five years from the coming into force of the founding legislation but the Secretary of State, after consulting the Irish Minister for Justice and Equality, may by statutory instrument extend or revive the life of the body.

92. Sub-section (6) relates to the fate of the ICIR's archives. This issue was not addressed in the SHA. The drafting committee considered requiring that the archives be destroyed upon completion of the ICIR's work, as we were mindful that a guarantee to do so could give reassurance to possible information providers. However, the Model Bill instead makes arrangements for the archives to be held securely and confidentially for 50 years in a manner that is to be determined by the Commission. We felt that this was necessary as the ICIR has the potential to gather a wealth of information that may be useful for understanding Northern Ireland's history in generations to come. The Model Bill further stipulates that penalties incumbent on ICIR Commissioners and staff regarding the disclosure of confidential information remain in effect throughout this period.

Section 33 Capacity, immunities and finance

93. Sub-sections (1) to (3) deal with the establishment of the ICIR as a corporate body and give a power to the Secretary of State to regulate to grant privileges and immunities relevant to an international body and to its functions. The referenced Schedules of the International Organisations Act 1968 deal with possible exemptions from tax, rates and excise duties and other legal obligations of various kinds. Only some of these privileges and immunities are likely to be relevant to the ICIR. However, the most relevant privilege is 'immunity from suit and legal process'. These sections therefore give the Secretary of State power to implement paragraph 47 of the SHA which says: 'The ICIR will be given the immunities and privileges of an international body and would not be subject to judicial review, Freedom of Information, Data Protection and National Archives legislation, in either jurisdiction.'

94. Sub-section (4) obliges the Secretary of State to fund the operations of the ICIR in such a way as to guarantee the independence of the body as provided for in the Founding Agreement. Sub-section (5) provides that the monies are to be paid out of the Consolidated Fund; that is from central UK funds decided by parliamentary vote.

Section 34 'Victims and survivors'

95. The SHA uses the terms 'victims and survivors' and 'next of kin' of those who suffered troubles-related deaths to identify those who might seek information from the ICIR. For the avoidance of doubt, and to give the ICIR an element of discretion, this section defines such people ('victims') as the family of those who suffered troubles-related deaths and gives a broad definition of family with the ICIR able to include persons who it 'thinks had a relationship of a family character with the deceased'.

Section 35 The work of the ICIR

96. The overall purpose of this section is to oblige the Secretary of State to make regulations about aspects of the work of the ICIR either specified in the sub-sections or contained in the Founding Agreement which will provide the legal framework within which it can carry out its work. As noted in paragraph 88 above, the complexity of the work of the ICIR will be such that it would be more appropriate for the details of this legal framework to be provided in subordinate, rather than primary legislation.

97. Sub-section (1) specifies that immunities or other protection must be given to people who communicate or cooperate with the ICIR. These should be similar to those granted to people who cooperate with the Independent Commission on the Location of Victims' Remains.

98. Sub-section (2) specifies that regulations must compel public authorities to provide information to the ICIR. The body will, of course, be attempting to access information also from non-state individuals or bodies, but it is not possible to compel unknown individuals or groupings to provide information by law. It is likely that the means of outreach and the protocols for information-gathering from private individuals or entities will be contained in a Code of Practice.

99. Sub-sections (3) and (4) provide for the implementation of provisions of the SHA and the proposed Founding Agreement relating to the confidentiality and inadmissibility in legal proceedings of information provided to the ICIR.

100. Sub-section (5) specifies that regulations must prohibit knowingly giving false information to the ICIR, obstructing its work (by, for example, destroying documents) and any disclosure of information by members or staff of the Commission. Such prohibition would implicitly create offences, specifically permitted by sub-section (6)(c). It is accepted by the drafting committee that taking civil or criminal proceedings against someone who has, for example, provided false information to the ICIR, but in confidence, might be difficult or impossible. This is an issue that should be given greater consideration when drafting the secondary legislation and Code of Practice.

101. Sub-section (7) makes provision for the Code of Practice discussed above.

PART 4 IMPLEMENTATION AND RECONCILIATION GROUP

Overview

102. Paragraph 51 of the SHA states:

> An Implementation and Reconciliation Group (IRG) will be established to oversee themes, archives and information recovery. After 5 years a report on themes will be commissioned by the IRG from independent academic experts. Any potential evidence base for patterns and themes should be referred to the IRG from any of the legacy mechanisms, who may comment on the level of

cooperation received, for the IRG's analysis and assessment. This process should be conducted with sensitivity and rigorous intellectual integrity, devoid of any political interference.

103. The SHA also states that:

- promoting reconciliation will underlie all the work of the IRG (paragraph 52);
- the IRG will encourage and support other initiatives that contribute to reconciliation, better understanding of the past and reducing sectarianism (paragraph 52);
- in the context of the work of the IRG, the UK and Irish governments will consider statements of acknowledgment and would expect others to do the same (paragraph 53);
- the IRG will be 11-strong, with further provision on appointments (paragraph 54).

The case for statutory provision

104. There is a strong case for giving the IRG a statutory base, instead of leaving its establishment and work to be determined simply by administrative or political agreement:

- Statutory provision will give the IRG a firmer and better defined basis for its existence. It will give the IRG more weight;
- It will ensure that the IRG functions properly and fulfils its mandate in accordance with the SHA. It will make the IRG less vulnerable to political dispute and will enhance the process of reconciliation;
- The IRG has oversight of matters such as archives and information recovery, which themselves will have a statutory basis. Statutory provision will help define the relations between all four new legacy bodies (HIU, ICIR, IRG and OHA);
- Statutory provision would fix the procedures for the report on themes and compilation of the evidence base;
- It would guarantee that the IRG would continue to function for the period after the HIU and ICIR had been wound up and before the report on themes was completed.

Structure of Part 4

105. This Part of the Bill is divided into five headings:

- Definitions (section 36);
- Establishment, nature, status, organisation and governance (sections 37–45);
- Objective and functions (sections 46–47);
- Relationship with other bodies (section 48);
- Report on themes and the evidence base (sections 49–50).

Particular questions

106. The drafting committee has sought to address the following particular questions:

- the appointment and tenure of the members of the IRG;
- the duration of the IRG;

- the nature of the IRG's oversight of themes, archives and information recovery;
- the extent of the IRG's work on outreach, reconciliation and statements of acknowledgment;
- the handling of the report on themes, including its timing;
- the compilation of the evidence base.

Section 36 Definitions relevant to the IRG

107. Section 36 provides a list of definitions relevant to the IRG. When the relationship between the various parts of the Bill is finally determined, some of these definitions might fit better in section 69 (interpretation) applying to the Bill as a whole. Particular definitions are discussed further below in the context of the provisions to which they relate.

Section 37 Establishment of the IRG

108. Sub-section (1) provides for the establishment of the IRG as a body corporate. The arguments for a statutory body have been set out in paragraph 104 above.

109. Sub-section (2) provides that the members of the IRG shall be appointed by the First Minister and Deputy First Minister, acting jointly, as soon as practicable after the entry into force of this section and in accordance with nominations under this section. The SHA does not give the Secretary of State a role in the nomination or appointment procedure, either of the Chair or other members, so the Bill has excluded the Secretary of State entirely from the appointment procedures outlined in sub-sections (2) to (8).

110. Sub-section (3) specifies that the IRG shall consist of 11 members in accordance with paragraph 54 SHA (first sentence).

111. Sub-section (4) provides that First Minister and Deputy First Minister shall nominate the Chair in accordance with paragraph 54 (third sentence). As in the SHA, the sub-section specifies that the Chair shall be independent and of international standing.

112. Sub-section (5) follows the nomination procedures for other members of the IRG outlined in paragraph 54 (fourth sentence).

113. Sub-section (6) bars from appointment publicly elected representatives, following paragraph 54 (second sentence).

114. Sub-section (7) encourages those making nominations to the IRG to work together to ensure gender balance. This reflects a principle which the drafting committee has sought to apply to all the new legacy bodies, for example, by section 5(6) in the case of the HIU and paragraph 5(9) of the Founding Agreement in the case of the ICIR.

115. Sub-section (8) specifies the qualities and experience required for members of the IRG and the requirement to act independently and impartially, free from any political interference. The criteria are similar to those required for Commissioners of the ICIR by paragraph 5(8) of the proposed Founding Agreement.

Section 38 Chair of the IRG

116. This provides for the appointment of the Chair and the Chair's replacement in the event that he or she resigns or is not able, willing or fit to perform the functions of office. It is similar to other provisions for office-holders in the case of other institutions, for example, the Commissioners of the ICIR under paragraph 6 of the Founding Agreement.

Section 39 Other members of the IRG

117. Sub-section (1) suggests a term of three years for members of the IRG. This is not specified in the SHA. The argument for three years is that this allows the possibility of both change and renewal of members of the IRG a reasonable period after its establishment (three years), but before a decision is taken on the report on themes (at five years). The likely life of the IRG is about nine years, allowing for completion and publication of the report on themes: see section 49(5) and (6). A tenure of three years would fit with this cycle, allowing two points of renewal or review. An alternative might be appointment for the full life of the IRG, but this might make membership of the IRG too static.

118. Sub-section (2) allows for the situation where the IRG's work is completed while a part of a three-year period of tenure of the members remains outstanding. It provides that the appointment of the members lapses with the completion of the IRG's work.

119. Sub-sections (3) to (6) are provisions parallel to section 38(2) to (5), dealing with cases where a member of the IRG resigns or is not able, willing or fit to perform the functions of office.

Section 40 Remuneration and allowances

120. Section 40 enables the Chair, in consultation with the First Minister and Deputy First Minister, to determine the terms of appointment of members including, in particular, whether members shall work for the IRG on a full-time or part-time basis (according to the requirements of the IRG from time to time). The requirements of the IRG may vary, but it is likely to be sufficient for the members to work part-time.

Section 41 Secretariat

121. The IRG is likely to have a lighter burden of work than the HIU, ICIR and OHA, but will still require administrative support for its work on reconciliation, themes and acknowledgment and for its oversight duties. Section 41 therefore proposes the establishment of a Secretariat, with similar provisions to the other institutions.

Section 42 Funding

122. This section guarantees continued funding for the IRG, including its staff and administration, out of the Consolidated Fund.

Section 43 Annual report

123. The IRG would account for its work by means of an annual report of its activities.

124. Sub-section (2)(a) specifies that the report may include recommendations to groups and bodies in Northern Ireland, including the legacy institutions, and to the two governments for further work on implementation and reconciliation within the scope of its mandate. This reflects the IRG's broader remit of promoting and supporting reconciliation under paragraph 52 SHA.

125. Sub-section (2)(b) specifies that the report may comment on the level of cooperation between the legacy institutions and others. This picks up the reference to such cooperation in paragraph 51 SHA.

Section 44 Governance

126. The Bill cannot lay down detailed provisions of governance but, with a body 11 strong and drawn from various political groupings, it ought to provide some basic principles of

decision-making. Hence the draft suggests that ordinary decisions should be taken by a simple majority, but that the decision to commission the report on themes should be approved by at least seven members.

Section 45 Duration

127. This section, taken together with section 46(b) and section 49(5) and (6), provides a timetable for the IRG's work, based on the report on themes. Section 46(b) reflects the statement in paragraph 51 SHA that this report will be commissioned after five years. It suggests that this five-year period should run not from the date of the IRG's establishment but from the date of the SHA. Time needs to be allowed for writing and completion of the report, for which section 49(5) suggests three years. The aim should be for the IRG to publish the report as soon as possible thereafter and, for this, section 49(6) allows a maximum of one year.

128. Publication of the report might provide an occasion to consider statements of acknowledgment and to recommend further activities of outreach and reconciliation, reflected in section 49(7) – see below. That should mark the completion of the IRG's work and, on this basis, six months might be sufficient to wind up the IRG after completion of the report on themes. This is therefore what section 45(1) proposes.

129. There are, however, obvious uncertainties. It is difficult to tell at this stage how precisely the IRG will fulfil its mandate and how in particular it will deal with the challenges outlined in paragraph 52 SHA. Section 45(2) therefore allows the Secretary of State by order to extend the life of the IRG.

Section 46 Objectives and functions

130. This brings together the objectives and functions of the IRG as outlined in paragraphs 51–53 SHA. Although paragraph 53 does not attribute a specific role for the IRG in statements of acknowledgement, these are to be considered 'in the context of the IRG'. Section 46(d) therefore provides that the IRG should encourage such statements and (in line with paragraph 53) not just from the two governments but from others. The timing aspects of section 46(b) have been referred to above.

Section 47 Exercise of functions

131. Particularly in view of its oversight duties, the IRG should have full independence and operational autonomy. Although the members of the IRG are nominated by the political parties, it is important that the IRG – as the other legacy bodies – operates as an independent body and complies with the SHA founding principles (for which see paragraph 21 SHA and section 1(3) of the Bill). Section 47(2) incorporates the final sentence of paragraph 51 SHA on the conduct of the report on themes. Section 47(3) allows the IRG to adopt a Code of Practice, with which it must comply in the conduct of its proceedings.

Section 48 Relationship with other bodies

132. This section gives some specifics to the IRG's oversight duties in respect of the ICIR and OHA, but deliberately does not prescribe these in detail. The drafting committee believes that the IRG's oversight of the ICIR and OHA should be 'light touch', allowing these institutions generally to get on with their work. Section 48(1) therefore mirrors provisions elsewhere in the Bill for the ICIR and OHA to provide annual reports to the IRG (paragraphs 4(j) and 10(4) of the Founding Agreement in Schedule 2 and section 63(2)(m)).

And section 48(2) enables the IRG to 'make recommendations' (but no stronger) to the ICIR and OHA as to their future activities.

Section 49 Report on themes

133. Section 49 describes the procedure and conditions for the report on themes. Section 46(b) previously states that this should be commissioned five years after the date of publication of the SHA. The provision in section 49(1) that the IRG shall commission the report on themes picks up this reference.

134. Paragraph 51 SHA states that the report should be commissioned 'from independent academic experts'. This is reflected in section 49(1) and section 49(3). The latter provision, which describes the necessary qualities of the experts, also draws on wording from other requirements for the process in the SHA (sensitivity, rigorous intellectual integrity and devoid of any political interference).

135. Section 49(2) makes clear that it is the IRG which decides the themes to be included in the report. This is consistent with paragraph 51 SHA, which also provides, however, that any of the legacy mechanisms should be able to refer to the IRG any potential evidence base for patterns and themes. In practice, the choice of themes is likely to be the culmination of an evolving process over the first five years, as the evidence base is developed. It would therefore be natural for the IRG to consult the other legacy mechanisms before it finally decides the themes to be included in the report. The drafting committee suggests, also in section 49(2)(b), that the IRG should consult victims and organisations representing their interests.

136. Section 49(4) recognises that different experts might be required to work on different themes and the structure of the overall 'report on themes' might need to be flexible to accommodate separate studies on separate themes. Sub-sections 49(5) to 49(7) have already been covered in the commentary above.

Section 50 Evidence base

137. This section provides guidance for compilation of the evidence base. As noted above, paragraph 51 states only that 'any potential evidence base for patterns and themes should be referred to the IRG from any of the legacy mechanisms . . . for the IRG's analysis and assessment'. This recognises that the IRG could not commission the report on themes, nor could the academic experts after five years compile the report, unless in the first five years a proper evidence base had been established. Section 50(1) therefore enables the IRG to compile the evidence base to facilitate the report on themes.

138. Section 50(2) provides for the IRG to engage suitably qualified and vetted analysts and experts. The vetting requirement follows from section 50(4), which envisages that the evidence base would include confidential material. Without access to confidential material, the report on themes is unlikely to be able to add value to existing publications or achieve more than a normal open-source research project. Section 50(5) enables the legacy mechanisms to pass such confidential material to the IRG's analysts and experts subject to conditions which they might specify. Section 50(6) allows the possibility that the IRG would also receive information from other public bodies. These provisions stop short of requiring other institutions to provide material to the IRG. But it is important that this should not be used to thwart the IRG's work. Hence section 50(7) provides that the two governments should facilitate the provision of information relevant to the evidence base.

PART 5 ORAL HISTORY ARCHIVE

Section 51 Definitions

139. This section provides a list of definitions applicable to this Part. As with section 36 in respect of Part 4 (the IRG), some definitions might be transferrable to a definitions section applicable to the whole Bill.

140. Most of the definitions are straightforward, but it should be noted that 'collectors' includes interviewers collecting new material as well as those tasked with identifying existing material which may be deposited with the Archive. Likewise, 'contributors' includes those interviewed for existing projects which may now be deposited with the Archive as well as those contributing new material.

141. Sub-section (d) specifies that 'oral history material' includes recordings of interviews (both audio and audio-visual) and related documentation and artefacts. The latter may include transcripts, consent forms, project summaries and descriptions, interview schedules or indicative topics, metadata, catalogues to collections, biographical cameos for interviewees, photographs of interviewees, creative works and other materials that support or inform recorded interviews (e.g. press-cuttings, films, photographs, unpublished manuscripts).

Section 52 Establishment

142. This part seeks to implement para 22 of the SHA which states: 'The Executive will, by 2016, establish an Oral History Archive to provide a central place for people from all backgrounds (and from throughout the UK and Ireland) to share experiences and narratives related to the Troubles.'

143. In view of the significant sensitivities and challenges arising, the drafting committee considers it appropriate that this resource be established by the First Minister and Deputy First Minister, acting jointly.

144. Sub-section 3 specifies that the First Minister and Deputy First Minister, acting jointly, shall determine the location of the OHA. It is envisaged that the Archive will, for the most part, be accessible online. A 'central place' could thus be envisaged partly as a cyber-space, but an appropriate central physical space in which people can listen to recordings and access supporting documentation should also be provided.

Section 53 Principles of operation

145. This section obligates the First Minister and Deputy First Minister, acting jointly, to give force to paragraph 24 of the SHA which states that: 'The Archive will be independent and free from political interference.' This is key to the success of the OHA. If the Archive is to attract the participation and support of 'people from all backgrounds and from throughout the UK and Ireland', it must be safeguarded against manipulation by vested interests. As noted in section 57(7), those tasked with running the Archive must be impartial and perceived to be impartial by potential contributors and stakeholders. It is also essential that they do not have financial, professional or other interests that are reasonably likely to conflict with the exercise of their functions.

146. Sub-section (2) underlines the importance of consistent adherence to the founding principles.

Section 54 Code of practice

147. Sub-section (1) provides for the establishment of a non-statutory Code of Practice to provide guidance on the work of the OHA.

148. Sub-section (2) notes that the Code of Practice must include a comprehensive Code of Ethics designed primarily to safeguard the rights and needs of contributors. This will acknowledge and outline the specific measures required to facilitate contributions from victims and survivors (including, for example, advocate-counsellor assistance where appropriate). The Code of Practice will obligate the OHA to take reasonable steps to protect information that appears to be sensitive or confidential, within the limits of the law. This includes anticipation and provisions for the medium to long-term fate of data. The Code will also outline the importance of ensuring that collectors and contributors are aware of the legal implications of acquiring, processing and storing oral history material.

Section 55 Capacity

149. This section stipulates that the Secretary of State may by regulations confer on the OHA the legal capacities of a body corporate. The drafting committee believes that this is the legal construction most likely to facilitate the independence of the OHA.

Section 56 Immunity from suit

150. Paragraph 23 of the SHA states that 'consideration will be given to protecting contributors, and the body itself, from defamation claims'. The drafting committee has considered the full range of claims that could potentially arise in relation to the exercise of the functions of the OHA and proposes in sub-section (1) to provide immunity from suit for staff and agents of the OHA in respect of all acts or omissions occurring in good faith in the execution of functions in connection with the OHA.

151. In relation to defamation claims, it is suggested that qualified privilege under Schedule 1 of the Defamation Act 1996 should attach both to statements made by contributors by way of contribution to the OHA and records or publications of such statements by the OHA.

Section 57 Appointment of Executive Board and Advisory Board

152. The governance structure for the OHA must enable it to function in a manner that is 'independent and free from political interference' (paragraph 24 SHA). It should reflect the protean nature of oral history and facilitate the Archive in its 'attempt to draw together and work with existing oral history projects' (paragraph 22 SHA). Developing relationships with existing projects presents numerous challenges. Existing projects fear that the proposed OHA could become *the* oral history archive of the Troubles, implicitly threatening or diminishing the contribution that they have made or continue to make. It is vital that the proposed OHA acknowledges and draws on the considerable expertise, experience and oral history material that already exists and that it seeks to work with existing projects in a spirit of mutually beneficial partnership (see section 63 (3)).

153. The Bill does not propose detailed and prescriptive provisions for governance but the drafting committee considers that an Executive Board consisting of three Directors assisted by an Advisory Board should enable the OHA to function optimally.

154. Section (3) stipulates that the Chair of the Executive Board and one other executive Director shall be appointed by the First and Deputy First Minister, acting jointly. In keeping with the remit outlined in the SHA (paragraph 22) one other Executive Director shall be appointed by the Secretary of State, in consultation with the government of the Republic of Ireland.

