NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Submission to NIO's Consultation on Addressing the Legacy of Northern Ireland's Past

August 2018

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Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC):

1.4 welcomes the consultation paper on addressing the legacy of NI's past. The Commission also welcomes that the general principles in clause 1 state that "human rights obligations should be complied with". However, the provisions contained within the Bill are not fully human rights compliant in law and practice and the Commission recommends that this should be remedied. The details of the areas where there are concerns are outlined in this submission.

1.8 recommends that the timeline of each institution set out in the draft Bill meshes in a reasonable way.

1.9 recommends that the consensus on the final detail of the proposed mechanisms, including their operation and outcomes, is human rights compliant, the specific detail of which is set out in this submission.

Omissions

2.3 recommends that prompt, effective steps are taken to expediently investigate other serious Troubles-related human rights abuses and violations in instances where the victims have not been killed, introduce a pension for severely physically injured victims in NI, and introduce advocate-counsellor assistance. These lacuna should be promptly and effectively addressed either in the Bill or using other effective mechanisms.

2.24 recommends that human rights compliant provisions must be expediently made for the effective official investigation of all other serious violations or abuses of human rights, in particular allegations falling under the prohibition on torture, cruel, inhuman or degrading treatment or punishment. A degree of flexibility is required to ensure that moving forward with investigating Article 3 ECHR cases does not delay the investigation of Article 2 ECHR cases, and vice versa. Thus, Article 3 investigations do not necessarily have to be conducted by the HIU and an additional investigative mechanism may need to be created to deal with such cases. Furthermore, any issues around

the remit and operations of the investigative body tasked with investigating Article 3 cases should be expediently resolved to ensure no further delays.

2.34 calls on the NI Executive to fund the Lord Chief Justice's plans for addressing outstanding legacy inquests. The Commission highlights concern that, in the absence of the necessary resources, the legal obligation under Article 2 ECHR on the State to deliver these inquests will not be met. In the continued absence of a devolved government, the UK government should take responsibility to ensure the funds are in place.

2.40 recommends that the implementation of the SHA commitment to a comprehensive Mental Trauma Service is realised without any further delay.

2.41 recommends that the Mental Trauma Service is adequately resourced and that those funds are ring-fenced to enable this service to meet the needs of victims to give effect to the State obligations to provide rehabilitation, as a form of effective remedy.

2.43 welcomes the commitment to establish a pension for those severely physically injured victims and would recommend that this is implemented without any further delay.

2.45 recommends that provision is made for appropriate rehabilitation to those who do not fall within the pension or mental trauma service, or whom another or additional form of reparation is more appropriate to ensure that the State fulfils its obligations to provide an effective remedy.

2.47 recommends that any specific advocate counsellor or other additional provision to support victims and survivors should be realised without further delay.

2.51 recommends that the draft Bill is amended to include the IRG as having a role in making recommendations in respect of statements of acknowledgment which would be directed to the governments of the UK and Ireland. Alternatively, and separate to the Bill, the Commission recommends that there is a clear statement of intent from both governments as to how they intend to progress this commitment of the SHA.

2.55 recommends that the UK government accepts the application of UN Security Council Resolution 1325 in NI and that the proposed mechanisms in the Bill and any additional mechanisms introduced to address the identified omissions make specific provision for women's involvement and effective participation at all stages, including design, implementation and evaluation.

2.58 recommends that the Bill includes a provision to ensure that all the mechanisms are adequately resourced in order to expediently and effectively perform their tasks.

2.59 recommends that safeguards should be in place to ensure that the continued lack of a devolved government should not negatively impact the operations and resourcing of the relevant mechanism.

Historical Investigations Unit

3.18 recommends that the HIU is promptly established and effective safeguards are in place to ensure it is human rights compliant, in line with the general principles set out in clause 1.

3.19 recommends that the HIU is established for the purpose of fulfilling the Article 2 ECHR obligation that *all* Troubles-related deaths are effectively investigated. This includes considering the structural and systemic dimension of violence and rights violations and abuses.

3.24 recommends that for the HIU to be appropriate for undertaking investigations into 'Troubles-related deaths' it must operate in line with the minimum human rights requirements established by the ECHR jurisprudence and this should be reflected within the wording of clause 7.

3.32 recommends an assessment of all HET, Police Ombudsman and LIB cases is conducted by the HIU to determine if they are human rights compliant or not. This may require the creation of two departments within the HIU – one to conduct Article 2 investigations and one to consider the human rights compliance of previous investigations conducted by the HET, Police Ombudsman and LIB. Those cases found not to be compliant with Article 2, should be reopened and subject to an expedient and effective investigation by the HIU. The Commission recognises the resource implications of this requirement, but this

approach is necessary to ensure human rights compliance, in line with the general principles set out in clause 1.