155. The role of the Advisory Board will be critically important. Sub-section (6) states that this Board shall consist of seven members. The Chair shall be appointed by the First and Deputy First Minister, acting jointly, in consultation with the two governments; three members shall be appointed by the First Minister and Deputy First Minister; one member shall be appointed by the Secretary of State; and one member shall be appointed by the Secretary of State, in consultation with the government of the Republic of Ireland.

156. Sub-section (6)(3) states that one member shall be the Deputy Keeper of the Public Records Office of Northern Ireland (PRONI) *ex officio*. This acknowledges the expertise of PRONI in digitising, cataloguing, preserving and providing access to official documentary records and the potential that exists for the sharing of resources, facilities and knowledge.

157. Sub-section (7) outlines the skills and attributes necessary for appointment to both the Executive Board and the Advisory Board. Appointees are likely to include representatives of existing oral history projects and networks. Sub-section (8) emphasises the importance of ensuring a gender balance across the governance structure.

Section 58 Tenure of Executive Directors

158. This section sets out the appointment and tenure for the Executive Directors of the OHA. Sub-section (2) stipulates that appointment is for five years and may be renewed, subject to the stated provisions.

Section 59 Tenure of members of Advisory Board

159. This section sets out the appointment and tenure for the Advisory Board members. Sub-section (2) states that appointment is for five years and may be renewed, subject to the stated provisions.

Section 60 Secretariat

160. The work of identifying, facilitating, recording, processing, preserving and providing access to oral history material is time-consuming and demands a range of practical, technical and professional skills. Section 60 thus provides for the establishment of a Secretariat to provide research, archival, interviewing and other professional and administrative support to the OHA. Sub-section (2) stipulates that the Directors shall appoint the staff of the OHA. The relevant skills and expertise are referred to in sub-section (3). These include the same qualities and attributes required of Executive and Advisory Board members in section 57(7). Sub-section (3) underlines the potential for memory to provoke psychosocial and traumatic harm and also the need for gender sensitivity in exercising judgements about the functions and development of the Archive.

161. Sub-section (4) notes that staff may be (but need not be) appointed on secondment from a public authority, including PRONI.

Section 61 Remuneration and allowances

162. This section stipulates the First and Deputy First Ministers, acting jointly, shall specify the appropriate remuneration and allowances for the Executive Directors. The Executive Directors will, in turn, determine the remuneration and allowances of staff.

Section 62 Funding

163. This section guarantees adequate funding (including payments and expenses to staff and Advisory Board members and the provision of appropriate premises and facilities) for the OHA out of the Consolidated Fund. It also provides for publication of a statement that details transparent accounting procedures and the operational independence of the OHA.

164. These provisions stop short of specifying the precise funding arrangements beyond the establishment costs drawn from the Consolidated Fund. It is, however, vital that the OHA is funded beyond the five-year period envisaged for other mechanisms. Providing an adequately resourced central repository for existing and new oral history material related to the Troubles is key to the success of the OHA. Here it can build on the work of Incore's *Accounts of the Conflict* project and help to bridge a critical gap between the impulse to collect and the obligation to preserve our shared cultural heritage. Collecting, safeguarding and providing access to oral history material in the medium to long term is central to the legal and ethical framework that will be embodied in the Code of Practice and to the principle of 'promoting reconciliation'. It will enable victims and survivors to engage with the Archive at a time and place that best suits their needs, enable contributors to renegotiate memories, and facilitate intergenerational understanding and learning.

165. It is intended that contributors will be invited to assign copyright in their interviews to the OHA and that the OHA will be equipped with the resources necessary to enable it to attend to long-term storage and preservation of oral history material. It may alternatively enter into negotiations with existing repositories with regard to the sharing of facilities and resources for the purposes of long-term preservation. Consent and copyright waivers will be styled accordingly.

Section 63 The work of the OHA

166. This substantive section outlines the specific work of the OHA. Sub-section (1) sets out the two core aims: to collect new oral history material from people from all backgrounds throughout the UK and Ireland and to seek to draw together and work with existing oral history projects.

167. Sub-section (2) outlines the necessary steps to achieve these aims. They are designed to meet and mitigate a number of interrelated challenges and risks. Firstly, buy-in from the necessary range of contributors and stakeholders cannot be taken for granted. Secondly, there is a real danger that the OHA could (from the outset) be manipulated by vested interests. It is therefore imperative that the Archive does not rely on a process of voluntary self-selection and instead engages in comprehensive outreach and engagement.

168. Comprehensive outreach and engagement is also necessary to identify and acknowledge the good work that has been done and that continues to be done by existing oral history projects and to avoid duplication of effort.

169. It is by no means easy or straightforward to identify themes that will 'promote reconciliation' and 'acknowledge and address the suffering of victims and survivors'. It is equally challenging to identify and collect experiences and narratives in a manner that is 'balanced' and 'proportionate'. Promoting reconciliation may demand that we go beyond narrow political definitions and terms of reference and think creatively and flexibly about ways and means of capturing perspectives that either have not been heard or that need to be heard in the interests of real and lasting peace and reconciliation. The work of the Advisory Board will be key in helping to draw out these challenges and dilemmas. Sub-section (2)(b) notes the importance also of consulting with international stakeholders who have encountered similar challenges in transitional and post-conflict settings, and with the IRG.

170. Sub-section (2)(e) provides for a central training programme designed to enable people from across the UK and Ireland to collect interviews in their communities and organisations for deposit with the OHA and to ensure that collectors comply with the Code of Practice. This is intended as a cost-effective means of enabling the OHA to operate with as much flexibility as possible, and with minimal organisational structure and

constraint. A centralised training programme could, we suggest, borrow from the success of commercial franchise operations. It would ensure that a wide range of organisations from throughout the UK and Ireland are facilitated in the creation of appropriate oral history material and that their efforts and zeal are given the necessary direction and quality control. This model is underscored by the principle of subsidiarity – the belief that the central OHA should not perform tasks more appropriately undertaken by those closest to the ground.

171. Sub-sections (2)(f–j) provide for the conduct, processing and preservation of recordings and relevant supporting data. They emphasise in particular that all reasonable steps must be taken to safeguard contributions which are to be kept confidential.

172. Sub-sections (2)(k) and (2)(l) point to the fact that material accruing to the OHA is primarily intended for immediate public access. To facilitate the sharing of experiences and narratives and confrontation with 'other voices' the OHA must prepare and make available catalogues of oral history material and facilitate free public access – both online and at a designated physical location.

173. Sub-section (2)(m) requires the OHA to make progress reports to the IRG at least annually. These should include reference to categories of interviewees that have engaged with or declined to engage with the Archive. They should also outline the process of identifying themes and topics for interviews. Preliminary analysis of the interview material may help to identify themes for further consideration by the IRG.

174. Sub-section (3) acknowledges the considerable challenges (practical, ethical and legal) of attempting to 'draw together and work with existing oral history projects' (paragraph 22 SHA). Sub-section (3)(c) thus suggests that a designated member of the Secretariat should lead on this aspect of the work. As noted in paragraph 152 above, the relationship between the OHA and existing projects and networks should be mutually beneficial. The OHA could, for example, address a critical gap in terms of providing adequate resources to digitise and safeguard oral history material into the future. Training opportunities could also benefit existing oral history projects. The precise arrangements governing the relationship between the OHA and existing oral history projects (e.g. deposit of existing collections or deposit of new material collected under the auspices of the OHA in line with its Code of Practice) must be determined on a case-by-case basis after due consultation and agreement.

175. Sub-section (3) emphasises the importance of avoiding duplication of effort and/or diminishing the good work that has gone before. This extends both to existing projects and to networks such as the Healing Through Remembering Storytelling Network. The proposed strategy of outreach to existing projects and stakeholders is designed to ensure that public monies are deployed wisely and prudently in pursuit of the founding principles and that relations between the OHA and existing projects and networks are mutually beneficial and supportive.

176. Sub-section (3)(g) states that, where existing projects choose to deposit material (whether in duplicate or in toto) with the OHA, the terms of the original deposit will to the fullest extent possible be respected.

Section 64 Arrangements with PRONI

177. This section acknowledges that PRONI has significant expertise in relation to the digitisation, cataloguing and preservation of official records and as such may wish to share facilities, equipment and expertise.

Section 65 Engagement with contributors

178. This section describes the nature of the relationship between the OHA and contributors. It stipulates that engagement with the OHA is voluntary and that contributors can withdraw from the process at any time. It also obligates the OHA to take all reasonable steps to ensure that contributors appreciate in advance the potential legal consequences of engaging with the OHA. Should contributors provide sensitive or confidential data, the OHA shall take all necessary steps to avoid identifying them prematurely. It will also provide contributors, wherever possible, with a copy of the final version of the oral history material which they have contributed. This may exclude material that the OHA and/or the contributor hav deemed unfit for immediate publication.

Section 66 Obtaining and holding information

179. This section acknowledges the risks associated with the OHA taking possession of information relating to specific offences or alleged offences that have not been fully dealt with by the courts of all relevant jurisdictions and obligates the OHA to avoid such a situation arising.

180. Sub-section (2) acknowledges the risk associated with the leakage of information that could breach a person's rights under the ECHR and thus requires that the OHA processes and stores data in a suitably secure manner.

Section 67 Publication of information

181. This section arises from paragraph 23 of the SHA which states that: 'The Archive will bring forward proposals on the circumstances and timing of contributions being made public.' Sub-section (1) notes that the primary intention of the OHA is to make oral history material publicly available. Subsequent sub-sections detail the necessary exceptions to this rule.

182. Sub-section (2) points to the necessity of subjecting all material accepted by the OHA to a sensitivity review to establish whether it should be kept confidential for a specified period. Sub-section (3) notes that a contribution may be so embargoed if a contributor so requests or, in the absence of such a request, the OHA considers that publication would present a substantive risk to an individual.

183. Sub-section (4) notes that decisions as to the circumstances and timing of contributions being made public will be arrived at in consultation with contributors. Sub-section (5) notes, however, that there may be circumstances in which the OHA must overrule the stated preference of a contributor. As noted in sub-section (6), such decisions will be arrived at after due consideration of the contributor's wishes and in consultation with properly trained staff and international best practice.

184. Sub-section (7) suggests that a contribution will only be kept confidential for a period longer than 30 years if the OHA is satisfied that publication of the contribution or relevant part thereof would continue to present a substantive risk to an individual.

185. Sub-section (8) acknowledges that many contributors may be reticent about contributing 'experiences and narratives related to the Troubles' and that such accounts are likely to include reference to issues of considerable local, familial or public sensitivity. In order to protect and offer reassurance to contributors the drafting committee thinks it advisable to disapply the Data Protection Acts and the Freedom of Information Act 2000 to all contributions until such times as a contribution has been finalised by the OHA and thereafter to any contribution which the OHA decides to keep confidential in accordance with this section.

186. Sub-section (9) specifies that in the unlikely event of a court order demanding that the OHA disclose or provide access to a contribution, the OHA must immediately notify the relevant contributor (or next of kin) and provide them with an opportunity to make representations to the relevant authority. This might include demonstration of the steps taken to ensure that the specified contribution does not include information about specific offences or alleged offences that have not been fully dealt with by the courts of all relevant jurisdictions.

187. Sub-section (10) provides further clarification on the meaning in this section of a 'contribution' and 'a substantive risk to an individual'.

Section 68 Arrangements with the Republic of Ireland

188. This section acknowledges the obligation in paragraph 22 SHA to facilitate contributions from 'throughout the UK and Ireland' and suggests that the OHA should make such arrangements with bodies (oral history networks, archives, libraries and other such organisations) as it sees fit.

189. Sub-section 2 notes that the Northern Ireland Executive and the Secretary of State shall, as appropriate, facilitate this process, if necessary by the conclusion of arrangements between the two governments (including, if necessary, supporting legislation)

PART 6 GENERAL

190. This Part deals with interpretation of various terms and the procedure for the adoption of regulations and is self-explanatory.

SCHEDULE 2 TEXT OF THE AGREEMENT BETWEEN THE UNITED KINGDOM AND IRELAND ON THE ESTABLISHMENT OF THE INDEPENDENT COMMISSION ON INFORMATION RETRIEVAL

Paragraphs 1 to 3 Establishment, objective and guiding principles

191. These paragraphs agree the establishment of the ICIR, specify its objective as set out in the SHA and subject its operations to the guiding principles set out in the SHA. Paragraph 50 of the SHA includes additional principles, specific to the ICIR, of independence and rigour.

Paragraph 4 Specific functions

192. Paragraph (4) lists the specific functions of the ICIR which are, in the opinion of the drafting committee, the minimum necessary if it is in fact to carry out the intentions of the SHA. As such, it is important that these functions be listed in the Agreement between the UK and Ireland which will provide the foundation stone of the ICIR. Although some aspects are elaborated upon in subsequent paragraphs, further detailed guidance on the complex and sensitive work that will be necessary if the ICIR is to be effective should be given in the Code of Practice.

193. Sub-paragraph (a) deals with the preparation of a Code of Practice. Some of the points that might be included in a Code of Practice are the need for a strategic communication plan, the need to work across the UK and Ireland and with, for example, conflict-affected communities, community groups, religious organisations, ex-prisoners' associations, current and former security force personnel and other groups, political parties, women's organisations and through social media, websites and public advertisements. Similar details will be required for other functions, although the nature of work with victims, reports to

victims and the collection, holding and use of information are prescribed in somewhat more detail in subsequent paragraphs.

194. Sub-paragraphs (h) and (j) provide for giving effect to SHA paragraph 51 by the ICIR making reports to the IRG which might recommend themes for investigation. In addition, following the recommendations made in the Haass-O'Sullivan proposals, the model treaty also notes that these reports could identify classes of person who have and have not cooperated with the ICIR. The drafting committee recommends that the Code of Practice provide for these reports to be published. This would both be in line with the principle of transparency and would also contribute to public confidence in the operation of the Commission. These arrangements for reporting to the IRG eschew any suggestion that the IRG would have a managerial or supervisory role over the ICIR which would compromise its independence.

Paragraph 5 Appointment

195. Sub-paragraphs (1) to (6) largely follow the appointment procedure noted in paragraph 44 SHA. Sub-paragraph (3) provides that the two members of the Commission nominated by the First and Deputy First Ministers are formally appointed by the two governments. This is to reflect the fact that the ICIR is to be established as an international body on the basis of an inter-state treaty; it is therefore important that the contracting state parties have formal control of the appointment process.

196. Sub-paragraph (8) lays out criteria which amount to a personal specification for those to be appointed as Commissioners. The drafting committee thinks it is important that these criteria be laid out in the Founding Agreement in order to ensure, as far as possible, that all people and groups in these islands are able to have confidence in the impartiality and qualifications of those appointed.

197. Sub-paragraph (9) requires that, within the limits of anti-discrimination legislation, the two governments work together to ensure that at least two of the Commissioners are women.

Paragraph 6 Tenure

198. In order to ensure the independence and autonomy of the Commissioners, this paragraph lays down the limited circumstances in which a Commissioner may be dismissed and how substitute appointments should occur.

Paragraph 7 Remuneration and allowances

199. This paragraph states that the Commissioners should work full time and be appropriately remunerated.

Paragraph 8 Secretariat

200. In a further measure to ensure independence, this paragraph provides for the Commissioners to appoint their own staff. It also requires that staff appointed have the same qualities of expertise, independence and impartiality as required of Commissioners in paragraph 5(8).

Paragraph 9 Funding

201. This paragraph provides for adequate funding (see paragraph 94 above) and transparent accounting procedures.

Paragraph 10 Independence

202. This paragraph provides that the ICIR be independent and have complete operational autonomy. Sub-paragraph (3) specifies that the operations of the ICIR are not to be constrained by the actions of other investigative bodies including the HIU. It also specifically allows the ICIR to require the provision of information from the HIU or other public bodies in order to assess the reliability of information otherwise provided. It will be necessary for there to be protocols or a memorandum of understanding between the HIU and the ICIR in order that there be no contamination of HIU investigations by reason of enquiries made by the ICIR and to regulate other aspects of cooperation.

Paragraph 11 Commencing an information retrieval process

203. This paragraph provides that the ICIR may commence an information retrieval process either in response to requests from victims and survivors or in response to requests from persons with information. Sub-paragraph (2) makes clear that this process can be initiated regardless of other investigations in to the same matter.

Paragraph 12 Engagement with victims and survivors

204. This paragraph expands on the function of engaging with victims. Sub-paragraph (1) stresses the voluntary character of the engagement and that a victim can withdraw at any time. Sub-paragraph (2) ensures that victims are warned that engagement might have legal consequences such as, in some circumstances, affecting the likelihood of successful future prosecutions, in spite of the protections built into the process. Sub-paragraph (3) provides that support must be given to victims during and after the process. Dealing with victims is going to be one of the most difficult and sensitive areas of work for the ICIR. Some of the matters that might be included in a Code of Practice are the need to work with victims' organisations, how to work with disparate or divided families, how support should be given to victims, and the nature of the actual process to be followed by those victims who wish to engage with the Commission.

Paragraph 13 Reports to victims and survivors

205. This paragraph deals with the content of reports and the protocols conditioning their contents and publication. Sub-paragraph (1) requires that the ICIR provide a report on request, which will contain at least the tests of reliability of information carried out and any new evidence received. However, sub-paragraph (3) provides that a report does not have to be given until the Commission thinks its processes are completed, but it may issue interim reports. Sub-paragraph (2) prohibits the publication of reports by the ICIR (though families would be free to do what they wish with reports).

206. Sub-paragraphs (4) and (5) provide that the ICIR may not identify individuals who have provided information to it, but may identify organisations who may be responsible for any acts or omissions recorded. Sub-paragraph (6) means that no report can contain information that might put an individual's life at risk. Sub-paragraph (7) provides that those providing information will be given relevant privileges and immunities (see paragraph 97 above).

Paragraph 14 Expenses

207. This paragraph provides that the expenses of victims and other people cooperating with the Commission may be paid and that other support might be offered. The practical implications of this will need to be detailed in a Code of Practice.

Paragraph 15 Obtaining information

208. This paragraph is the foundation for the power suggested in section 35(2) of the Model Bill (see comments in paragraph 98 above) to compel public authorities to provide information. Sub-paragraph (3) permits the ICIR to seek information outside these islands and diplomatic support from the two governments is to be provided. Sub-paragraph (4) makes it clear that the ICIR is not to be regarded as a form of de-commissioning body or as providing an amnesty mechanism for the handing in of weapons or other articles which may be relevant to criminal investigations.

209. It is suggested that the Code of Practice might address matters such as how the commission should seek to engage with possible information providers, how meetings will be conducted, and how information recovery might be a process involving several meetings and processes.

Paragraph 16 Holding and disclosing information

210. This paragraph provides that the ICIR shall hold information in a secure and ECHR-compliant manner and that it will not disclose either information or the identity of information providers to law enforcement or other public authorities. The code of practice should require the Commission to set up data management systems to enable it to do data analysis and cross-check between information provided. Section 32(6) of the Model Bill stipulates that the archives of the ICIR should be held securely and confidentially for 50 years in a manner to be determined by the ICIR.

Paragraph 17 Use of information

211. This paragraph is the foundation for the power provided for in Section 35(3) and (4) which makes any information given to the ICIR inadmissible in legal proceedings. Sub-paragraph (2) notes that information already in the possession of a public authority may be so used, even if it is provided to ICIR, and also that a prosecution of a person may proceed in reliance on evidence obtained elsewhere even if that information is also provided to the ICIR.

Paragraph 18 Offences

212. This paragraph makes provision for the offences detailed. Please note the comments made on behalf of the drafting committee in paragraph 100 above.

Paragraph 19 Entry into force

213. This paragraph provides that the Agreement will enter into force on the first day of the second month after completion of legal formalities by the state Parties.

Paragraph 20 Duration of Agreement

214. This paragraph provides the Agreement will continue in force until terminated by mutual agreement by the two governments, but it will continue to have effect after such termination in relation to meeting liabilities or disposing of remaining assets of the Commission.

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Justice, truth and oral history: legislating the past 'from below' in Northern Ireland

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Abstract

Drawing on the 'from below' perspective which has emerged in transitional justice scholarship and practice over the past two decades, this article critically examines the dealing with the past debate in Northern Ireland. The paper begins by offering an outline of the from below perspective in the context of post-conflict or post-authoritarian societies which are struggling to come to terms with past violence and human rights abuses. Having provided some of the legal and political background to the most recent efforts to deal with the past in Northern Ireland, it then critically examines the relevant past-related provisions of the Stormont House Agreement, namely the institutions which are designed to facilitate 'justice', truth recovery and the establishment of an Oral History Archive. Drawing from the political science and social movement literature on lobbying and the ways in which interests groups may seek to influence policy, the paper then explores the efforts of the authors and others to contribute to the broader public debate, including through drafting and circulating a 'Model Bill' on dealing with the past (reproduced elsewhere in this issue) as a counterweight to the legislation which is required from the British government to implement the Stormont House Agreement. The authors argue that the combination of technical capacity, grass-roots credibility *and* 'international-savvy' local solutions *offers a framework for praxis from below in other contexts where activists are struggling to extend ownership of transitional justice beyond political elites.*

Keywords: transitional justice; from below; dealing with the past; legislation; truth recovery; prosecutions; oral history.

Introduction

While transitional justice has only emerged as a recognisable field of inquiry in the last two to three decades, it has rapidly acquired all of the elements of what Picard[2] has termed 'respectabilisation'. Originally viewed by many as an addendum to the study of

1 The authors would like to acknowledge the support of the Arts and Humanities Council which funded the work on which this research is based (Grant Reference AH/J013897/1), the ESRC (Grant Reference ES/J009849/1) from which some of the international comparative work is drawn, as well as the Queen's University Belfast Business Alliance Fund. In addition, we would like to thank our colleagues who worked on the Model Bill process with us, in particular, Brian Gormally, Jeremy Hill, Daniel Holder, Louise Mallinder, Gemma McKeown and our parliamentary draftsman Daniel Greenberg.

2 Emmanuelle Picard, 'Une Discipline en Voie de Respectabilisation: La Germanistique Française au Milieu du XXe Siècle' (2002) Lendemains 68–78.

transition within political science,[3] analysis of the variants of justice which are linked to the shift from conflict or authoritarian rule has become a growth industry. Academics and activists from fields as diverse as law, anthropology, international relations, philosophy, criminology, psychology, history and many others self-identify as *doing* transitional justice. As one of the authors has argued elsewhere, there is now something of a 'swagger' to the field, not least because of the huge amount of monies spent on 'top-down' transitional justice institutions.[4] For example, retributive-focused legal institutions, such as the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court, or hybrid tribunals in Sierra Leone, East Timor or Cambodia, have spent billions of dollars in efforts to prosecute those deemed most responsible for past human rights violations.[5] The term 'truth commission' is now widely understood and utilised in everyday language and politics, including in long-established democracies.[6] Similarly, 'rule of law' programmes are now a major constituent element of democratic reform and peace-building work – again buttressed by huge amounts of funding from the international donor community.[7] Dealing with the past in the guise of transitional justice is now normalised, mainstreamed and increasingly institutionalised.

In tandem with that institutionalisation of transitional justice, for at least a decade, a number of scholars and activists in different transitional societies have been pressing for a greater openness to what McEvoy and others have termed 'transitional justice from below'.[8] The impetus for such a focus has come from a number of places. Intellectually, it draws from a range of fields (including history, political science, development studies and critical legal studies) which variously emphasise 'from below', 'the subaltern', 'actor-orientated', 'grass-roots' or legal-pluralist understandings of the intersection between politics, governance and law.[9] It also reflects a critical approach to whether political elites in some transitional contexts have either the capacity or political will to come to terms with uncomfortable truths about the past.[10] Given the perhaps inevitable focus on 'the

3 Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (first published University of Oklahoma Press 1991).

4 Kieran McEvoy and Lorna McGregor, 'Transitional Justice from Below: An Agenda for Research, Policy and Praxis' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart 2008) 2.

5 William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (OUP 2012); Phillipe Sands, *From Nuremberg to The Hague: The Future of International Criminal Justice* (CUP 2003).

6 See Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2nd edn (Routledge 2011). For example, on 2 March 2009 the *New York Times* ran an editorial posing the question 'A Truth Commission for the Bush Era?' with regard to the actions of US forces during the 'War on Terror'. President Obama ultimately concluded that such a commission should not be established. See 'No Truth Commission on Torture, says Obama' *Irish Times* (Dublin, 25 April 2009).

7 Christopher May, *The Rule of Law: The Common Sense of Global Politics* (Edward Elgar 2014).

8 See Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34(4) Journal of Law and Society 411–40.

9 See, for example, David Ludden (ed), *Reading Subaltern Studies: Critical History, Contested Meaning and the Globalization of South Asia* (Anthem Press 2002); E P Thompson, *The Making of the English Working Class* (first published Victor Gollancz 1963); Jeremy Brecher, Tim Costello and Brendan Smyth, *Globalisation From Below: The Power of Solidarity* (Southend Press 2001); Jean-Paul Faguet, *Decentralization and Popular Democracy: Governance From Below in Bolivia* (University of Michigan Press 2012); Norman Long, 'The Case for an Actor Orientated Sociology of Development' in Norman Long (ed), *Development Sociology: Actor Perspectives* (Taylor & Francis 2001); Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton University Press 2000).

10 Alexander Betts, 'Should Approaches to Post-conflict Justice and Reconciliation Be Determined Globally, Nationally or Locally?' (2005) 17(5) European Journal of Development Research 735–52; Paul Gready, 'Reconceptualising Transitional Justice: Embedded and Distanced Justice' (2005) 5(1) Conflict, Security and Development 3–21.

rule of law' as a bedrock of transitional justice, there is often a wariness of the dominance of lawyers and legalism and a related unease that those who have been most affected by violence or human rights abuses often find that their views are not heard or accorded adequate weight once the wheels of 'top-down' transitional justice processes begin to turn.[11] Indeed, in contexts where national justice systems are themselves too corrupt, tainted, ineffective, or overwhelmed, it is frequently victims and survivor groups, community and civil society organisations, human rights non-governmental organisations (NGOs), church bodies and others that have done much of the heavy lifting in pressing for change and finding alternative or interim means of dealing with the past.[12]

Transitional justice from below does not simply mean locating transitional justice at community level. Rather, the term is increasingly used to denote the 'resistant', 'corrective' or 'mobilising' character of the actions of community, civil society and other non-state actors in challenging hegemonic understandings of the world or seeking to ameliorate the consequences for vulnerable people of the exercise of power by elite political, social or economic actors.[13] It should also be stressed that, while the from below perspective is generally interested in maximising community ownership and participation in processes of justice in transition, this is not at the expense of a suspension of critical faculties. It certainly does not presuppose a naive or overly romanticised notion of community or civil society as a place that is devoid of reactionary or exclusionary views or practices.[14] Rather, it requires a cold-eyed and pragmatic assessment of community risks and capacities, and the development of strategies which can buttress against those risks and enhance capacity.

Finally, transitional justice 'from below' is not a rejectionist discourse with regard to equivalent efforts 'from above'. For current purposes, developing effective methods of dealing with the past in transitional contexts is marked not simply through the negotiations between governments and political parties. Rather it requires, imaginative ways of ensuring meaningful engagement in the design and implementation of institutions by those who have been involved in the social and political struggles which placed them on the political agenda in the first place.[15] It is designed to offer, in Falk's terms, a different vantage point to 'see' more clearly how interactions, accommodations and relationships with institutions and structures from above should evolve. It is therefore intended to encourage and challenge those who design and implement such institutions to improve what they do, to think more deeply about why they do it, and to explore ways in which those same institutions of transitional justice can broaden the participation of those who have been most directly affected by conflict.

The particular 'from below' initiative discussed in this article concerns efforts by the authors and others to inform ongoing political and social discussions on dealing with the past in Northern Ireland. In section one of this article we offer a brief overview of the legal and political context in which this and a related series of interventions on the past have developed over the past few years. We then critically assess some of the basic elements of the most recent attempt to design inter-related processes that might facilitate

11 McEvoy and McGregor (n 4); Nicola Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (OUP 2015); Phil Clark, *The Gacaca Courts and Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (CUP 2010).

12 Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (CUP 2006).

13 See, for example, Richard Falk, 'Globalization-from-Below: An Innovative Politics of Resistance' in Richard Sandbrook (ed), *Civilizing Globalization: A Survival Guide* (State University of New York Press 2003).

14 Amitai Etzioni, *The Spirit of Community* (Simon & Schuster 1994).

15 Upendra Baxi, *The Future of Human Rights* (OUP 2002).

prosecutions, truth or information recovery and the creation of an oral archive – processes which are reflected in the proposed institutions enshrined in the Stormont House Agreement (SHA) (2014). Finally, we reflect on our methods and seek to draw out some broader lessons which may be applicable in other transitional contexts where civil society or academics seek to make practical interventions.

The political and legal context to dealing with the past

The Good Friday Agreement (1998) contained a range of what might be termed 'past-facing' provisions concerning support for victims, prisoner release and reintegration, policing, human rights and criminal justice reform.[16] However, unlike similar peace accords elsewhere, there was no overarching mechanism such as a truth and reconciliation commission designed to comprehensively 'deal with the past'. Instead, a 'piecemeal' approach has given rise to a smorgasbord of institutions and techniques to deal with particular aspects of the conflict and its consequences. These have included: the establishment of a number of public inquiries into particular controversial events, including the killing of 13 civilians on Bloody Sunday;[17] the establishment of the Office of the Police Ombudsman, the responsibilities of which include investigating both historical and contemporary allegations of police malfeasance;[18] a series of coronial inquests into over 50 conflict-related deaths, many of which occurred in controversial circumstances;[19] the establishment and ultimate disbandment of the Historical Enquiries Team (HET) , a police-led review of all conflict-related deaths;[20] a series of high-profile litigation efforts by affected families in the domestic courts and the European Court of Human Rights;[21] investigations of alleged miscarriages of justice by the Criminal Cases Review Commission;[22] as well as numerous community and civil society-based efforts focused on truth recovery, story-telling, oral history and commemoration.[23]

In addition, there have been at least four major attempts to draw on these incremental efforts and 'pull it all together' in an overarching mechanism or series of mechanisms. The latest initiative is outlined in detail below, but it might be useful at this juncture to offer a brief summary of what is now quite a complex historical narrative, not least

16 For an overview of these and other elements of the Good Friday Agreement, see special issue of Fordham International Law Journal (1998) 22(4).

17 See *The Report of the Bloody Sunday Inquiry* (Saville Report) HC 29-I vols 1–10 (HMSO 2010).

18 For an overview of the work of the Police Ombudsman, see the most recent annual report: <www.policeombudsman.org/About-Us/Publications/Annual-Reports-and-Business-Plans> accessed 14 March 2016. For the broader context see Graham Ellison, 'A Blueprint for Democratic Policing Anywhere in the World? Police Reform, Political Transition, and Conflict Resolution in Northern Ireland' (2007) 10(3) Police Quarterly 243-269.

19 See speech by the Lord Chief Justice Sir Declan Morgan, 'Review of the Strategy for Victims and Survivors', Victims and Survivor Commission Conference, Belfast, 9 March 2016.

20 See Patricia Lundy, 'Can the Past be Policed?: Lessons from the Historical Enquiries Team Northern Ireland' (2009) 11 Journal of Law and Social Challenges 109–56; 'Exploring Home-Grown Transitional Justice and its Dilemmas: A Case Study of the Historical Enquiries Team Northern Ireland' (2009) 3 International Journal of Transitional Justice 321–40.

21 Gordon Anthony and Luke Moffett, 'Northern Ireland Law, Politics and the "Problem of the Past"' (2014) 20(3) European Public Law 395–406.

22 Hannah Quirk, 'Don't Mention the War: The Court of Appeal, the Criminal Cases Review Commission and Dealing with the Past in Northern Ireland' (2013) 76(6) Modern Law Review 949–80.

23 See, for example, Brian Gormally and Kieran McEvoy, *Dealing with the Past in Northern Ireland 'From Below'* (Community Foundation for Northern Ireland 2009); Kirk Simpson, *Truth Recovery in Northern Ireland: Critically Interpreting the Past* (Manchester University Press 2013); Grainne Kelly, *'Storytelling' Audit: An Audit of Personal Story, Narrative and Testimony Initiatives Related to the Conflict in and about Northern Ireland* (Healing Through Remembering 2005).

because what is currently under consideration has drawn explicitly and implicitly from previous work.

In 2006, following a two-year process of extensive debate and deliberation with a diverse cross-section of opinion, the local NGO, Healing Through Remembering, produced a major report which outlined a series of options for dealing with the past.[24] In 2007, following consultation with the Irish government, the then Labour administration appointed the Consultative Group on the Past (CGP) to make recommendations on how to deal with the past. The British and Irish governments were very aware of, and directed the CGP towards, the Healing Through Remembering work on the past in its deliberations.[25] The CGP itself made clear from the outset that it would draw upon this previous work. As the co-chairs Lord Eames and Dennis Bradley told the *Irish News* early in their consultation process, 'organisations such as Healing Through Remembering have already completed in-depth analysis across a range of issues on dealing with the past. When you take this along with the efforts of local initiatives undertaken by community organisations, it is clear that there is an opportunity to build on that work.'[26] Similarly, once its report was completed, the CGP was always candid that it had not 'started from scratch' in conducting its work.[27] Indeed, the antecedence of some of the key elements of the CGP report became a focus for both supporters and detractors, once its recommendations were made.[28]

Following widespread controversy concerning one recommendation that all victims of the conflict (including the family members of paramilitaries who were killed) should receive a £12,000 recognition payment, that report was rejected by the Conservative-led Coalition government which came to power in 2010. Three years later, US diplomats Richard Haass and Meghan O'Sullivan chaired negotiations involving the political parties

24 Kieran McEvoy, *Making Peace with the Past: Options for Dealing with the Past in and about Northern Ireland* (Healing Through Remembering 2006).

25 As Minister of State at the Department of the Taoiseach (Deputy Tom Kitt) told the Dáil, 'I commend to the House the work of Healing Through Remembering, a cross-community organisation bringing together representatives from North and South and Britain, of victims' groups, churches, academics, community and youth organisations. They have produced reports and recommendations on issues including truth recovery, commemoration, acknowledgement and story telling. These are thoughtful and well-researched documents that deserve careful consideration. They would serve as a very useful reference for the work of the Consultative Group On The Past.' Dáil Éireann Deb, 31 January 2008, vol 645, col 730.

26 'Dealing with the Troubled Past is Difficult Issue for Society' *Irish News* (Belfast, 2 January 2008).

27 'The report took account of existing work and research undertaken into ways of dealing with the past by a large range of individuals, groups, non-governmental organisations, statutory bodies and Governments. The Consultative Group paid particular respect to the work of Healing Through Remembering (HTR), a cross-community project made up of individual members from a range of political backgrounds.' See 'Report of the Consultative Group on the Past in Northern Ireland', second report of session 2009–10, House of Commons Northern Ireland Affairs Committee, 6.

28 For example, Alliance Party spokesperson Stephen Farry stated: 'We fully appreciate and welcome the Eames Bradley Report . . . a lot of the elements within Eames/Bradley have been trailed, for example, through Healing Through Remembering, such as storytelling, addressing the needs of victims, memorials, Day of Reflection, broader reconciliation issues.' Speech at 'Reflecting on the Report of the Consultative Group on the Past Conference', Belfast, 15 May 2009. On the other hand, in dismissing the CGP report, the prominent Unionist victim campaigner Willie Frazer argued in a blog titled 'Eames Bradley Quango' that: 'The naive nonsense that exists at the core of this report found its origins in the Healing Through Remembering work which was rejected by victims. Its answer adopted by Eames Bradley is to rely on the decency of terrorists to come forward and tell the truth, indeed the appeasement does not end there they will be paid for their participation – given immunity from prosecution. This is clearly a rehash of Republican wish lists, South African fairy tales and the wilder nonsense from the minds of Northern Ireland great and good. But as victims we say it is unacceptable, it is not worth the paper it is written on.' William Frazer, 20 October 2008 <www.cain.ulst.ac.uk/victims/archive/author.html> accessed 13 February 2016.

in Northern Ireland which focused on a number of outstanding issues, including dealing with the past. Despite the negotiation of seven successive drafts, the parties ultimately failed to reach an agreement on the past and other matters and in December 2013 the talks were terminated as no agreement could be reached.

In September 2014, negotiations recommenced, this time with both the British and Irish governments more centrally involved. In December 2014, the SHA was published, which included provisions to establish a number of mechanisms designed to deal with the past (detailed below). In the subsequent Queen's speech, the UK government committed to introducing legislation at Westminster to enact these commitments.[29] In 2015, relations within the Northern Ireland Executive deteriorated over a number of issues, including welfare reform, as well as austerity cuts and confirmation by the Police Service of Northern Ireland (PSNI) that the IRA still existed following the murder of two senior Republicans in Belfast.[30] Political negotiations recommenced in September 2015 between the two governments and the five political parties in the Northern Ireland Executive and eventually, in November 2015, the Fresh Start Agreement was reached.[31] However, while substantial progress was apparently made,[32] no agreement on dealing with the past was reached during these negotiations, much to the dismay of victims across the political spectrum.[33] In the run-up to the negotiations, the British government published a 'summary of measures document' offering a broad outline of its plans and a draft government Bill on the past was prepared.[34] A leaked version of the government's draft Bill (which was amended during the negotiations) contained extensive provision for the British government to redact information deemed 'sensitive' from going to families affected by the conflict on the basis of national security (discussed further below). This ultimately proved unacceptable to both of the nationalist parties (Sinn Féin and the Social Democratic and Labour Party (SDLP)) and the Irish government.[35] At the time of writing, efforts are ongoing (including by the authors and others) to seek to narrow the gap between the different actors on the outstanding issues preventing the establishment

29 'Legislation will be Taken Forward Giving Effect to the Stormont House Agreement in Northern Ireland', Queen's Speech, 27 May 2015 <www.gov.uk/government/speeches/queens-speech-2015> accessed 14 February 2016.

30 'IRA "Army Council" Still Exists but Has "Wholly Political Focus"', BBC NI News, 20 October 2015.

31 'A Fresh Start: The Stormont Agreement and Implementation Plan: an Agreement to Consolidate the Peace, Secure Stability, Enable Progress and Offer Hope', 17 November 2015 <www.gov.uk/government/news/a-fresh-start-for-northern-ireland> accessed 15 March 2016.

32 'The cross-party talks that ran from 8 September to 17 November last year, which culminated in the Fresh Start agreement, brought us closer than ever before to consensus on the best way to deal with Northern Ireland's past. While we established much common ground, it was not possible to reach agreement on all issues . . . The UK Government is determined to resolve the outstanding issues that are preventing the establishment of the legacy institutions set out in the Stormont House Agreement.' Written Statement from Secretary of State for Northern Ireland to Parliament, 21 January 2016 <www.gov.uk/government/speeches/written-ministerial-statement-on-the-icir> accessed 13 March 2016.

33 See, for example, 'Stormont Deal: Cross-Community Victims Group Accuses Political Leaders of Betrayal' *Newsletter* (Belfast, 18 November 2015); 'Where is rhe Fresh Start for Victims, Leaders Asked' *Irish News* (Belfast, 19 November 2015).

34 'Northern Ireland (Stormont House Agreement) Bill 2015 Summary of Measures' <www.gov.uk/government/publications/villiers-publishes-policy-paper-on-northern-ireland-stormont-house-agreement-bill-2015> accessed 2 March 2016.

35 'Britain Fails to Honour its Commitment on Truth and Justice' *An Phoblacht* (Dublin, 1 December 2016); Mark Durkan, 'National Security Strictures Suppress Truth about Dirty War' *Derry Journal* (Derry, 26 November 2015); 'Charlie Flanagan Critical of National Security "Smothering blanket"' *Irish News* (Belfast, 27 November 2015).

of the various past-focused mechanisms, including a workable mechanism for dealing with the issue of redactions in the interest of national security.

As noted above, the provisions on the past contained in the SHA are in reality a sort of palimpsest which draws upon the various proposals which have come before. As one seasoned political commentator who has followed closely the twists and turns of the debate on the past for over a decade told one of the authors in 2015: 'there are only so many ways of doing this thing and God knows we have explored them all since the Healing Through Remembering report came out in 2006'.[36] The SHA commits the two governments and the five parties in the Northern Ireland Executive to establishing four mechanisms. These are as follows.