3.39 recommends that Schedule 6, paragraph 3 is amended to enable the HIU to conduct, at a minimum, a targeted consultation on the procedure.

3.40 recommends further amendments of Schedule 6, paragraph 3 are required to ensure the HIU has a duty to be accessible to members of the public who wish to provide evidence relating to a death.

3.42 recommends clause 5(6) is amended to include acts of violence or force allegedly linked to the NI conflict.

3.55 recommends that clauses 9(4)-9(8) are removed and that clause 9 is redrafted to ensure that where there are concerns that a human rights compliant investigation has not yet been conducted into a death, the Director must authorise an investigation by the HIU.

3.62 recommends the HIU is adequately resourced to ensure it has the capacity to promptly conduct investigations and to promptly process and effectively store the case files and information that it receives.

3.64 recommends that the Police Service NI and Police Ombudsman are adequately resourced to ensure that these institutions can promptly transfer all relevant case files and information to the HIU.

3.67 recommends that clauses 8(2) and 8(3) ensure compliance with the overriding obligation to ensure effective Article 2 compliant investigations into all deaths, this includes cases completed by the HET, LIB and the Police Ombudsman.

3.69 recommends Schedule 12, Paragraph 3(1) is redrafted to ensure that a coroner has the ability to hold an inquest into a death that is within the HIU's remit when this is necessary to ensure an Article 2 compliant investigation is conducted.

3.76 recommends, that once established, the HIU conducts its investigations with reasonable expedition.

3.90 recommends clause 37(2)(b) is amended to enable repeat year-long extensions. A review process for whether a

further extension is required should be established, with the determining factor being whether more time is required to ensure all investigations in the HIU's remit are thorough.

3.92 recommends that it is added to the list of specified consultees as set out in clause 37(7).

3.94 recommends that sufficient resources are provided to the HIU to ensure all of its investigations are thorough and meet human rights standards.

3.96 recommends that Schedule 12 includes effective safeguards to address any direct involvement with a case or unavoidable conflict of interest that arises due to the HIU cooperating with another investigative body. This is required to ensure the independence and impartiality of the HIU's investigative process.

3.98 recommends that a provision is inserted that clearly sets out the HIU's requirement to take the necessary steps to protect witnesses, victims and their relatives and persons conducting the investigation from threats, attacks and any act of retaliation or intimidation.

3.100 recommends that provision is included in Schedule 7, paragraph 2 to ensure all lines of evidence can be followed, in the interests of conducting a thorough investigation.

3.107 recommends that, to ensure the HIU has the powers to conduct a thorough investigation, that clause 25 is amended to extend the HIU's powers of compellability to all reasonable lines of inquiry, which includes all relevant public authorities and relevant private individuals. This amendment should include the relevant safeguards required to ensure that the powers are not arbitrarily exercised, for example some form of judicial oversight should be available to allow for a challenge where these is a dispute. This amendment should also include the process for notification of compellability, for example the requirement of a warrant.

3.108 recommends that clause 25 is amended to make it clear that the HIU can compel all reasonable written, oral and material evidence.

3.109 recommends that clause 25 is amended to clarify what the penalty is for non-disclosure, only partial disclosure or deliberately misleading disclosure.

3.127 recommends that every effort is made to ensure that the HIU's Director and as many members, officers and appointments panellists as possible are independent and impartial, in line with the ECHR's jurisprudence.

3.128 recommends that the draft Bill makes provision for safeguards to ensure that anyone appointed to the HIU that was directly involved in or had an unavoidable conflict of interest cannot interfere with the affected HIU investigation.

3.130 recommends that Schedule 4, paragraphs 1(2) and 2(2) include a requirement that where any HIU case is transferred to the Police Service of NI, a police force in Great Britain, or the Police Ombudsman that the new investigators are independent and impartial in line with ECHR jurisprudence, and were not directly involved in or have a conflict of interest in any case they are tasked with investigating.

3.132 recommends that it is specifically stated that a final decision regarding clause 10(4) should ensure independence and impartiality.

3.134 recommends that, to avoid a conflict of interest, Schedule 1, paragraph 3(7) of the draft Bill is amended to require that the attendance of non-committee members at meetings of the committee and sub-committee must have a specific purpose and be reasonable.

3.136 recommends that it is specifically stated within Schedule 12, paragraph 8 that any sharing of facilities are setup and secured in a way that maintains independence and impartiality.

3.139 recommends that clause 37(3)(b) is amended to state that "with reasonable justification" and "in line with human rights standards", the Department of Justice or the Secretary of State can make provision to wind up the HIU at any other time. A statement setting out the reason why should be made to the NI Assembly or UK government, as appropriate.