- **Historical Investigations Unit** (HIU) – an independent investigative institution (answerable to the Policing Board of Northern Ireland) which will take over the past-focused work previously undertaken by the HET and the Office of the Police Ombudsman. This body is envisaged as having the equivalent powers of the PSNI in terms of arrest, stop, search, question, retaining evidence and so forth. Decisions regarding whether or not sufficient evidence is available for a prosecution for conflict-related offences will be made by the Director of Public Prosecutions. It is required to carry out investigations which are deemed compatible with the Article 2 requirements of the European Convention on Human Rights.[37] In addition, where there is sufficient evidence to meet the possible threshold for prosecution, the Director of Public Prosecutions shall make that decision. In addition, the HIU is required to produce a 'victim-centred' report to the affected families in the case of each of the deaths that it investigates.[38]
- **Independent Commission on Information Retrieval** (ICIR) – an independent international body established by treaty by the UK and Irish government. The ICIR will have an independent chair of international standing, as well as one other nominee each appointed by the British and Irish governments and the First and Deputy First Ministers. The function of this body is to allow families affected by the conflict to seek and receive information about the circumstances surrounding the death of their loved ones from those who may have knowledge of these events. In order to facilitate those with such information coming forward, the SHA specifies that no information provided can be used for criminal or civil proceedings. Both governments commit to supporting any request for information from the ICIR and its operation shall be 'held accountable to the principles of independence, rigour, fairness and balance, transparency and proportionality'.[39]
- **Oral History Archive** (OHA) – this element was described in the SHA as providing 'a central place for people from all backgrounds (and from throughout the UK and Ireland) to share experiences and narratives related to the Troubles'. The SHA also stipulated that, as well as collecting new archival material, the OHA would 'attempt to draw together and work with

36 Personal interview with prominent journalist, 21 October 2015.

37 Anthony and Moffett (n 21).

38 SHA (2014), para 30 <www.gov.uk/government/publications/the-stormont-house-agreement> accessed 10 February 2016.

39 Ibid paras 41–50.

existing oral history projects'. It crucially noted that: 'The Archive will be independent and free from political interference.' In the subsequent leaked draft legislation and accompanying policy document, the British government specified that the OHA would be located within the Public Records Office of Northern Ireland (PRONI), albeit with 'operational independence' from the Department of Culture Arts and Leisure, the relevant parent department.[40]

- **Implementation and Reconciliation Group** (IRG) – the work of the IRG will include determining a range of themes and patterns related to the conflict which shall be explored by a group of appointed academic experts.[41] The work of those academics will be overseen by a group of political nominees, with the Democratic Unionist Party (DUP) appointing three members, Sinn Féin two, and the other parties which were signatories to the Agreement appointing one each, as would the two governments – with an independent chair of international standing. The Agreement stipulates that the work of the IRG 'should be conducted with sensitivity and rigorous intellectual integrity, devoid of any political interference'. The process is designed to 'promote reconciliation' and a 'better understanding of the past' and 'reduce sectarianism'. It also states that: 'In the context of the work of the IRG the UK and Irish Governments will consider statements of acknowledgement and would expect others to do the same.'[42]

While reaching an agreement to establish these four institutions represented a significant political achievement, the brevity of the relevant text was such that much of the ensuing discussion inevitably centred on the detail of the enabling legislation. Not for the first time, 'progress' had depended on a measure of creative ambiguity. As one of the senior party political negotiations told the authors, '. . . in reality all we could achieve in the end were heads of agreement'.[43] Given that reality, the legislative detail was inevitably going to be a source for additional debate and discussion amongst politicians and civil society once negotiations recommenced in the autumn of 2015. It was in order to ensure that the relevant political and public conversations on these often technical matters were as informed as possible that the authors were involved with other colleagues in producing the Model Bill on the past. That Model Bill and accompanying explanatory text are detailed elsewhere in this issue. Before critically examining some of the substantive measures contained both in the leaked government legislation which appeared in 2015 and the Model Bill, it might be useful at this juncture to offer some background to the process by which the Model Bill was produced.

For a number of years, McEvoy has been working closely with different civil society organisations on aspects of dealing with the past in Northern Ireland, most notably Healing Through Remembering and the Committee on the Administration of Justice. In addition, with Mallinder and others, he has also conducted extensive international and comparative research to explore how different jurisdictions have dealt with challenging

40 SHA (n 38) paras 22–25.

41 Ibid para 51.

42 Ibid paras 52–54.

43 Discussion with senior political negotiator, 30 January 2015. By way of illustration: the Healing Through Remembering Report (2006) on options for dealing with the past was 117 pages; the report of the CGP (2009) contained 189 pages including appendices; the Haass–O'Sullivan (2013) document contained 19 pages on the past; and the SHA had only five pages on the same topic.

aspects of the transition from conflict or authoritarianism.[44] That international research on the legal and political challenges associated with dealing with the past fed directly into the local work in Northern Ireland.

Commencing in 2011, he led a team of academics, lawyers and activists who (in partnership with Healing Through Remembering) began an Arts and Humanities Research Council-funded project designed to assist politicians, government officials, civil society groups and others in exploring the complex interplay between prosecutions, amnesties (and related immunities) and truth recovery in Northern Ireland. That project engaged in an extensive range of bilateral meetings with victims groups, ex-prisoners, former police officers and others, as well as the British and Irish governments and all of the political parties involved in the negotiations on the past. The team offered to provide accurate but accessible legal and policy advice (free of charge) to any relevant civil society or political party interested in the dealing with the past debate. As a result, the team produced a series of five reports, as well as several blogs, organised a number of conferences and seminars, and published the findings in numerous broadcast and print media outlets.[45]

As the original funding came to an end in 2013, additional resources were secured from the Queen's University Business Alliance to support a partnership on dealing with the past with Northern Ireland's primary human rights NGO, the Committee on the Administration of Justice (CAJ). In 2015 CAJ launched its *Apparatus of Impunity* report (funded by the Business Alliance) which documented many of the failings of the 'piecemeal' approach to the past. In an effort to move beyond critiquing the status quo, McEvoy and Bryson from Queen's, colleagues from CAJ, along with Mallinder and another colleague (Hill) from the Transitional Justice Institute,[46] instructed parliamentary counsel (Greenberg) and began work on producing the Model Bill on dealing with the past and the accompanying explanatory commentary (reproduced elsewhere in this issue). From 2014 onwards the developing drafts were discussed in the course of more than 20 detailed face-to-face meetings with senior British and Irish officials (involved in both the political negotiations and the preparation of their respective legislation in either jurisdiction on the past),[47] senior politicians from across the political spectrum and a wide range of local civil society organisations. Drafts of the Bill were also presented at three major conferences organised in association with our civil society partners and the Northern Ireland Commission for Victims and Survivors.

Once completed, the Model Bill was formally launched at an event at the House of Lords sponsored by former Northern Ireland Office Minister Lord Dubbs in October 2015 and addressed by Shadow Northern Ireland Secretary of State Vernon Coaker, amongst others. It was also widely publicised through the local print and broadcast media, at a further conference in Belfast, and a range of seminars and briefings aimed at civil society organisations and political parties.

44 See, for example, Kieran McEvoy, 'Prisoner Release and Conflict Resolution: International Lessons for Northern Ireland' (1998) 8(1) International Criminal Justice Review 33–61; Kieran McEvoy and Louise Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy' (2012) 39(3) Journal of Law and Society 410–40; Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice Voice, Agency and Blame' (2013) 22(4) Social and Legal Studies 489–513.

45 The reports, blogs etc. are all available on the project website <www.amnesties-prosecution-public-interest.co.uk> accessed 14 March 2016.

46 Jeremy Hill is now a visiting scholar at the Transitional Justice Institute. He is a former senior Foreign and Commonwealth Office lawyer, a former UK ambassador and served as the legal advisor to the CGP.

47 A number of the past-focused institutions proposed in the SHA required parallel enabling legislation in both Westminster and Dáil Éireann.

Our approach in drafting and disseminating the Model Bill was to stick closely to the text of the SHA and to write the substantive sections in a manner that was consistent with UK domestic law and the relevant international human rights standards. The Model Bill was very explicitly not a 'wish list' document. From the outset, we were very aware that its efficacy as an advocacy tool depended upon its technical competence and our collective credibility in delivering it, and related policy outputs, in as measured, constructive and informed a fashion as possible.[48] The detailed explanations of the text in the Model Bill are outlined in the 'Clause by clause' article published elsewhere in this issue. In this paper we have attempted to place the work on the Model Bill in its broader legal and political context. In particular, we will now examine how those involved sought: to frame discussions on the workability of the various mechanisms proposed in the SHA in the light of past experiences of analogous institutions both locally and internationally; to manage the expectations of affected parties, in particular victims of the conflict; and to have a close eye on what would be required politically to maximise public confidence in the institutions. Below, we have grouped the primary issues around which the efforts to deal with the past in Northern Ireland have coalesced – namely, the potential for conflict-related prosecutions; the opportunities for truth or information recovery (both about specific events and broader patterns and themes of the conflict); and the role of archives and story-telling in capturing people's lived experiences during the conflict.

Prosecutions, 'justice' and disclosure

In many transitional contexts, the struggle for 'justice' is often viewed as synonymous with the efforts to investigate and prosecute those who were responsible for previous acts of murder, torture and other human rights violations. The importance of individual accountability, deterrence, bringing some 'satisfaction' to victims, embedding human rights and the rule of law and symbolic marking of the wrongness of past actions are amongst the compelling rationales offered for pursuing past prosecutions.[49] In the Northern Ireland context, a determination to retain the possibility of prosecutions for conflict-related offences has been a constant theme in political negotiations on dealing with the past – usually expressed most strongly by the Unionist political parties and victims' groups from that community.[50] The political reality is that the 'focus on dealing with the past is ensuring robust criminal prosecutions are in place to pursue justice' has been a fundamental prerequisite for Unionist negotiators throughout the transition.[51] The

48 For a discussion on the relationship between credibility and effective advocacy, see Bertram J Levine, *The Art of Lobbying: Building Trust and Selling Policy* (CQ Press 2008); John C Scott, *The Social Process of Lobbying* (Routledge 2014).

49 Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (WW Norton 2011).

50 Cheryl Lawther, *Truth, Denial and Transition; Northern Ireland and the Contested Past* (Routledge 2013).

51 DUP MP Jeffrey Donaldson, 'Final Furlough Approaching in Haass Talks' *Newsletter* (Belfast, 14 December 2013). The SDLP and to a lesser extent Sinn Féin have also continued to advocate for prosecutions of state actors such as those involved in the killings at Bloody Sunday. On the announcement that a murder investigation into the Bloody Sunday killings would restart, Sinn Féin Assembly Member, Raymond McCartney, called for the investigation to be properly resourced 'to ensure the relatives get access to justice' *Irish Republican News* (Dublin, 10 January 2015). Responding to the arrest of an ex-Lance Corporal from the Parachute Regiment as part of that investigation, Derry SDLP councillor, Brian Tierney, stated: 'I want to welcome the progress made in the investigation into the murder of 14 innocent civilians in Derry on Bloody Sunday. The families of those murdered by British soldiers on that day in 1972 waited far too long for the truth about what happened, they should not be forced to wait any longer for justice.' *Belfast Media Group* (Belfast, 11 November 2015).

vehicle for achieving that objective has been the police-led work of the HET and its successor envisaged under the SHA, the HIU.

Informed by the political reality that 'the justice option' had to be kept on the table, much of our policy and practical work interventions on the issue have been directed towards helping to manage the expectations of victims regarding the potential for conflict-related convictions. In the policing and legal community, there is a widespread acceptance that the very significant practical and evidential challenges associated with securing convictions for historical offences (many of which happened decades ago) mean that very few convictions will in reality be secured.[52] Indeed, since the signing of the Good Friday Agreement in 1998 there have only been four successful prosecutions of non-state actors (two Loyalist and two Republican) for pre-1998 conflict-related murders or attempted murders and none of state actors.[53] Moreover, under the terms of the Good Friday Agreement, anyone convicted of a conflict-related offence will serve a maximum of two years regardless of the seriousness of the offence.[54] Thus, our approach to working on the HIU has been to ensure that these realities remain at the forefront of the public conversation while simultaneously emphasising the truth recovery potential of the proposed mechanism.

When the HET was established it had a number of specified objectives to guide its work. Interestingly, the first of the three specified objectives of the HET was to 'assist in bringing a measure of resolution' to the families of victims killed during the conflict between 1968 and 1998.[55] The key output designed to deliver this measure of resolution was the Review Summary Report about the circumstances of the death of their loved one delivered to families. Mindful of legal and ethical responsibilities,[56] the HET committed to a policy of 'maximum permissible disclosure, consistent with legal constraints'.[57] For the vast majority of cases reviewed by the HET (and if the SHA is implemented, its successor, the HIU), it is these reports to families which will be the most important *product* of the work of those investigations.

As is discussed in more detail in the 'Clause by clause' article, we considered that the key elements to maximise the effectiveness of the HIU to deliver such products were to

52 As former Chief Constable Sir Hugh Orde said with regard to the HET which he established: '. . . the likelihood of solving cases was clearly going to be slight. Witnesses would be old or dead. Exhibits, if still available, could be contaminated or inadmissible. Informants and agents would be in the mix; the original paperwork incomplete or missing . . . At the height of the Troubles, 497 people were murdered in one year. The forensic laboratory was blown up twice. Numerous police stations were blown up, stations housing much of the investigative material. Police resources, understandably, would have been stretched to the limit.' Hugh Orde, 'War is Easy. Peace is the Difficult Prize', Longford Lecture, 2 December 2009. In a similar vein, the Attorney General for Northern Ireland, John Larkin, noted: 'More than 15 years have passed since the Belfast Agreement, there have been very few prosecutions, and every competent criminal lawyer will tell you the prospects of conviction diminish, perhaps exponentially, with each passing year, so we are in a position now where I think we have to take stock.' 'Northern Ireland Attorney General John Larkin Calls for End to Troubles Prosecutions', BBC NI News, 20 November 2013.

53 See 'The Apparatus of Impunity? Human Rights Violations and the Northern Ireland Conflict: A Narrative of Official Limitations on Post-Agreement Investigative Mechanisms' (Committee on the Administration of Justice 2015) ii.

54 Northern Ireland (Sentences) Act, 1998 (s 10, 'Accelerated release').

55 The other specified objectives were to re-examine all 'troubles related' deaths 'in a manner that satisfies the PSNI's obligation to conduct an effective investigation' and to do so in a way that commands the confidence of the wider public. PSNI HET Operational Guide 2013, para 2:1.

56 For example, the Regulation of Investigatory Powers Act 2000 which makes it a criminal offence to name an informant and contains obligations to protect lives under Article 2 European Convention on Human Rights.

57 See Lundy (n 20).

ensure that it is independent, properly resourced, suitably staffed (including with reference to gender) and sufficiently empowered – particularly with regard to the disclosure of documents and other materials. As has been well documented, one of the key failings of the HET when it was in operation was its practical inability to ensure that former members of the Royal Ulster Constabulary (RUC) did not compromise the independence of investigations into historical cases where state malfeasance (including by the RUC) was a constituent part of the investigation.[58] Our proposed solution to this issue was to adopt a similar position to the Office of the Police Ombudsman regarding legacy cases and to disbar former RUC or British Army members (or indeed those with an affiliation to paramilitary organisations or their linked political parties) from employment by the HIU. On the issue of resourcing, we sought to ensure that the HIU could not be subject to financial manipulation or general austerity measures by specifying that the UK Treasury should determine the HIU's budget and that it must be paid out of the Consolidated Fund – which would mean that in practice its budget could only be changed by a relevant vote in Parliament. With regard to disclosure, the formulation in the Model Bill was that other public authorities had an unfettered duty of disclosure in response to a request by the HIU for documentation requested in conducting its investigations. With regard to the onward disclosure to families by the HIU in the subsequent reports, the Model Bill suggested that the HIU Director may omit information if it might put a person's life at risk or if it might prejudice the administration of justice (e.g. interfere with a potential successful prosecution).

As noted above, this final issue regarding the disclosure powers of the HIU became the key stumbling block which apparently prevented an agreement being reached in late 2014. After political negotiations had recommenced in the autumn of 2015, a leaked version of the government's draft legislation on dealing with the past in Northern Ireland came into the public arena. Amongst the most notable elements of that leaked draft were the provisions relating to disclosure and the HIU. While the powers of disclosure of information including intelligence *to* the HIU to assist it in conducting investigations were quite strong, the HIU's ability to provide 'onward disclosure' of such information to families was significantly curtailed by numerous references to powers that the Secretary of State could exercise to redact information on 'the grounds of national security' – a term that was not included in the Stormont House Agreement. As noted above, from the outset Sinn Féin and the SDLP (and latterly the Irish government and the Alliance Party) all criticised the British government for attempting to use a 'national security veto' to undermine the truth recovery functions of the HIU.[59] While none of the political actors have contested the responsibility to redact information that might put individuals' lives at risk (the version favoured in the Model Bill), difficulties in assessing which other

58 Patricia Lundy and Bill Rolston, 'Redress for Past Harms? Official Apologies in Northern Ireland' (2016) 20(1) International Journal of Human Rights 104–22; Patricia Lundy, 'Research Brief: Assessment of the Historical Enquiries Team (HET) Review Processes and Procedures in Royal Military Police (RMP) Investigation Cases' (Ulster University Research Report 2012) <http://eprints.ulster.ac.uk/21809/> accessed 21 March 2016.

59 'Sinn Féin Criticise Leaked Draft Westminster Bill Dealing With Legacy of The Troubles' *BBC NI News* (Belfast, 6 October 2015); 'Stormont House Agreement: SDLP State Opposition to Victims Bill' *Derry Journal* (Derry, 14 October 2015); 'Republic's Foreign Minister Charlie Flanagan Critical of National Security Smothering Blanket' *Irish News* (Belfast, 27 November 2015). The Alliance Party leader and Justice Minister David Ford is quoted as 'sharing the concerns of nationalist and the Irish government' over the national security clauses in the leaked Bill. He told the *Irish News*, 'Clearly every government has national security issues but the concerns we expressed on seeing the draft bill was that there seemed to be about four layers of that – which gave an indication of an unwillingness to be opened. If I thought there was an overlaying of national security it's not surprising other people rejected it completely.' in 'David Ford Upbeat for Alliance ahead of Stormont Election' *Irish News* (Belfast, 4 March 2016).

legitimate national security interests might be redacted and the decision-making process for making such redactions have continued to prove difficult to resolve. Since the political negotiations failed to reach agreement, the authors and other civil society actors have been working through a range of possible solutions. Drawing upon the relevant UK and European Court of Human Rights jurisprudence, and best practice in other transitional justice contexts, we have been examining the criteria by which such redactions could be made, the shape of an independent judicial decision which could determine the reasonableness of any such redactions, and the ways in which the respective interests of the state and affected families might be legally represented in coming to such a determination.[60] That work is ongoing at the time of writing.

In sum, the drafting of the Model Bill and related policy and research work before and since has sought to engage with the technical challenges associated with legislating for an investigative mechanism which has both a prosecutorial and a truth recovery function. Debates around the meaning and purpose of justice in post-conflict and post-authoritarian contexts are quite commonplace. As the field has evolved, differing shades of emphasis on retributive, restorative, transformative and other iterations of justice often map onto particular institutions such as trials, truth commissions, reparations programmes and so forth.[61] What is less common, however, is the institutionalisation of both retribution and restorative measures in the same mechanism. The HIU and its predecessor the HET are an adaptation of police 'cold case review' investigative techniques now well established in many settled democracies. However, that adaptation has been applied to a post-conflict context where the mechanism is designed to provide the possibility of *both* prosecutions *and* truth recovery and where the state which is designing the mechanism (and, of course, the former police force, the RUC) was a direct protagonist in the conflict. Little wonder that reaching political agreement on the relevant legislation has proved such a formidable challenge.

Truth, 'information retrieval' and immunity

In addition to the justice-focused elements to transitional justice, scholarship and praxis in the field has been focused since at least the 1980s on the notion of truth recovery as a key component to dealing with past violence and human rights abuses.[62] The efforts at truth recovery in a number of Latin-American jurisdictions including Argentina, Chile, Guatemala and others were most famously incorporated into the South-African Truth and Reconciliation Commission (SATRC) established in 1995.[63] Over 40 truth commissions have been established since the Argentinian Commission on Disappearances was set up in 1983 and variants on the mechanism have emerged in recent years in settings as diverse as Sierra Leone (2000), Canada (2009), Brazil (2011) and Sri Lanka (2015).[64] The rationales for *doing* truth recovery usually include: the rights of affected families and survivors to

60 Kieran McEvoy, 'The Stormont House Agreement Model Bill, National Security and Dealing with the Past in Northern Ireland', paper presented at Queen's Human Rights Centre, 14 March 2016.

61 See, for example, Ruti Teitel, *Transitional Justice* (OUP 2002); Roht-Arriaza and Mariezcurrena (n 12); Kerry Clamp (ed), *Restorative Justice in Transition* (Routledge, 2013); Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8(3) International Journal of Transitional Justice 339–61.

62 Hayner (n 6).

63 Richard A Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (CUP 2001).

64 Hayner (n 6); International Centre on Transitional Justice, *Drafting a Truth Commission Mandate: A Practical Tool* (2013); 'Sri Lanka to Set Up a South Africa Style Truth and Reconciliation Commission' *The Guardian* (London, 15 September 2015).

know (sometimes referred to as the 'right to truth'); the establishment of an authoritative public record; challenging cultures of denial and impunity; and, particularly since the SATRC institutionalised the linkage, encouraging personal, communal and social reconciliation.[65] In addition, truth commission or equivalent truth recovery mechanisms are often framed as either an alternative to retributive trials or in some cases as a complementary measure – a recognition that *punishing* all of those guilty of past atrocities through the courts is often practically impossible.[66] Each of these elements have featured to varying degrees in the debates on dealing with the past in Northern Ireland.

Much of the truth or truths about the conflict in Northern Ireland which have been revealed to date have come from the various piecemeal mechanisms discussed above.[67] Amongst the various efforts to devise an overarching approach to the past, one can discern a clear shift in the political language. In the 2006 Healing Through Remembering document, one of the options explored was the establishment of a 'Truth Recovery Commission'. In 2009, the CGP recommended the establishment of a 'Legacy Commission', key tasks of which were to establish truth and 'information recovery'.[68] The CGP further stipulated that the processes of investigation, information recovery with regard to individual cases, and the examination of larger 'themes' in the conflict would come under the purview of the proposed Legacy Commission.[69] In 2013, the final version of the Haass–O'Sullivan text which ultimately failed to reach agreement included provisions for the establishment of an Independent Commission for Information Retrieval (ICIR) with no mention of a 'truth recovery' function. The Haass–O'Sullivan document also contained a commitment that the ICIR 'will also establish an internal unit to analyse patterns or themes . . . to understand context and contribute to public awareness of history both now and for subsequent generations'.[70] As noted above, the ICIR was retained in the SHA 'to enable victims and survivors to seek and privately receive information about the (Troubles related) deaths of their next of kin'.[71] However, in the negotiations which led to the SHA, the 'big picture' analysis was decoupled from the ICIR and that responsibility was given to a new mechanism, the IRG, 'to oversee themes, archives and information recovery'.[72] The word 'truth' does not appear anywhere in the SHA.

65 Margaret Popkin and Naomi Roht-Arriaza, 'Truth as Justice: Investigations Commissions in Latin America' (1995) 20(1) Law and Social Inquiry 79–116; Erin Daly, 'Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition' (2008) 2(1) International Journal of Transitional Justice 23–41; Marie Breen Smyth, *Truth Recovery and Justice after Conflict: Managing Violent Pasts* (Routledge 2007).

66 Mark Freeman, *Truth Commissions and Procedural Fairness* (CUP 2006); Amnesty International, 'Commissioning Justice: Truth Commissions and Criminal Justice' (2010).

67 It should also be noted that a number of prominent community-based truth recovery processes have also been a feature of the Northern Ireland conflict and transition. See further McEvoy (n 24); Patricia Lundy and Mark McGovern 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35(2) Journal of Law and Society 265–92.

68 As the report makes clear, the authors were keen to distinguish their work so that it 'should not be read as a copy of the South African Truth and Reconciliation Commission'. See 'Report of the Consultative Group on the Past, 23 January 2009', 56 <www.cain.ulst.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf> accessed 12 January 2016.

69 Ibid 134.

70 Richard Haass and Meghan O'Sullivan, 'Proposed Agreement, 31 December 2013: An Agreement Among the Parties of the Northern Ireland Executive' 9 <www.cain.ulst.ac.uk/events/peace/haass-talks/haass_2013-12-31.pdf> accessed 12 January 2016.

71 SHA (n 38) para 41.

72 Ibid para 51.

The lack of emphasis on truth recovery in the evolution of the dealing with the past mechanisms is of interest. Of course, there is a plethora of literature which offers strong critiques of the very notion of truth and highlights the particular challenges of truth recovery in post-conflict contexts where memory wars remain a key political and ideological battleground.[73] A certain intellectual wariness about the viability of truth recovery in Northern Ireland, as elsewhere, is quite commonplace. More immediate, however, is the reality that, in Northern Ireland, Sinn Féin has long called for an international truth commission (specifically referencing the South-African example) and the SDLP has historically called for a similar mechanism designed to ensure a 'robust truth process'.[74] Unionists, on the other hand, have long expressed cynicism about whether such truth recovery will ever happen and, instead, have continuously asserted their determination to prevent 'the rewriting of history' by Republicans.[75] In short, the gradual reduction to zero of discussion on truth recovery and its replacement by information retrieval and information recovery reflects increased buy-in by Unionist politicians in the process of dealing with the past.

Our work on the truth or information recovery aspects of this process has been across a number of areas, in addition to the HIU discussed above. With regard to the now decoupled mechanism (the IRG) to deal with the broader themes of the conflict, the political shape of the compromises made during the Stormont House negotiations on this new institution were very obvious once the text was released. As noted above, the SHA stipulated that the IRG would be overseen by a body of 11 people, all of them political appointees by the local parties and the two governments.[76] This body would commission a report on themes from independent academic experts. The SHA also stipulated that the work of the IRG should 'be conducted with sensitivity, and rigorous intellectual integrity, devoid of any political interference'.[77]

As detailed in the 'Clause by clause' article, our concern in drafting the Model Bill was therefore to write clauses which maximised the independence of this mechanism. Towards that end, we suggested that it too (like the HIU) should be a body corporate; included some criteria on the qualities and skills of the kind of people who should be appointed to the IRG; imposed a statutory duty on members to act independently and impartially; and suggested provisions on reporting and relations with the other bodies. After the failed negotiations of 2014 recommenced in autumn 2015, most of our energies were channelled into public and private lobbying that the IRG should actually be included in the enabling Westminster legislation after the British government made it clear that it considered that inclusion of the IRG in the primary legislation was not required. It is our understanding that this point, also argued strongly by a number of the political parties and the Irish government, was ultimately conceded in those negotiations and that the IRG will be included in Westminster legislation, although significant details have not been resolved at the time of writing.

73 See, for example, Michel Foucault, *The Politics of Truth* (Semiotext 1997); W T Anderson (ed), *The Truth About Truth* (Putman 1995); Ifi Amadiume and Abdullahi An-Na'im (eds), *The Politics of Memory; Truth, Healing Justice* (Zed Books 2000).

74 'Truth: A Sinn Féin Discussion Document' (Sinn Féin, 2003); 'Addressing the Past: A Comprehensive Truth Process and the Ethical Way Forward' (SDLP 2013).

75 'Dealing with the Past in Northern Ireland' (DUP 2009). For a definitive discussion on the complexities of Unionist attitudes to truth recovery, see Cheryl Lawther (n 50).

76 SHA (n 38) 10.

77 Ibid.

The other vehicle for truth and information recovery in the SHA is the ICIR. A key challenge of this or any equivalent body is how to encourage those with information which may be of relevance to victims to come forward. As was noted above, this was a specific issue upon which members of the team had been working for many years. In 2007, a detailed report on the issue was submitted to the CGP.[78] Internationally, much of these kinds of discussions are framed as the 'truth recovery in return for amnesty trade-off'.[79] It is also true that elements of the Northern Ireland transition can be accurately described as amnesties or amnesty-like measures.[80] However, in contributing to the Haass–O'Sullivan and Stormont House negotiations, the team ultimately decided to emphasise the longstanding British legal tradition of using limited immunities from prosecution in public inquiries and related investigations into past events rather than pressing for the more contentious term of amnesties.[81] In 2013, a proposal submitted from the project team on ways of trading truth recovery for different forms of immunity from prosecution was adapted by the parties and is contained in the final draft agreement presented by Haass and O'Sullivan. It was retained in slightly amended form in the SHA 2014.[82]

In working on the Model Bill, again we sought to ensure the independence and effectiveness of the ICIR: suggesting that it should be a body corporate; specifying a range of victims and survivors who would be able to access its services; and suggesting that the Secretary of State make regulations to require public authorities to provide it with information. In addition, we included a clear statement that 'information provided to the ICIR is not admissible as evidence in criminal or civil legal proceedings'. We also included a requirement for regulations that a person providing information should also not be subject to 'administrative sanctions' (e.g. to protect a state employee from disciplinary proceedings), as well as the power to create offences for people knowingly providing false information, obstructing the work of the ICIR (including public authorities destroying information likely to be required by the ICIR), or disclosure of information by its members or staff. In addition, because the ICIR will have a cross-border dimension and require the completion of an international treaty between the two governments, we included a schedule to our Model Bill with suggested text for that Agreement.

78 Kieran McEvoy and Louise Mallinder, 'Article 2 Compliant Truth Recovery and Guarantees of Non-Prosecution' (confidential submission to the CGP, 2007).

79 For a detailed discussion, see Louise Mallinder, *Amnesty, Human Rights and Political Transitions* (Hart 2008); Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (CUP 2009).

80 Kieran McEvoy, Luke Moffett, Louise Mallinder and Gordon Anthony, 'The Historical Use of Amnesties, Immunities and Sentence Reductions in Northern Ireland' (2015) <www.amnesties-prosecution-public-interest.co.uk/themainevent/wp-content/uploads/2015/03/Historical-Use-of-Amnesties-Report-Final-24-March-2015.pdf> accessed 21 March 2016.

81 As one team member suggested in a team meeting, 'emphasising that limited legal immunity in return for information provided is as British as Finchley, rather than any fancy transitional justice formulation, will hopefully make it more palatable to Unionists in particular who are highly suspicious of the whole notion of transitional justice'.

82 Kieran McEvoy and Louise Mallinder, 'Truth, Amnesties and Prosecution: Models for Dealing with the Past in Northern Ireland' (Queen's University Belfast 2013). See Liam Clarke, 'Parties Involved in the Haass Talks are Considering Four Possible Models for Setting Aside Prosecutions for Troubles-Era Offences, the Belfast Telegraph Has Learnt' *Belfast Telegraph* (Belfast, 9 December 2013). In the same story, the leader of the DUP negotiating team Jeffrey Donaldson MP told the *Belfast Telegraph*: 'We have met with Kieran McEvoy and his colleagues and listened to what they have to say. We have made it clear both in public and in private that we are opposed to amnesties for terrorist murder. However limited immunity is a separate concept.' In the Haass–O'Sullivan document the ICIR is given the power to offer 'inadmissibility' or 'limited immunity' to protect individuals from criminal or civil liability with regard to any statements they make to the ICIR, Haass and O'Sullivan (n 70). In the SHA only the term 'inadmissible' is used, although the legal and practical effects are precisely the same.

When the leaked version of the UK government legislation became public in late 2015, the inadmissibility of information given to the ICIR for criminal or civil proceedings was confirmed. However, similar to our concerns with regard to the HIU, analogous provisions which required the ICIR to pass copies of the reports (which were due to go families) first to the British and Irish governments to review for 'national security' reasons became the primary focus of our concerns. At the time of writing, those concerns remain.

Oral history, story-telling and the past

The final element of the Model Bill and SHA mosaic for dealing with the past in Northern Ireland is the OHA. As with the other elements of the SHA, versions of this mechanism have been trailed in previous rounds of negotiation. As early as 1998, the report into victims and survivors commissioned by the then Secretary of State Mo Mowlam highlighted 'the value of "telling the story"'.[83] The CGP provided much fuller detail on the potential role for story-telling, recognising its potentially 'cathartic nature' in enabling people to share their stories with others (especially their former enemies). They envisaged a role for the chair of the Legacy Commission, through a Reconciliation Forum, to promote story-telling schemes and memorial projects and further recommended the collation of stories in some form of archive.[84] Similarly, the Haass–O'Sullivan document recommended that the Northern Ireland Executive should establish 'an archive for conflict-related oral histories, documents and other relevant materials' for those who 'wish to share their experiences connected with the conflict'. That report, like the SHA, also stipulated that this archive 'will be free from political interference' and, in addition to collecting new material, will function as a repository for existing oral history archives.[85]

The ancient art of story-telling has long since been overtaken by technology, but the central imperative to *listen* in a measured, humane and respectful fashion continues to underscore the modern oral historian's craft.[86] Often juxtaposed to the overly legalistic and costly nature of other transitional justice mechanisms (such as trials or truth recovery bodies), advocates highlight the particular appeal of oral history and story-telling approaches in post-conflict or post-authoritarian settings.[87] This includes the possibility of 'giving voice' to marginalised, victimised and 'subaltern' witnesses and of broadening the canvas for dealing with the past. Thus, neglected themes such as rural experiences of conflict, the intersection of class struggles, mental health and

83 Sir Kenneth Bloomfield wrote: 'As I received passionate letters of ten, a dozen or more pages, or listened to the first-hand account by survivors of their own trauma, I had a growing realisation that, for some at least, the cathartic effect of putting one's experience on record is profound.' Kenneth Bloomfield, 'We Will Remember Them: Report of the Northern Ireland Victims Commissioner', April 1998, ch 3, s 12.

84 CGP (n 68) 97–98.

85 Haass and O'Sullivan (n 70) 35-37.

86 It is beyond the scope of this article to explore the respective boundaries of story-telling, oral history, oral tradition and qualitative interviews. For current purposes, these overlapping approaches and methodologies are understood to embrace individual life narratives, cultural memory and community advocacy, as well as elements of artistic and literary performance. For an overview of the broad field of oral history, see Robert Perks and Alistair Thomson (eds), *The Oral History Reader* (Routledge 2004) and Donald A Ritchie (ed), *The Oxford Handbook of Oral History* (OUP 2011).

87 See, for example, Jessica Senehi, 'Constructive Storytelling: A Peace Process' (2002) 9(2) Peace and Conflict Studies 41–63; and 'Building Peace: Storytelling to Transform Conflicts Constructively' in Dennis J D Sandole, Sean Byrne, Ingid Sandole Staroste and Jessica Senehi (eds), *Handbook of Conflict Analysis and Resolution* (Routledge 2009) 201–15.

generational shifts can be examined.[88] In addition, oral history provides a platform to explore the gendered dimensions of conflict, providing 'under the radar' opportunities to document difficult and sensitive issues concerning domestic violence and other gender-based harms.[89] Affording space for the complex, contradictory and sometimes inchoate nature of individual experience also creates important opportunities for victims and survivors to tell their stories in full and in context, at a time and place that best suits their needs.[90]

In the Northern Ireland context, many existing oral history projects have set out to: amplify 'unheard voices'; provide a counterbalance to official narratives; offer some form of redress for victims and survivors; underscore advocacy and community action; and share lessons with other societies.[91] In many ways, the 'piecemeal' nature of efforts to deal with the past discussed above increases the significance of this type of work.[92] In the absence of an overarching truth mechanism, academic and community oral history and story-telling projects in Northern Ireland have provided some of the few available options for those who want to have their experiences and their consequences recorded and acknowledged.[93] The WAVE Trauma Centre victims' group, for example, has developed a range of story-telling projects to capture the experience of those who were either bereaved or injured as a result of the conflict.[94] Other projects have concentrated on the experience of specific communities, particularly those most affected by the conflict.[95] Former combatants, in particular, Republican ex-prisoners, have worked collectively to coordinate the story of their prison experiences and to link this to outreach, reconciliation and support work.[96] Significant impetus was injected into the sector by the European Union's Peace III Programme which funded dozens of oral

88 See further Anna Bryson, 'The Interview: A Tool for Peace Building? Reflections on the Peace Process: Layers of Meaning Project' (2014) 9 Journal of Cross Border Studies in Ireland 79–90.

89 In Northern Ireland, for example, it has been suggested that there has been a sustained exclusion of women from dealing with the past initiatives and that the gendered impact of the conflict and post-conflict legacy needs of women thus have not been adequately addressed. See 'Gender Principles for Dealing with the Past' (Legacy Gender Integration Group September 2015) 2 <www.rwuk.org> accessed 14 November 2015.

90 Sean Field, '"Beyond Healing": Trauma, Oral History and Regeneration' (2006) 34(1) Oral History 31–42 and 'Disappointed Remains: Trauma, Testimony and Reconciliation in Post-Apartheid South Africa' in Ritchie (n 86) 142–58; Stephen M Sloan, 'The Fabric of Crisis: Approaching the Heart of Oral History' in Mark Cave and Stephen M Sloan (eds), *Listening on the Edge: Oral History in the Aftermath of Crisis* (OUP 2014) 262.

91 See Anna Bryson, 'Victims, Violence and Voice: Transitional Justice, Oral History and Dealing with the Past' (2016) 39(2) Hastings International and Comparative Law Review 299–353.

92 See 'Preliminary Observations and Recommendations by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff, on his Visit to the United Kingdom of Great Britain and Northern Ireland' (9–18 November 2015) <www.caj.org.uk/files/2015/11/18/PDG_Statement1.pdf> accessed 19 November 2015.

93 Much of the work in this area has been co-ordinated and led by the cross-community NGO, Healing Through Remembering.

94 Relevant storytelling projects include: 'Injured on that Day', 'Don't You Forget About Me' and 'Unheard Voices'. See: <www.wavetraumacentre.org.uk/about-us/wave-projects/unheard-voices> accessed 17 November 2015.

95 Notable examples include the Falls Community Council Dúchas project developed in the late 1990s to record the experience of the conflict in nationalist West Belfast <www.duchasarchive.com> accessed 15 March 2016 and the RUC George Cross Foundation oral history project which focuses on experiences of former members of the RUC between 1922–2001 <www.rucgcfoundation.org/oral-history> accessed 19 November 2015.

96 See Brian Gormally and Kieran McEvoy, *Conflict Transformation from the Bottom Up* (2011), unpublished author's copy.

history and story-telling projects.[97] In view of the participatory nature of the method, it is not surprising that a number of academic-led oral history projects have been predicated on community engagement and cooperation.[98] In keeping with the international trend, some of the most powerful work has developed at the interface of oral testimony and the arts. Outputs here include 'theatres of witness' and interview-based plays and novels.[99]

In light of the plethora of local oral history projects and expertise and the long-standing need to provide a central repository for accounts of the conflict, the SHA (correctly in our view) stipulated that 'as well as collecting new material, this archive will attempt to draw together and work with existing oral history projects'.[100] In our work on the Model Bill, we thus began our deliberations by focusing on how the OHA might complement and facilitate existing groups and organisations. At an early stage in our consultations it became clear that many existing projects feared what might be described as a 'Tesco' or 'Walmart' effect, i.e. that a new central archive would challenge and ultimately threaten their existence. Others expressed concerns that, in the absence of proactive and fulsome engagement with existing groups, the new archive would inevitably run the risk of repeating the mistakes of the past. To allay these concerns, it was clear that the governance model would have to reflect the need to ensure good and mutually productive relations with existing organisations. As with other aspects of the Model Bill process, we drew upon best practice elsewhere – in particular looking at models employed by organisations such as the Digital Public Library of America and the Royal Irish Academy, as well as local umbrella groups, such as Healing Through Remembering.[101]

As is detailed further in the 'Clause by clause' article, the governance structure we ultimately settled on proposed that the Public Records Office of Northern Ireland (PRONI) – subject to the necessary checks and balances – could function as the shell for the proposed OHA. Crucially, however, we included provisions to give the OHA statutory independence. It would be established by the First and Deputy First Ministers, acting jointly, and governed by three executive directors (one of whom would be appointed in consultation with the Dublin government). In addition, we suggested that a strong and diverse Advisory Board (provided for in statute) would represent the interests of existing oral history projects and networks and would assist the Executive Board with the development of strategy and policy, objectives and priorities. We also included provisions to enable this board to oversee complaints, financial regulation and the submission of reports to the IRG. The day-to-day work (research, outreach, interviewing, archiving and administrative support) would be undertaken by a Secretariat and the necessary skills and attributes for all office-holders were set out in some detail in the

97 Major projects funded include *The Peace Process: Layers of Meaning Project* <www.peaceprocesshistory.org> accessed 19 November 2015; Diversity Challenges, 'Green and Blue Across the Thin Line' <www.green-and-blue.org> accessed 19 November 2015; and Border Lives <www.borderlives.eu/project> accessed 19 November 2015.

98 See, for example, the Ardoyne Commemoration Project, *Ardoyne: The Untold Truth* (Beyond the Pale 2002).

99 See, for example, <www.theatreofwitness.org> accessed 17 November 2015.

100 SHA (n 38) paras 22–24.

101 The Digital Public Library of America provides a particularly instructive example. In 2010 40 leaders from libraries, foundations, academia and technology projects across America came together and agreed to work together to create 'an open, distributed network of comprehensive online resources that would draw on the nation's living heritage from libraries, universities, archives, and museums in order to educate, inform, and empower everyone in current and future generations'. After much deliberation it settled on a governance model based on partnership agreements with existing stakeholders and an Executive Director who works under the guidance of a Board of Directors comprised of leading public and research librarians, technologists, intellectual property scholars and business experts from across the USA. See <www.dp.la/info/about/history> accessed 14 July 2015.

Model Bill. In addition, to ensure adherence to international best practice, we made provision for a detailed Code of Practice (with particular guidelines for work with specific groups, such as victims and young people). We also proposed a central 'training the trainers' model as a cost-effective way of enabling the OHA to operate with as much flexibility and reach as possible. To avoid a narrow and inward-looking approach, we tailored the governance structure to ensure meaningful participation and input from agencies and victims and survivors 'throughout the UK and Ireland'.[102] Finally, in the drafting of the Model Bill, and our related policy work and engagement with stakeholders, we were concerned to counter the apparent assumption (which appeared to be shared by some politicians and officials) that the OHA could be largely passive in enabling people from 'throughout the UK and Ireland' to participate and contribute. Based on our own previous experience, we argued strongly that ensuring participation from a suitably broad range of victims and others demanded careful anticipation, consultation, outreach, reflection and persuasion.[103]

Other than the governance and outreach functions of the OHA, the obvious practical challenge which has overshadowed our own work and that of the officials working on the legislation has been the 'fear factor' associated with the Boston College Tapes project. Commencing in 2001, a prominent journalist, Ed Moloney, and two researchers, interviewed approximately 40 former members of Republican and Loyalist paramilitary organisations on behalf of Boston College, with the proviso that their interviews would not be made public until after their death. Public attention was drawn to the archive following the publication of two of the interviews (with recently deceased interviewees), in a book and documentary, and by media coverage of an exchange with one of the interviewees which suggested that the tapes contained information about some of the most notorious crimes of the Troubles. The British government (on behalf of the PSNI) subsequently contacted the US Department of Justice requesting (under the terms of the UK–US Mutual Legal Assistance Treaty) to subpoena 'any and all interviews' containing information about the murder of Jean McConville. In December 2011, Judge William Young ruled against both Boston College and the project researchers and ordered that the relevant material be handed over, a decision that was upheld by a three-judge US Federal Appeal Court in July 2012. A number of high-profile political activists were subsequently arrested, including senior loyalists, veteran Republican Ivor Bell and the President of Sinn Féin, Gerry Adams, who was subsequently released without charge.[104]

This controversy underlined in the sharpest possible terms that, under current legislation, oral history archives cannot offer a cast-iron guarantee of confidentiality. We proposed to address this by emphasising the need for training on issues of ethical and legal probity and by stating clearly that the OHA would not accept information about crimes that had not been processed and fully determined by the courts of all relevant jurisdictions. At the same time, we recognised the danger of the OHA becoming overlaid

102 Some victims and survivors based in Britain have understandably expressed concerns that the OHA could easily become too 'Northern Ireland-centric'. See Nick Taylor, chief executive of the Tim Parry, Jonathan Ball Foundation for Peace <www.foundation4peace.org/foundation-sets-out-ambition-to-become-gb-oral-history-archive> accessed 2 December 2015.

103 See further Anna Bryson and Seán McConville, *The Routledge Guide to Interviewing: Oral History, Social Enquiry and Investigation* (Routledge 2014).

104 See Will Havemann, 'Privilege and the Belfast Project' (2010) 79 Stanford Law Review Online 79–85; McEvoy (n 24) 56–58.

by an excessively bureaucratic and legalistic approach.[105] We also acknowledged that one of the unfortunate legacies of the Boston College Tapes project is that many oral history projects (however innocuous or apolitical) have become uneasy about depositing their materials with archives. To mitigate the possibility of the OHA becoming an anodyne repository of 'safe' and unchallenging narratives, we proposed that the Data Protection Acts and the Freedom of Information Act 2000 should not apply to material deposited with the proposed archive until such times as accounts have been published (i.e. reviewed by contributors and approved for release by the appropriate staff members). This is not designed to encourage information about material that could be deemed defamatory or otherwise controversial. Rather, it simply acknowledges the considerable sensitivity of 'experiences and narratives related to the Troubles' and the need to encourage and facilitate as wide a range of contributions as possible. Whilst contributions to the archive should, for the most part, be accessible online, we also proposed that opportunities should be provided for people to hear and share their respective stories in a central, inclusive and welcoming space.

Such assurances arguably amount to very little unless the fundamental issue of trust, or what we describe here as 'grass-roots credibility', is addressed. This speaks to a core stipulation set out in the SHA that the archive 'will be independent and free from political interference'. At an early point in the negotiations on the outworking of the SHA, the PRONI was invited to scope out various options for the development of the OHA. With the tacit agreement of the five main political parties, this quickly solidified into a proposal that the proposed archive should be under the charge and superintendence of the Deputy Keeper of PRONI. As PRONI is an executive agency of the Department of Culture, Arts and Leisure, this immediately raised concerns for us and others about its independence. Those who have attempted to develop sensitive cross-community projects know all too well that political interference is to be avoided at all costs.[106] Suggestions that the Deputy Keeper would have 'operational independence' from his/her keeper (the prevailing minister) in respect of the OHA did little to allay fears.[107] The issue of ministerial control of documents is but one element of a much wider conundrum. Operational independence is well and good in theory but, in light of organisational impulses and constraints, it is difficult to envisage a career civil servant closing his or her ears to the clearly expressed wishes of their direct minister. And, at any rate, the proposal to entrust to the Deputy Keeper all power to control and direct the OHA, including decisions about which records to include and which to destroy and if, how and when to engage 'expert practitioners', remains highly problematic. Discussions with politicians and policy-makers on these and related issues concerning the OHA are ongoing at the time of writing.

In summary, like others involved in these discussions, we have long since been persuaded of the short and long-term need for an effective overarching strategy for oral history, story-telling and the conflict. What future generations make of the conflict in

105 For an analysis of the impact that risk aversion has had on research topics, see Ted Palys and John Lowman, 'Going Boldly Where No One Has Gone Before? How Confidentiality Risk Aversion is Killing Research on Sensitive Topics' (2010) 8(4) Journal of Academic Ethics 265–84.

106 For example, in spite of a carefully crafted 124-page 'Masterplan and Implementation Strategy' (including plans for an international centre for conflict transformation) underscored by significant and costly research and consultation, the Maze–Long Kesh Regeneration project was effectively stalled overnight due to political disagreement.

107 See further Anna Bryson, 'The Stormont House Oral History Archive, PRONI and the Meaning of Independence' <www.rightsni.org/2015/10/the-stormont-house-oral-history-archive-proni-and-the-meaning-of-independence-guest-post-by-dr-anna-bryson> accessed 15 October 2015.

Northern Ireland will be significantly swayed by the source material we bequeath to them.[108] What is missing from official documentation on the proposed OHA is any hint of a vision. Articulation of such a vision demands careful reflection on complex concepts, such as reconciliation, victimisation, truth and reconciliation; reflections that will in turn inform the acquisitions and preservation policy – the essential contours of the mechanism. Cast in the right mould, the OHA could make a valuable contribution to the process of dealing with the past and, ultimately, to reconciliation. Past experience dictates that grasping the nettle of reconciliation requires long-term vision and a departure from penny-wise, pound-foolish approaches. If there is a silver lining to the recent failure to agree a legislative framework for dealing with the past, it is that the various opportunities and challenges outlined here might be debated more fully before institutional and legal parameters are set in stone.

Conclusion

At the time of writing, the authors and our colleagues on the Model Bill team are still working intently with officials from both governments, as well as other political and civil society actors, to overcome the remaining obstacles to finally 'deal with the past' in Northern Ireland. There is a widespread agreement that we are 'closer than ever before'[109] and we are confident that, with political will and some legal imagination, these remaining obstacles are resolvable. However, given the fact that they are yet to be resolved, it is perhaps too early to be overly definitive about the lessons to be learned from the Model Bill process and the related policy and advocacy work which has preceded and accompanied this project. By definition therefore, these conclusions must at this stage remain somewhat tentative. With such caveats duly noted, we would suggest that there are at least three overlapping themes which emerge which may be of interest to activists seeking to influence transitional justice processes 'from below' elsewhere. These can be summarised as *technical capacity*, *grass-roots credibility* and providing *'international-savvy' local solutions*.

Both governments, other civil society organisations and a number of the political actors involved have publicly acknowledged the value and worth of the technical contribution of the project to date at various conferences, seminars and events. For example, in a letter to our project partner, the Committee on the Administration of Justice, the current Under-Secretary of State for Northern Ireland said:

> I would like to acknowledge the input that you and others have brought to the shadow bill project, and I know my officials have found this to be a useful and innovative way of engaging in parallel with the development of the Bill. In addition the events and workshops which you have hosted have facilitated the expression of the views of stakeholders on these important issues.[110]

108 A telling example in the Irish context is provided by the 1773 Witness Statements concerning the 1913–1921 revolutionary period which were collected on behalf of the Irish state between 1947 and 1957. Together with the Military Service Pensions collection these accounts (now available online) have profoundly influenced the historiography of this critical period in Irish history. See, for example, Marie Coleman, *The Irish Revolution, 1916–1923* (Pearson 2013) and Diarmaid Ferriter, *A Nation and Not a Rabble: The Irish Revolution, 1913–23* (Profile Books 2015).

109 Secretary of State for Northern Ireland Teresa Villiers, 'Speech on the Independent Commission on Information Retrieval' 21 January 2016 <www.ukpol.co.uk/2016/02/10/theresa-villiers-2016-speech-on-the-independent-commission-on-information-retrieval/> accessed 15 March 2016.

110 Letter from Under-secretary of State for Northern Ireland Ben Wallace MP, 23 September 2015. See Anne Skorkjær Binderkrantz, 'Customizing Strategy: Policy Goals and Interest Group Strategies' (2012) 1(1) Interest Groups and Advocacy 115–38.

Drafting legislation is by definition a complex and specialist undertaking. As in other contexts,[111] having what Binderkrantz has referred to as 'technical insight' has undoubtedly afforded the team access and influence with key players.[112] As Beyers, Weiller and Brandli and others have argued, such technical expertise may be particularly valued by policy-makers, officials and other who are working in complex and sensitive areas.[113] Indeed, precisely because of the politically sensitive and legally complex issues involved, an 'institutional opportunity structure'[114] existed for the provision of measured, detailed and technically sound interventions. Nothwithstanding inevitable disagreements on policy and principle, the ability to 'speak the same language' on the technical aspects of the debate helped create a variant of an 'epistemic community' between the Model Bill team and government officials.[115]

However, the process has involved much more than the provision of technical information. In reviewing the relevant literature on political and policy advocacy, we have arguably been involved in both 'insider tactics' (e.g. engaging with the political actors and government officials) and 'outsider tactics' (e.g. a sustained campaign of media and civil society engagement).[116] Queen's Law School and its Human Rights Centre, in particular, together with the Transitional Justice Institute at Ulster University, have a significant reputation for their commitment to making an impact in the 'real world'. Notwithstanding those profiles, we would argue that the partnership with the Committee on the Administration of Justice (Northern Ireland's primary human rights NGO) on the Model Bill process and with Healing Through Remembering (the jurisdiction's primary 'dealing with the past' NGO) on the broader truth recovery, immunities and oral history work was crucial in emphasising that this was 'not just an academic exercise' for those involved.

Equally critical has been the team's openness to applying international knowledge and experience to the local. As Nelken has argued, one of the key advantages of comparative legal scholarship is not only that it allows us to 'make sense of difference', but that it also allows us to move beyond the essentialising tendencies of our own context and to consider and present local problems in a different light.[117] For some audiences, the team's ability to draw upon international law (in particular, the jurisprudence of the European Convention on Human Rights), as well as transitional policy and practice elsewhere, was a clear advantage. However, as evidenced with the interventions concerning the truth and

111 See, for example, R A W Rhodes and David Marsh (eds), P*olicy Networks in British Government* (OUP 1992); PerOla Öberg, Torsten Svensson, Peter Munk Christiansen, Asbjørn Sonne Nørgaard, Hilmar Rommetvedt and Gunnar Thesen, 'Disrupted Exchange and Declining Corporatism: Government Authority and Interest Group Capability in Scandinavia' (2011) 46(3) Government and Opposition 365–91.

112 See Anne Skorkjær Binderkrantz, 'Customizing Strategy: Policy Goals and Interest Group Strategies' (2012) 1(1) Interest Groups and Advocacy 115–38.

113 Jan Beyers, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2004) 5(2) European Union Politics 211–40; Florian Weiler and Matthias Brändli, 'Inside Versus Outside Lobbying: How the Institutional Framework Shapes the Lobbying Behaviour of Interest Groups' (2015) 54(4) European Journal of Political Research 745–66.

114 Andreas Dür and Gemma Mateo González, 'Gaining Access or Going Public? Interest Group Strategies in Five European Countries' (2013) 52(5) European Journal of Political Research 660–86.

115 See Peter Haas, 'Epistemic Communities' in Joel Krieger (ed), *The Oxford Companion to Comparative Politics* (OUP 2012) 351–59; Mai'A K Davis Cross, 'Rethinking Epistemic Communities Twenty Years Later' (2013) 39(1) Review of International Studies 137–60.

116 Beyers (n 113); Hanspeter Kriesi, Anke Tresch and Margit Jochum, 'Going Public in the European Union Action Repertoires of Western European Collective Political Actors' (2007) 40(1) Comparative Political Studies 48–73.

117 David Nelken, 'Comparative Criminal Justice: Beyond Ethnocentricism and Relativism' (2009) 6(4) European Journal of Criminology 291; and *Comparative Criminal Justice: Making Sense of Difference* (Sage 2010).

immunity debate discussed above, in other contexts such knowledge and experience was probably less persuasive than British public law policy and practice. As is evidenced by the design of all of the past-focused institutions in the SHA, 'bespoke local solutions' (in some instances clearly influenced by international experience whether or not this was expressly articulated) were required in order to reach political consensus.

Over a quarter of a century ago, the legendary sociologist Stan Cohen wrote compellingly about the difficult balancing act for academics between their natural intellectual scepticism and their moral and political obligations to try to make a difference, to 'engage'.[118] Given the difficulties associated with dealing with the past in Northern Ireland over the past two decades, we would be lying if we didn't admit that there have been times when we have been beyond frustration at the inability of our politicians to 'do the deal' on the issue. Needless to say, our frustrations are as nothing compared to those of the victims and survivors who were directly affected by the conflict.[119] The Model Bill process and related work has presented us with a classic 'window of opportunity' in political terms where three elements came together: a complex series of problems; the opportunity to develop and refine proposals to address those problems; and the possibility of political change.[120] Regardless of the ultimate outcome, the process of engagement has been a privilege.

118 Stan Cohen 'Intellectual Scepticism and Political Commitment: The Case of Radical Criminology' in Paul Walton and Jock Young (eds), *The New Criminology Revisited* (Macmillan 1990) 98–130.

119 As the Chief Executive of the Wave Trauma Centre victims' organisation put it when the news emerged that the 2015 Stormont House Fresh Start Agreement had yet again failed to include a 'deal' on dealing with the past: 'The two Governments and political parties have said that dealing with the suffering of victims and survivors is central to Northern Ireland moving forward. They can no longer say that with any credibility. The reality is that they have abandoned and betrayed victims and survivors who have repeatedly been promised that there would be an inclusive and comprehensive way found to deal with the legacy of the past. Victims and survivors were told to wait for Eames/Bradley but they got nothing. They were told to wait for Haass–O'Sullivan and got nothing. They were told to wait for Stormont House and got nothing. Now they have been given a document that with absolutely no hint of irony is being called a "Fresh Start" and there is nothing beyond a vague reference to continuing to "reflect". Where is the "fresh start" for them? . . . perhaps the saddest, most depressing aspect of all this is that while they are shocked, disgusted and beyond disappointment they are not surprised.' See 'Where is the Fresh Start for Them?', press release, Wave Trauma Centre, 18 November 2015' <www.wavetraumacentre.org.uk/news/where-is-the-fresh-start-for-them> accessed 3 March 2016.

120 John W Kingdon, *Agendas, Alternatives, and Public Policies* (Little Brown 1984).

LEGISLATION, TRENDS AND CASES

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Legislation

The national security doctrine in Northern Ireland legislation

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The derailment of the Stormont House Agreement legacy Bill in late 2015 was a result of the belated inclusion of 'national security' caveats into the powers of the independent Historical Investigations Unit (HIU) the legislation was to establish. The Northern Ireland (Stormont House Agreement) Bill was to be introduced into Westminster in the autumn 2015 session. However, a leaked draft of the Bill shortly before this revealed that Whitehall had inserted provisions within it granting ministers unprecedented powers to change the contents of HIU investigative reports on grounds of 'national security' before they were given to families. Whilst such detailed codification of such powers would have taken the 'national security doctrine' in legislation to new levels, the doctrine itself has nevertheless already grown exponentially in recent years in the context of devolution. This article overviews these developments.

Hiding in plain sight: national security and legal certainty

National Security provisions appear throughout Northern Ireland legislation in different forms. There is no statutory definition of 'national security'. As the MI5 website clarifies: 'It has been the policy of successive Governments and the practice of Parliament not to define the term, in order to retain the flexibility necessary to ensure that the use of the term can adapt to changing circumstances.'[1]

Some legislation relies on essentially circular reasoning for interpreting national security that simply refers back to the undefined concept itself. For example, there are definitions of 'national security information' as: 'information the disclosure of which to the public would, or would be likely to, adversely affect national security'.[2] The formulation in legislation can rely on terms such as 'protected information', which is information that deals with issues of national security, or where such information would be contrary to national security interests.[3] How protected information is defined is

1 Committee on the Administration of Justice (CAJ), 'The Apparatus of Impunity? Human Rights Violations and the Northern Ireland Conflict: A Narrative of Official Limitations on Post-Agreement Investigative Mechanisms' (CAJ/Queen's University Belfast 2015) 30.

2 E.g. Civil Contingencies Act 2004, Article 12A(3), as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Sch 3, para 103.

3 E.g. Police (Northern Ireland) Act 1998, s 41A(1), as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Sch 3, para 22.

essentially discretionary and depends simply on the opinion of the Secretary of State.[4] For evolutionary reasons outlined below, identifying national security references is often complex, requiring the cross-referencing of a number of statutes.[5]

In this area, the courts have tended to exercise significant deference to the Executive, often upholding the latter in its determination of national security-related issues.[6] It is, of course, difficult to appeal against the misapplication of a power that is not defined, particularly to the judicial review standard of Wednesbury unreasonableness. It is complex to contend that the Secretary of State is going beyond his or her statutory powers in making determinations on which matters are to be considered issues of national security where there is little legal certainty and, hence, considerable discretion as to what this actually means. Until relatively recently, the courts determined that national security issues were 'par excellence a non-justiciable question'.[7] However, since the *Belmarsh* case, where the court declared a national security-related policy as incompatible with the ECHR, there has been a shift.[8] The domestic courts have therefore placed some parameters around the concept, as has Strasbourg itself.

Evolution of the national security doctrine

The use of national security in constitutional legislation has expanded dramatically in recent years in the context of the peace settlement. The concept was not mentioned in the Government of Ireland Act 1920 and was mentioned only once in the Northern Ireland Constitution Act 1973. By contrast, the Northern Ireland Act 1998, which was the main implementation legislation for the Belfast/Good Friday Agreement, contains a number of national security provisions. These included a power for the Secretary of State to veto 'any action proposed to be taken by a Minister or Northern Ireland department' (including legislation) that she 'considers' incompatible with the 'interests' of national security. The Secretary of State can also direct by order that a minister or Northern Ireland department take 'any action' (including legislation) that she again considers necessary to 'safeguard the interests of' national security.[9] A Schedule to the 1998 Act provides that among the 'excepted matters' which are retained within the legislative competence of Westminster, are matters of 'national security'.[10] Reform of policing and the establishment of oversight bodies for policing led to additional national security provisions being incorporated in legislation. The doctrine was further expanded on the devolution of policing and justice powers to Northern Ireland in 2010. The implementation statute contained 45 references to national security, essentially ensuring that power over national security elements of the justice system remained with the UK government.[11]

4 Criminal Justice (Northern Ireland) Order 2008, Article 16(4) as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010.

5 E.g. Police (Northern Ireland) Act 1998, s 63(4)(b) 'Restriction on disclosure of information', as inserted by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Sch 3, para 33(3). This provision prevents the disclosure of certain information 'on the ground mentioned in section 76A(1)(a) of the Police (Northern Ireland) 2000 [as inserted by Police (Northern Ireland) Act 2003, s 29(1)]'. The ground in s 76A(1)(a) is: 'it is in the interests of national security'.

6 Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' (2011) 9:1 International Journal of Constitutional Law 172.

7 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 412 (per Diplock LJ).

8 *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

9 Northern Ireland Act 1998, s 26.

10 Ibid Sch 2, para 17.

11 Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010.

The sole reference in the Northern Ireland Constitution Act 1973 to national security is found in the anti-discrimination provisions in s 23. This section provides an exemption to protections against discriminatory legislation when undertaken on grounds of, inter alia, 'safeguarding national security'. Sub-section 4 provides that a certificate from the Secretary of State certifying that the provision 'was done for the purpose of safeguarding national security shall be conclusive evidence that it was done for that purpose'.[12] Such provisions were then also found in Northern Ireland's subsequent anti-discrimination laws, including the 1976 Acts on fair employment and sex discrimination.[13] In a complaints tribunal, a certificate of national security was conclusive evidence to dismiss a complaint.[14] Subsequent anti-discrimination legislation has also contained such national security caveats.[15] This procedure, where there was no right of appeal from such a ministerial determination, was found to be incompatible with the right to a fair trial under Article 6 ECHR at the European Court of Human Rights.[16] As a result of such rulings anti-discrimination legislation was amended to provide for an appeal, but to a closed Special Tribunal.[17] These types of tribunals, often dubbed 'secret courts' and involving the special advocate system, have since grown exponentially. In recent years, legislative proposals to hold inquests behind closed doors were defeated on a number of occasions. However, other civil proceedings can now be subjected to a 'closed material procedure' under the Justice and Security Act 2013, where the information in question is deemed to potentially prejudice 'the interests of national security'.[18]

Institutions established as part of the peace process are subject to limitations based on national security. The Northern Ireland Human Rights Commission's powers of investigation are qualified by national security caveats.[19] National security qualifications are often to be found in relation to information disclosure to oversight bodies. For example, policing legislation in 2000 set out that the Chief Constable of the Police Service of Northern Ireland's duties to report to the Policing Board were qualified to the extent that, if the Chief Constable is of the view that information in the report should not be disclosed, 'in the interests of national security' (and other grounds such as public order), then the Chief Constable *may* refer the requirement to report to the Secretary of State. The Secretary of State then has powers to modify or set aside the requirement to report to the Board on this matter.[20] These powers were further codified in 2003 to empower the Secretary of State to either set aside the duty to report or, alternatively, to instead report to a Special Purposes Committee of the Board.[21] In the 2010 devolution statute, the qualifications were again amended so that the Secretary of State only deals

12 Northern Ireland Constitution Act 1973, s 23(4).

13 Sex Discrimination (Northern Ireland) Order 1976, s 53; Fair Employment (Northern Ireland) Act 1976, s 42.

14 Kieran McEvoy and Ciaran White, 'Security Vetting in Northern Ireland: Loyalty, Redress and Citizenship' (1998) 61(3) Modern Law Review 341, 350.

15 See Race Relations (Northern Ireland) Order 1997; Fair Employment and Treatment (Northern Ireland) Order 1998; Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003; Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006; Employment Equality (Age) Regulations (Northern Ireland) 2006; Equality Act 2010; Disability Discrimination Act 1995, Sch 3, para 8.

16 *Tinnelly & Sons Ltd and Others and McElduff and Others v UK* ECHR 1998-IV.

17 E.g. Fair Employment and Treatment (Northern Ireland) Order 1998, s 96, amends the Sex Discrimination (Northern Ireland) Order 1976 by adding a process for appeal against a national security certificate to the tribunal established in s 91 of the Northern Ireland Act 1998.

18 Justice and Security Act 2013, s 6(11); CAJ (n 1) 38.

19 Northern Ireland Act 1998, s 69B, inserted by Justice and Security Act 2007.

20 Police (Northern Ireland) Act 2000, s 59.

21 Ibid as amended by the Police (Northern Ireland) Act 2003, s 10.

with national security questions and the Department of Justice deals with other grounds for non-disclosure (such as public order).

The evolution of such powers becomes indicative of the emergence of a parallel system of accountability whereby devolution is restricted to 'non'-national security matters. At worst, this allows for a power through which devolved authorities are required to defer decisions to the Secretary of State on grounds that are yet to be fully delineated. Put cynically, in the absence of legal certainty over the concept, the Secretary of State may cry 'national security' at any point on a range of matters and usurp powers that had been devolved.

Throwing in everything: including the kitchen sink

By 1999, the national security doctrine had already been extended at a UK level to include, or rather exclude, the kitchen sink. Legislation establishing the Food Standards Agency gave the body wide entry and enforcement powers, but not to those kitchens that the Secretary of State regards it as requisite or expedient for it not to inspect 'in the interests of national security'.[22] Similar regimes were introduced as national security caveats on disclosure of information. The Freedom of Information Act 2000 maintains a national security caveat.[23] Personal data is exempt from data protection where there are national security considerations.[24] In all these cases, a certificate from a minister of the Crown is conclusive evidence.[25]

The embedding of the national security doctrine into the 2010 devolution statute for policing and justice in Northern Ireland in large part centres on caveats over disclosure. Throughout the legislation, the Secretary of State has a number of powers to intervene and determine if there is information that should not be published in a report. In this way, the Secretary of State may restrict the information from the Chief Constable or the Police Ombudsman, as both are required to inform her if they are 'of the opinion' that there is potential national security information to be included in reports. This process is also provided for in relation to a report of the Chief Inspector of Criminal Justice who is required to submit reports to the Secretary of State if the inspector believes they include protected information. In such circumstances, the report cannot be disclosed to anyone else, including the Department of Justice, and can be redacted. The Secretary of State must inform the department that the report will exclude protected information.[26]

The devolution statute, however, also embeds the doctrine in a different way in essentially creating a parallel chain of command for justice powers whereby the Department of Justice deals with non-national security matters and the Secretary of State continues to exercise national security powers.

This is particularly notable in relation to prisons where the 'Secretary of State may continue to exercise' pre-devolution functions in relation to national security. This explicitly includes powers to continue to make Prison Rules, to which rules made by the Department of Justice are subordinate, having effect only insofar as they comply with the Secretary of State's rules. The Secretary of State performs functions and may make decisions regarding national security which include, but are not limited to, 'the taking of decisions on the basis of protected information', 'the controlling of access to protected

22 Food Standards Act 1999, s 38(3), in relation to crown premises.

23 Freedom of Information Act 2000, s 24(1).

24 Data Protection Act, s 28(1).

25 E.g. Freedom of Information Act 2000, s 24(3).

26 Justice (Northern Ireland) Act 2002, s 49(1A)–(1E), as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Sch 13, para 7(2).

information' and 'the holding and use of protected information'. In matters of national security, the Secretary of State even has the power to commandeer employees normally answerable to the Department of Justice bodies and proceed on the basis that they are then 'officers of the Secretary of State', answerable to her, and 'subject to her direction and control'.[27]

Codifying the national security doctrine: the leaked Stormont House Agreement Bill

The December 2014 Stormont House Agreement itself intentionally did not provide for any disclosure caveat on grounds of national security; in fact, the term does not appear at all within the Agreement. Government's intent to insert the doctrine only became clear in September 2015 when the Northern Ireland Office published a Summary of Measures document on the Bill. In addition to planning that the oversight body for the HIU would cease to be the Policing Board when the unit dealt with national security or other non-transferred matters (when instead the line of accountability would switch to the Secretary of State), the policy document also dealt with national security qualifications on disclosure. A version of the Bill leaked to the media revealed that such qualifications had been codified as never before. Rather than permissive powers for the heads of institutions to make decisions as to whether information may engage national security and be referred to the Secretary of State, instead whole classes of document would be pre-certified by any policing and security agency before being passed to the HIU. The doctrine went beyond national security to become 'national security+'. The provisions encompassed any information classified as national security information by any relevant authority, but also, for good measure, any document which emanated from the intelligence unit of the police or military would automatically receive the same classification. Once information had been classified in such a way, the sole decision-maker as to whether it would remain in HIU reports to families would be the Secretary of State herself. Should an HIU staff member pass such information to families without her consent, the leaked Bill provided that they could face a prison sentence. No right to appeal was contained within the Bill.

In this instance, the insistence on such provisions provoked the collapse of agreement on the introduction of the draft legislation and a return to the drawing board in relation to procedures over onward disclosure. It has nevertheless laid bare government's desired direction of travel regarding the further codification of the national security doctrine.

27 Prison Act (Northern Ireland) 1953, s 1A(7), as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Sch 4, para 3.

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Trends and innovations in the market for legal services

Strategies for managing change and the use of paraprofessionals: a cross-sector study for the benefit of post-LETR providers of legal services

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PART ONE: FURTHER EDUCATION, THE NHS AND THE SHARED MANAGEMENT AGENDA

Introduction

The Legal Education and Training Review Report[2] (the LETR Report) contemplates the nature of legal services and seeks to establish a framework to support and facilitate provision of these services. The market is experiencing 'a time of unprecedented change with consumer demands, technology and the regulatory system fundamentally changing the way that legal services are delivered'.[3] The question remains how providers of legal services will manage this change and how they can best prepare their managers for that role.

This is not an issue faced only by lawyers. Other sectors have experienced an equally significant change, particularly in the public sector. This two-part paper asks whether the experience of management in the public sector can inform the current debate on management in the legal services sector (LSS). This first part proposes the authors' theoretical model, which records their observations that change management in the public sector can be categorised into three strategies. The focus in this paper, on the further education (FE) and National Health Service (NHS) sectors, is to allow for a comparative analysis of change management in the LSS in the second paper. That paper will consider the recent history of the LSS and will find that the changes faced resonate with those experienced in the public sector. Through this cross-sector analysis, the authors reveal that there exists a shared management agenda, which may not otherwise have been readily apparent. The second paper concludes by articulating clearly this shared agenda, with the aim of engaging stakeholders within the LSS, informing their debate as to how to implement and manage change, and having impact by preventing them from reinventing the proverbial wheel.

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2 LETR Independent Research Team, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (LETR 2013).

3 Solicitors Regulation Authority, *Training for Tomorrow: Ensuring the Lawyers of Today Have the Skills for Tomorrow* (Solicitors Regulation Authority 2013).

The theoretical model

Students of business administration will be familiar with the standard theoretical models of managing change. As few in the LSS will be familiar with those models, the authors set out in Table 1 their alternative approach, based on their analysis of change management in the public sector.

Table 1: Strategies observed in public sector management

1	Provide the service as before and meet every imperative for efficiency by requiring highly qualified staff to work harder
2	Substitute paraprofessionals for professionals
3	Substitute capital for labour

The cross-sector analysis

The public sector is not perceived as radically innovative in terms of service delivery. However, parts of the sector inexorably have introduced features which mirror the most radical changes in legal provision. Two sectors are considered in this paper:

- FE; and
- the NHS.

Further education

The mid-1990s marked a rapid, government-inspired growth in FE. To promote and afford this growth, the government adopted a funding model which removed funding for a number of students (say, 5 per cent) at the existing average unit of resource (say, £xooo per full-time student equivalent) and required colleges to enrol additional students at a lower unit of resource (say, £xooo-y). To make up lost income, colleges needed to enrol more students than before. Having done so, they now had less income per student. Most concluded that to manage this situation effectively they needed to enrol much larger numbers of students than before. In consequence, they increased their budget significantly, covered their overheads and had money to invest, but could no longer teach students as before, due to the reduction in the unit of resource which was set to recur each year. What was to be done? Each college sought its own salvation. Over time, strategies began to emerge which can be analysed as follows.[4]

A. Attempt to secure more work from the existing, highly qualified professional workforce (e.g. by increasing teaching hours, reducing preparation time and reducing holiday entitlement) – **Strategy One**.

B. Employ paraprofessionals (e.g. trainers rather than lecturers, work-based assessors and classroom assistants) to enable lecturers to teach larger numbers of students – **Strategy Two**.

C. Reduce student class contact with lecturers and replace these lost hours in newly created libraries or workshops staffed by librarians/technicians and supported by significant investment in information technology and learning materials – **Strategy Three**.

4 Ian Anderson Todd, *Implementing Change from Within: Strategic Management of the FE Curriculum* (Kogan Page 1995).

D. Create large physical areas (e.g. lecture theatres, studios, laboratories/workshops) in which lecturers could deliver to much larger groups of students – also **Strategy Three**.

These strategies can be expressed generically using the theoretical model as set out in bold above. The experience of the implementation of these strategies in FE is illuminating.

Strategy One

Colleges which adopted Strategy One often did so as a default strategy. There was considerable disruption in workforce relations and morale. To be fair, all strategies had an impact on morale because, despite resisting Strategy One, the workforce did not repudiate (indeed it endorsed) the underlying assumption that all work should be undertaken by qualified professionals, as before. The preferred solution of the workforce would have been the appointment of more (unaffordable) professionals.

Strategy Two

Colleges adopting Strategy Two experienced some of the same difficulties faced by Strategy One, and also some new issues. First, many professionals opposed the notion that any work they had previously undertaken could be delivered satisfactorily by paraprofessionals. In the authors' experience, in extreme cases every error paraprofessionals made was highlighted, while mistakes made by professionals were simultaneously excused based on the alleged additional workload created by the introduction of paraprofessionals.

Second, and conversely, a number of young, enthusiastic and well-qualified paraprofessionals concluded they could deliver a better service than the professionals. In some cases, they were mistaken and this perception had to be managed. In other cases, however, in the authors' experience, they were correct.

Strategy Three

The colleges opting for Strategy Three experienced some aspects of the issues faced by colleges with different strategies. In addition, usually these colleges had invested heavily in information technology and therefore faced additional problems.

Once initial network-related issues have been resolved, the provision of service delivery through IT tends to start well because hardware and software are new and up to date. Soon, however, both begin to date and fail, raising continuing issues of maintenance, replacement and relevance. Few managers had the skills to resolve these issues.

This led to a reliance on newly appointed technical managers. However, while generally skilled in relation to hardware issues, these new managers (often recruited from outside the sector) were not familiar with the curriculum product delivered by the software and became aware of deficiencies only when alerted by complaints.

Typically, having made a large initial capital investment in both hardware and software, no ongoing budget capacity was created. Many colleges did make provision for depreciation of assets and could address hardware issues. However, few made provision for continuing modification of curriculum products delivered through the software, even though these products represented their *core business*.

Further, while curriculum professionals designed or approved these products, it was paraprofessionals who delivered or supported them. Their remit was confined to delivering the product as designed; they had no authority to amend or vary the material even when customer feedback consistently revealed shortcomings. This created multiple

complaints. Often customer dissatisfaction was the only catalyst for change within the delivery of the *core business*. In effect, in the authors' experience, this was how the system had been designed and managed (though everyone involved in the design would have been startled by such a conclusion).

The strategies outlined above were radical and presented lecturers and managers alike with a challenging agenda. For lecturers, there was concern at 'the changing role of teachers in the context of the growth of resource-based learning . . . the blurring of distinctions between teaching and support staff and the implied threat to professional status and capacity'.[5] For managers, there were significant new issues to address.

The management issues presented by (i) the rapid growth in FE and (ii) the adoption of strategies for accommodating the concurrent requirement for efficiency, can be summarised as follows.

- HR managers needed to support all levels of the workforce through a period of rapid change, often not welcomed by the professionals, who preferred the status quo and the appointment of more professionals.
- Managers were required to determine how best to design systems and processes to allow product delivery by paraprofessionals.
- Paraprofessionals required ongoing training, supervision and management. They needed to be empowered to react to shortcomings in designed systems and processes to maintain customer satisfaction, while ensuring that these interventions would not compromise the integrity of service delivery. Further, they required clear career pathways so they would not come to resent a reward structure which did not appear to relate to the relative competence of themselves and the professionals they were, in part, replacing.
- Professional staff (the **A-team**) needed to be managed in a way which ensured that they operated only at an appropriate level (**A-team** work); could, and would, design and oversee systems and processes; and did not feel undervalued as their roles changed and their previous patterns of behaviour were altered.
- IT systems required strategic management to ensure that the core product continued to be relevant and flexible; high-level technical management to ensure value for money and fitness for purpose. Further, processes were required to ensure managers were not disempowered by the technical detail of their product delivery platform.

The National Health Service

Net expenditure in the NHS increased from £64bn in 2003/2004 to £113bn in 2014/2015.[6] Despite this huge increase in resources, however, population growth, increasing life expectancy and developments in science, technology and pharmaceuticals create an ongoing imperative for major efficiency gains to meet a burgeoning demand which, in our model for health care delivery, is not rationed by price.

5 N Lucas, J McDonald and D Taubman, *Learning to Live with It: The Impact of FEFC Funding: Further Evidence from Fourteen Colleges* (NATFHE 1999).

6 NHS Confederation, 'Key Statistics on the NHS' (2016) <http://www.nhsconfed.org/resources/key-statistics-on-the-nhs>.

As with FE, the NHS has sought to deploy paraprofessionals (Strategy Two). The use of this term in this sector needs, however, to be used with care. Doctors are not the only professionals; nurses and pharmacists are, rightly, proud of their professional status and likely to reject the concept that they could be described in any other terms. Times change, however, and increasingly they are involved in activity which would lead to them being described as paraprofessionals when undertaking functions previously carried out by doctors.

Paramedics

Paramedics are the senior healthcare workers at an accident or medical emergency. They administer oxygen and drugs and use high-tech equipment, such as defibrillators and apply splints and drips. Usually, they operate as part of a two-person ambulance team, accompanied by an emergency care assistant or ambulance technician (there is a *hierarchy* of paraprofessionals). Some paramedics work alone, arriving by car or motorcycle. Often, they see patients in their own homes. There are plans to significantly develop the use of these paraprofessionals.

A review[7] revealed that 40 per cent of people presenting to Accident and Emergency (A&E) departments are discharged requiring absolutely no treatment and that 50 per cent of 999 calls requiring an ambulance to be dispatched could be managed at the scene. Based upon this report, Sir Bruce Keogh, the National Medical Director, concluded that 'we must provide highly responsive urgent care services outside of hospital so people no longer choose to queue in A&E', thus making explicit the policy objective of reducing the demand for services delivered by professional doctors. The way forward, he concluded, is to harness 'the skills, experience and accessibility of a range of healthcare professionals including pharmacists and ambulance paramedics'.[8] His aim is to 'develop our 999 ambulances into mobile urgent treatment services capable of dealing with more people at the scene and avoiding unnecessary journeys to hospital'.

The way forward will be difficult and at its heart is the issue of risk. Currently, the paramedic briefs a doctor on arrival at the hospital. Decision-making and accountability then rests with the doctor. Will the paramedics accept this accountability? It is a hard ask. Is it precisely responsibility and accountability which are the hallmarks of the professional, reflected in their enhanced rewards? A timid approach in implementing Sir Bruce's policy will defeat the policy objectives and accountability will lie with managers and politicians; a bolder approach could result in error and personal accountability. The media and politicians are often unforgiving in these circumstances. So, too, in the absence of no-fault liability, is the legal system. Rising for a moment above these difficulties, the generic issue is revealed: when considering risk in relation to paraprofessional interventions, is priority given to the immediate transaction or to the totality of transactions?

Sir Bruce Keogh is aware of the likely agenda. He asserts, 'traditional barriers and vested interests will need to be tackled and broken down . . . timid, limited or disjointed initiatives will be insufficient'.[9]

7 Urgent and Emergency Care Review Team, *Transforming Urgent and Emergency Care Services in England* (NHS England 2013).

8 Ibid.

9 Ibid.

Nurses

Auxiliary nursing staff have relieved nurses of most of their domestic responsibilities (e.g. making beds, washing patients, emptying bedpans and changing catheters). Increasingly, the responsibilities of those auxiliaries also move into areas seen by the public as the work of nurses. For example, they weigh patients, take their temperature and pulse and check respiration rates. Their role reflects a drive to ensure that nurses are engaged in **A-team** work and they represent a workforce standing ready to fill the gap as nurses are moved into higher order functions. Many nursing students undertake work as auxiliaries while qualifying to gain experience on the wards.

The movement of nurses to higher-order functions has, of course, already begun. Just as auxiliaries tend to focus the work of nurses on **A-team** work, nurse practitioners tend to move doctors in the same direction. Nurse practitioners are nurses who are able to diagnose medical problems, order treatments, prescribe medication and make referrals. The Royal College of Nursing (RCN) believes nurse practitioners 'have led the way in challenging traditional professional boundaries'.[10] This has not escaped the attention of doctors: 'You know it can be threatening, we've got all this training and was it all necessary? . . . we might do ourselves out of a job.'[11] One general practitioner (GP) was of the opinion that the nurse practitioners saw all the straightforward patients and 'we see all the difficult patients now . . . it has left me feeling pressurised'.[12] This would appear to validate the notion that nurse practitioners move doctors to **A-team** work. It also raises another issue: what happens to a professional when all work is **A-team** work?

As stated above, in FE some paraprofessionals considered they were working to a higher standard than their professional colleagues. It would appear that a similar conclusion can also be reached by nurse practitioners. An American study[13] asked both doctors and nurse practitioners whether they agreed with the statement 'that physicians provide a higher quality examination and consultation than do nurse practitioners during the same type of primary care visit'. Two-thirds of doctors agreed and three-quarters of nurse practitioners disagreed.

Walk-in centres

Typically, walk-in centres are managed by a nurse and are open 365 days a year and outside office hours. The first centre opened in 2000 and they have been popular. The national evaluation of walk-in centres[14] conducted a survey of users of 38 centres and of patients in 34 neighbouring GP practices. Both groups were very satisfied, but there was greater satisfaction with walk-in centres. There was a general lack of awareness that the service was nurse-led. This may show that it does not matter to the user whether they are attended to by a professional or a paraprofessional – providing the service is good. Critically, the survey revealed that only 31 per cent of users of the walk-in centres were referred to a GP and only 6 per cent to A&E. Of users, 32 per cent did intend to make

10 RCN, *Advanced Nurse Practitioners: An RCN Guide to Advanced Nursing Practice, Advanced Nurse Practitioners and Programme Accreditation* (RCN 2012).

11 Ali Wilson, David Pearson and Alan Hassey, 'Barriers to Developing the Nurse Practitioner Role in Primary Care – The GP Perspective' (2002) 19 Family Practice 641.

12 Ibid.

13 Karen Donelan, Catherine DesRoches, Robert Dittus, Peter Buerhaus, 'Perspectives of Physicians and Nurse Practitioners on Primary Care Practice' (2013) 368 New England Journal of Medicine 1898.

14 Chris Salisbury et al, *The National Evaluation of NHS Walk-in Centres Final Report* (University of Bristol 2002) <www.bristol.ac.uk/media-library/sites/primaryhealthcare/migrated/documents/wiceval.pdf> accessed 21 March 2016.

a follow-up appointment with their GP, but, in the event, no greater proportion of users presented to a GP after four weeks than those who had originally attended a GP practice rather than a walk-in centre. Not only are they popular, then, they also appear to be making a meaningful contribution to the achievement of policy objectives. However, this does not mean that they have secured the approval of professionals in the sector. A survey of local health practitioners working near walk-in centres revealed that doctors (in A&E and general practice) were most critical; practice nurses were most supportive.[15]

The team that undertook the national survey pointed out that 'there is a potential for nurses to retreat into task-oriented roles guided by decision-support software'.[16] The way nurses used the software varied, they found: 'Those accustomed to making clinical decisions regarded it as an aid to managing each patient. They would sometimes override the algorithms if, in their professional judgement, this was warranted. But less experienced nurses might feel uncomfortable with this.' They concluded that 'the imposition of decision support software to enable patient management does not sit comfortably with the evolution . . . of nurses capable of managing complete episodes of care'.

NHS Direct

NHS Direct had also used such software. This service was created in 1998 to improve access to health education and advice and enable patients to care for themselves (thus protecting doctors from being competed away from **A-team**, high-order tasks). It was discontinued on 31 March 2014 as it was not financially viable.[16a] NHS Direct appears to have polarised opinion.[17] There were concerns about the employment of undue caution. The National Audit Office concluded that: 'Advice given by NHS Direct staff . . . generally errs on the side of caution.'[18] In 2007 NHS Direct referred 54 per cent of users to GPs, 19 per cent to A&E and 26 per cent to self-care.[19] By 2011 the percentage of calls completed within NHS Direct had increased to 54 per cent.[20]

Why did such a large percentage of calls result in referral to a professional? The answer may lie in the experience of nursing staff involved; the use of decision support software; and aversion to risk. One study[21] noted that 'a low risk approach for some nurses was to adhere to the software recommendations'. The nurses in the study were experienced. However, the study revealed that 59 per cent had a 'no risk attitude to clinical decision-making'. The proportion of calls in the study which resulted in self-care

15 Salsibury (n 14).

16 Elizabeth Anderson et al, 'NHS Walk-in Centres and the Expanding Role of Primary Care Nurses' (2001) 98 Nursing Times 36.

16a NHS Direct National Health Service Trust, *Annual Report and Accounts 2013/2014* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326960/Hc_402_NHS_Direct_web_only.pdf>

17 Erica Jane Cook, *Who Uses NHS Direct? Factors that Impact on the Uptake of Telephone Based Healthcare* (University of Bedfordshire 2013).

18 Comptroller and Auditor General, *NHS Direct in England* (National Audit Office 2002).

19 Geraldine Byrne, Janice Morgan, Sallie Kenall and Debbie Saberi, 'A Survey of NHS Direct Callers' Use of Health Services and the Interventions They Received' (2007) 8 Primary Health Care Research and Development 91.

20 Health Committee, *Written Evidence from NHS Direct NHS Trust (ES 31): Experience to Date of the Transition from NHS Direct to the NHS 111 Service* (Parliament 2013) <www.publications.parliament.uk/pa/cm201314/cmselect/cmhealth/171/171vw25.htm> accessed 21 March 2016.

21 Alicia O'Cathain et al, 'The Effect of Attitude to Risk on Decisions Made by Nurses using Computerised Decision Support Software in Telephone Clinical Assessment: An Observational Study' (2007) 7 BMC Medical Informatics and Decision Making 39.

was 16 per cent. At first sight, a 'no-risk' strategy appears to be appropriate in health care. When considering the single transaction represented by one user, this may, indeed, be the case. However, at the macro level it may look different. When working with finite resources, a fastidious level of care for patients with sore throats, temperatures, headaches or an upset stomach may significantly impede the ability to provide the correct level of care to those other patients who are in real and urgent need of it.

One significant feature of this decision-making, of course, is the extent to which paraprofessionals are prepared to risk individual accountability (noted above in the case of paramedics). This, in turn, raises the issue of accountability for the macro effects of individual decision-making. What, for example, was the individual accountability of a NHS Direct nurse for referring to A&E a patient who was subsequently discharged without treatment? Currently, the spectre of legal liability provides a disproportionate loading in favour of caution. It may be that only the introduction of no-fault liability can alter the balance.

The experience of operating NHS Direct raises the question of whether the NHS can introduce capital to reduce staff costs (Strategy Three). The sector has shown an ability to substitute capital for labour in relation to specific functions. Automated check-in systems in GP surgeries save support staff costs. Automated or call centre reminders of hospital appointments promote efficiency in the use of staff and specialist equipment. X-rays can now be scanned directly to a database enabling direct access by consultants, saving the time of both support staff and consultants. Speech recognition software enables consultants to add notes to the image, saving consultant time and obviating the need for a typist. However, patient records are the heartbeat of the NHS. Here, the picture is different.

In 2002 the Department of Health (DoH) decided to take a centralised approach to move an antiquated system of manually transferring paper records to a fully electronic system. The programme was dismantled in 2011, though the government decided to keep component parts in place. It was concluded[22] that 'the benefits to date from the National Programme are extremely disappointing'. The expected benefits, to be secured by trust management, are estimated at £3.7bn (half the costs incurred). The project has been described as 'the biggest IT failure ever seen'.[23] The DoH was criticised for failing to 'recognise the difficulties of persuading NHS trusts to take new systems that had been procured nationally and to get people to operate the systems effectively even when they were adopted'. Dismantling the national programme has not, of course, removed the need. The management of patient records will consume a great deal of management time.

Conclusion

A consideration of the FE and NHS sectors confirms that Strategy One is not feasible. Reliance on this strategy will cause the system to fail. Both sectors are committed to Strategies Two and Three. The management agenda will focus on the role of paraprofessionals and on the potential for capital deployment and development. There is revealed a genuinely shared agenda across these sectors.

It is surprising that the common issues identified in this first paper are not subject to cross-sector analysis and evaluation. Equally, it is also surprising that a common

22 House of Commons Committee of Public Accounts, *The Dismantled National Programme for IT in the NHS* (House of Commons 2013).

23 Rajeev Syal, 'Abandoned NHS IT System has Cost £10bn so far' *The Guardian* <www.theguardian.com/society/2013/sep/18/nhs-records-system-10bn> accessed 21 March 2016.

framework does not exist for management development. There is, perhaps, no better illustration of this need than the shared goal that paraprofessionals become less averse to risk to secure institutional objectives. In their second paper, to be published in the next issue, the authors will consider the LSS and explore how the shared management agenda revealed in this paper can help to inform the current debate as to how to implement and manage change in the LSS.

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Case notes

Regulating virtual currency: Case C-264/14 *Skatteverket v David Hedqvist* [2015] ECLI:EU:C:2015:718

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1 Introduction

In the judgment of the Fifth Chamber in Case C-264/14 *Skatteverket v David Hedqvist* [2015] EUECJ C-264/14, ECLI:EU:C:2015:718 the court was called to examine the meaning of supply of goods[1] and services[2] effected for consideration under Article 2(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the VAT Directive). The case concerned the value added tax (VAT) applied to 'bitcoin' virtual currency. Mr Hedqist sought to determine whether transactions to exchange 'traditional currency' for the bitcoin virtual currency or vice versa were subject to VAT. If the court's decision was affirmative, it would have to resolve the question of whether Article 135(1) of the VAT Directive[3] is to be interpreted as meaning that the exchange transactions are tax exempt. The court resolved the question on the basis of settled case law relating to exemptions under VAT, interpreted in light of the objective pursued by the provisions. The significance of this ruling lies in the interpretation of the VAT Directive and the notion of 'supply of goods and services'. The case is likely to be of particular interest in an increasingly important yet under-developed body of law: regulating virtual currency.

2 Factual and legal background

As noted, the case concerned the VAT Directive enacted on the common system of VAT, but can only be understood against the background of relevant provisions.

Title 1 of the Directive deals with 'subject-matter and scope'. Article 2(1) of the VAT Directive deals with distinguished transactions which shall be subject to VAT. Article 2(1) provides context for the supply of goods[4] and services[5] for consideration within the territory of a member state by a taxable person acting as such.[6] Article 14(1) specifies that the 'supply of goods' transaction shall mean 'the transfer of the right to dispose of tangible property as owner'. Alternatively, Article 24(1) provides that, for any transactions which do not constitute a supply of goods, they shall mean a supply of services. Virtual

1 Article 14(1).

2 Article 25(1).

3 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

4 Article 2(1)(a).

5 Article 2(1)(c).

6 Ibid.

currencies are clearly not tangible, even if they do need physical storage (i.e. a computer), and as such fall within the scope of 'services'.

Express circumstances exempt from VAT are provided under Article 135(1). The exemptions cover financial services, including currency.[7] The court found that the purpose of Article 135(1)(b) to (g) exemptions should be interpreted with the objective of avoiding difficulties involved in making financial services subject to VAT.

Reference for preliminary ruling

Reference for a preliminary ruling was made by the Supreme Administrative Court (Högsta förvaltningsdomstol) to the Court of Justice. Mr David Hedqvist was a Swedish national, who requested a preliminary decision from the Swedish Revenue Law Commission to establish whether VAT needed to be paid on the purchase and sale of bitcoin virtual currency units. A bitcoin refers to 'a virtual currency used for payments between private individuals over the internet and in certain online shops that accept it; users can purchase and sell the currency on the basis of an exchange rate'.[8] The Revenue Law Commission concluded that Mr Hedqvist would be supplying an exchange service effected for consideration. However, the service was covered by the Swedish legislation which provided an exemption under chapter 3, para 9 of the Law (1994: 200) on VAT.[9]

The Revenue Law Commission's decision on bitcoin virtual currency is that it is a means of payment similar to other legal means of payment. It further provided for the decision to limit the scope of the exemption Article 135(1)(e) to cases of bank notes and coins, not currency. The Swedish Tax Agency (Skatteverket) appealed to the Supreme Administrative Court arguing that the service to which Mr. Hedqvist refers is not covered by the exemption under chapter 3, para 9 of the Law on VAT. The Supreme Administrative Court determined the provision of service of consideration by an inference from the judgment in First National Bank of Chicago (C-172/96, EU:C:1998:354). The ruling was made on a similar question to the main proceedings. The Court of Justice held that exchange of currencies, where a bank sets different rates for sale and purchase, constitutes a supply of a service effected for consideration.[10] The transaction in review was in regard to the exchange activity not the transfer of currency.

The transactions referred to in this instance were in respect of the exchange of a virtual currency for a traditional currency and vice versa, where payment is the net value between the paid price (exchange rate) and sale price (consideration for the exchange) of the operator. The Supreme Administrative Court decided to stay the proceedings based on the second issue of whether the transactions were within the scope of exemptions for financial services within Article 135(1) of the VAT Directive. On the basis of Article 267 the court requested a preliminary ruling on 27 May 2014.

The order of reference made note of anonymous ownership and the transfer of bitcoin within the network of users who have 'bitcoin addresses'. Moreover, the order referred to the 2012 report by the European Central Bank on virtual currencies that they be defined as a type of 'unregulated digital money', consisting of a 'bidirectional flow', where users purchase and sell on the basis of an exchange rate. Bitcoin was further

7 Article 135(1)(e)(d).

8 Judgment para 11.

9 Judgment para 16.

10 Case C-172/96 *First National Bank of Chicago* [1998] I-354, paras 25–35.

distinguished from electronic money[11] as the funds were not expressed in traditional accounting units (e.g. euros), but in virtual account units (bitcoin). This interpretation gives rise to a virtual currency scheme determined on its form rather than its function; in other words based on the form of money rather than it being a new way of executing transactions without the use of traditional government-backed currency. The bitcoin unregulated network provides a platform in which bitcoins are used as compensation offered for goods and services.

The order of reference defines Mr Hedqvist's transaction to be limited to the purchase and sale of bitcoin units in exchange for traditional currency, such as Swedish krona and vice versa. Neither the reference order nor the court's judgment tackle the question of whether VAT is applied to bitcoins used to purchase goods and services. The Supreme Administrate Court referred two questions to the court.

1. Is Article 2(1) of the VAT Directive to be interpreted as meaning that transactions in the form of what has been described as the exchange of virtual currency for traditional currency and vice versa, which is effected for consideration included by the supplier when the exchange rates are determined, constitute the supply of a service effected for consideration? (judgment para 23)
2. If so, must Article 135(1) (of that Directive) be interpreted as meaning that the abovementioned exchange transactions are tax exempt? (judgment para 23)

3 Judgments of the court

> Is Article 2(1) of the VAT Directive to be interpreted as meaning that transactions in the form of what has been described as the exchange of virtual currency for traditional currency and vice versa, which is effected for consideration included by the supplier when the exchange rates are determined, constitute the supply of a service effected for consideration? (judgment para 3)

The first question required the court to determine whether the meaning of the transaction was one which constitutes the supply of services for consideration within the meaning of Article 2(1)(c) of the VAT Directive.

The court refers to the definition of supply of goods to distinguish bitcoin from the scope of the provision. Advocate General Kokott stated the findings of the referred court, defining bitcoin as a form of stored data which can be transferred electronically.[12] Bitcoin is created by an algorithm program as opposed to having a particular issuer, such as those of traditional currencies recognized as legal tender. The advocate general emphasised the distinction between legal tender and other means of payment and concluded that the application should be recognized equally, dependent on the function.[13] The court agreed with her opinion that virtual currency has no purpose other than as a means of payment.[14] Consequently, the context of the exchange transaction

11 Directive 2009/110/EC of the European Parliament and Council of 16 September on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directive 2005/60/EC and repealing Directive 2000/46/EC (OJ 2009 L 267, p 7).

12 Case C-264/14 *Skatteverket v David Hedqvis*t [2015] ECLI:EU:C:2015:718 Opinion of Attorney General Kokott, para 7.

13 Ibid para 15.

14 Judgment para 24.

could not be characterized as 'tangible property' within the meaning of Article 14 of the VAT Directive.[15]

After concluding that the transactions constituted the supply of services within the negative definition of Article 24 of the VAT Directive, the court moved on to the effect of 'for consideration' within the meaning of Article 2(1)(c). The court examined whether the sale price would be subject to VAT. The court examined the case law on taxable events, concluding that VAT was payable 'only if there is a direct link between the services supplied and the consideration received by a taxable person'.[16] The legal relationship (direct link) is established between the provider of a service and the recipient pursuant to which there is a reciprocal remuneration.[17] The court examined the contract between Mr Hedqvist's company and the other parties to the transactions. The legal relationship is based on bidirectional flow of the reciprocal agreement to transfer an amount of a certain currency in exchange for a corresponding value in a virtual currency (bitcoin). The court found consideration in the difference between the sale price and the exchange rate.[18]

The court further emphasised that the form of remuneration is irrelevant for the purpose of determining consideration for the supply of service.[19] The court concluded that the meaning of transaction – exchange of traditional currency for units of the bitcoin virtual currency and vice versa – does constitute the supply of service for consideration within Article 2(1)(c). In other words, the service is subject to VAT.

> If so, must Article 135(1) (of that Directive) be interpreted as meaning that the abovementioned exchange transactions are tax exempt? (judgment para 23)

The second question referred to the court was whether the transaction, as concluded above, is exempt from VAT interpreted within Article 135(1)(d) to (f). The court's approach was to examine the objective of the exemptions. It provided a preliminary point in accordance with the case law, namely that the exemptions constitute a purpose to provide uniformity in the application of the VAT system within the EU.[20] Moreover, the general principle that VAT is levied on all services supplied for considerations requires the strict interpretation of terms used to specify those exemptions.[21] However, the court emphasised the principle of fiscal neutrality inherent in the common system of VAT. Therefore, the strict interpretation must be limited in a way that avoids depriving the effect of the exemptions.[22] As a general principle of equal treatment, this principle was developed by the court in VAT matters. The implications for the VAT common system arise from the differences in treatment which affect competition and the effect of the internal market.[23] The court referred to its previous case law on fiscal neutrality to highlight that flexibility in the interpretation is taken into account if the effect of the exemption is to be deprived.[24]

15 Judgment para 24.

16 Ibid para 27.

17 Ibid.

18 Ibid para 28.

19 Ibid para 29.

20 Ibid para 33.

21 Ibid para 34.

22 Ibid para 35.

23 P Rendahl, *Cross-Border Consumption Taxation of Digital Supplies* (International Bureau of Fiscal Documentation 2008) 72ff.

24 Case C-461/08 *Don Bosco Onroerend Goed* EU:C:2009:722, para 25; Case C-259/11 *DTZ Zadelhoff* EU:C:2012:423, para 21; Case C-326/11 *JJ Komen en Zonen Beheer Heerugowaard* EU:C:2012: 461, para 20.

Article 135(1)(d)

Because of the nature of the provisions as an exception to the VAT principle, the foreign exchange transaction has to be strictly interpreted. The exemption laid down in Article 135(1)(d) of the VAT Directive states that exempt transactions involve 'deposit and current accounts, payments, transfers, debts, cheques and other instruments'. In the case of *Axa UK*, the court established that the service in question must form a whole, fulfilling the specific, essential functions of the service provided in the provision.[25] The court gave short shrift to this account, noting that transactions under Article 135(1)(d) are defined according to the nature of services provided.[26] Moreover, in *Granton Advertising*, the court concluded that transactions referred to in Article 135(1)(d) are services or instruments that operate as a way of transferring money.[27] The court made clear its agreement with the judgment, reading the wording of the provision strictly.

In light of Advocate General Kokott's observation,[28] the provision does not cover transactions that involve money itself. Bitcoins are financial services, 'a contractual means of payment'[29] which are not subject to negotiable instruments such as debts or cheques. The court concluded that the bitcoin virtual currency is a direct means of payment between the parties that accept it.[30]

Article 135(1)(e)

The court went on to examine Article 135(1)(e) on the question of whether the transaction could be interpreted as involving 'currency, bank notes and coins used as legal tender'. The court acknowledged the fact based on the concepts used in the provision in light of the versions of all the languages of the EU.[31] It draws this from the advocate general's reference verifying that various languages do not allow it to be determined without ambiguity whether the provisions apply only to transactions involving traditional currencies or other forms of currency.[32] The court highlighted that the question of the scope of the expression read literally, where the linguistic differences arise, cannot be determined.[33] The court drew further attention to the purposive rather than literal approach that is to be taken into account. The purpose of Article 135(1)(e)[34] was to 'alleviate the difficulties connected with determining the taxable amount and the amount of VAT deductible which arise in the context of the taxation of financial transactions'. The court has already concluded, in agreement with the advocate general that transactions involving a non-traditional currency that has no other purpose than as a means of payment are financial services.[35]

Specifically, in the context of exchange transactions of traditional currencies, there are difficulties connected with determining the taxable amount and the amount deductible, where an exemption is found under Article 135(1)(e). The court

25 Case C-175/09 *Axa UK* EU:C:2010:646, para 26 and 27 and the case law cited.
26 Judgment para 39.
27 Case C-461/12 *Granton Advertising* EU:C:2014:1745, paras 37 and 38.
28 Opinion para 51.
29 Judgment para 42.
30 Ibid.
31 Ibid para 45.
32 Opinion paras 31–34.
33 Judgment para 47.
34 Ibid paras 36 and 37.
35 Ibid para 49.

acknowledged the fact that the difficulties may be the same.[36] The court concluded that the provision of Article 135(1)(e), within a purposive interpretation, would be deprived of its effect if it was limited to traditional currencies.[37] As such, transactions involving the exchange of currencies for units of the bitcoin virtual currency are to be covered under Article 135(1)(e).

Article 135(1)(f)

The exemption provided under Article 135(1)(f) covers 'shares, interests in companies or associations, debentures and other securities'. The court underlined that these securities, as 'conferring property right over legal persons' and 'other securities', should be regarded as being comparable in nature. The court had already found common ground that bitcoin virtual currency is neither a security-conferring property right or of a comparable nature.[38] Thus, the transaction fails to fall within the scope of Article 135(1)(f) of the VAT Directive.

4 Analysis

The expansion of forms of digital transactions means that the existing legal models must be developed and policy-makers must make an appropriate regulatory regime. Analogous to the expansion of debit and credit cards, the popularity of bitcoin has facilitated the business of virtual currency. This was a transformative judgment changing the status of virtual currency in the realm of VAT. The rulings of the European Court of Justice were correct as they interpreted and applied the scope of the VAT Directive. It now seems pressing that the European Commission make proposals for a change in the framework. In line with the Advocate General's opinion, the lack of stable value and vulnerability to fraud of bitcoins, raised by the Federal Republic of Germany, cannot justify the difference between traditional currency and virtual currency.[39] Both will be affected by similar risks. The ruling has underlined and reinforced the difference in treatment between virtual currency created by algorithms and traditional currency backed by governments. The case can be read in the context of a broader policy disquietude about the lagging regulatory context of digital currency. The questions remain whether the same solution will be reached in determining VAT application regarding purchases for goods and services rather than 'exchange transactions'. In future, the view of technology and currency in regulation terms will need to provide further mechanisms of oversight, but ultimately embrace the uniqueness of virtual currency.

36 Judgment para 49.

37 Ibid para 51.

38 Ibid para 55.

39 Opinion para 44.