3.156 recommends that clauses 7(2) and 18(3), and Schedules 9 and 10 reflect the principles of necessity, reasonableness, proportionality and legitimate aim to ensure any restrictions are not arbitrary and that the Secretary of State's decisions are guided by human rights standards.

3.158 recommends that Schedule 10, paragraph 5(2) is amended to require the Secretary of State to provide reasons for prohibiting the disclosure of international information, unless it is likely to prejudice the national security interests of the UK. It should also reflect the principles of necessity, reasonableness, proportionality and legitimate aim to ensure any restrictions are not arbitrary and that the Secretary of State's decisions are guided by human rights standards.

3.161 recommends that clause 21 provides for certain safeguards to ensure the appeals process for non-disclosure decisions are effective and accessible, for example that family members can chose their legal counsel from the panel handling the closed material.

3.164 recommends that closed material procedure should be used with caution to ensure that it does not create obstacles to ensuring accountability and does not compromise a victim's right to an effective remedy.

3.165 recommends that the time limit to appeal a non-disclosure of information, as set out in clause 21, is extended to three months.

3.167 recommends that reasonable support and other assistance is provided to all family members within clause 22(5).

3.169 recommends that the publication of statements about support and guidance, as set out in clause 23(5), should be guided by human rights obligations, including keeping family members informed.

3.171 recommends that close family members with respect to ongoing or pending investigations are specifically listed as 'specified consultees' under clause 37(7).

3.175 recommends that clause 20 specifically states that the HIU will publically publish where it is reasonable to do so.

3.177 recommends that detailed guidance is published that sets out how the HIU decides when to remove information from public reports on the grounds that it may cause distress to close family members. This guidance should be developed, implemented, monitored and reviewed in consultation with the Commission for Victims and Survivors and the victims sector. The Bill should also require that such guidance should also be considered before the HIU makes a decision on non-disclosure of information on the grounds of distress.

3.178 recommends that the Bill contains a requirement on the HIU to publish the annual figures for the number of times information was removed from public reports on the grounds that it may cause distress to close family members.

3.182 recommends that it is specifically stated in the draft Bill that all statements, reports and publications of the HIU are issued in an accessible manner and that reasonable accommodation is made for special requirements, where this is necessary.

3.183 recommends that it is specifically stated in the draft Bill that, where relevant, reasonable accommodation will be made to provide accessible family support and other assistance.

3.187 recommends that it is specifically stated within Schedules 15 and 16 that the monitoring mechanism and process operate in compliance with human rights.

3.189 recommends that it is expressly stated that the complaints and disciplinary mechanisms set out within clauses 14(1), 14(2), 31(1), Schedule 13 and Schedule 14, paragraphs 1 and 2 are independent and impartial.

3.191 recommends that Schedule 14 is amended to provide the HM Inspectorate of Constabulary and Fire and Rescue Services with the power to inspect the HIU.

3.205 recommends that Schedule 8 sets out requirements for how retained biometric material will be stored and efficient safeguards against misuse and abuse.

3.206 recommends that Schedule 8, paragraph 1(5) is amended to include reference to a "reasonable period of up to [specified number of] years" and "for the purposes of the HIU's investigations".

3.207 recommends that Schedule 8 clarifies what is permitted regarding the retention of biometric material if the HIU's investigative functions extend beyond five years. This should reflect human rights standards, in line with the general principles set out in clause 1.

3.208 recommends that an effective and accessible mechanism is in place for individuals to be informed that their biometric material is held, how it is stored, how long it will be stored for and the monitoring body to be contacted to report misuse or abuse.

Independent Commission of Information Retrieval

4.3 recommends that clause 42(5) is amended to provide for an extension to the timeframe for the ICIR in the event of non-completion of its functions.

4.6 recommends that consideration is given to how the State will fulfil its human rights obligations in respect of information received that engages other ECHR rights, in particular Article 3, and which is outside the scope of deaths within the remit of the ICIR.

4.10 recommends that further detail be provided in relation to the involvement of the Government of Ireland in the disclosure assessment and how any resulting conflict will be resolved.

4.17 recommends that the Bill be amended to require the ICIR to inform a family, in advance of receiving a report, that the Secretary of State intends to redact and on what grounds.

4.18 recommends that the draft Bill provides for an appeal mechanism to allow the decision to redact to be challenged by the family. Any mechanism similar to that under the HIU should consider the recommendations made by the

Commission on closed material procedures in Section 3.0. Alternatively, recourse to a judicial review challenge should be possible.

4.20 recommends that the right to privacy is specifically considered in advance of the disclosure of information to a family, in addition to the considerations of national security and risk to life or safety.

4.23 recommends further clarity regarding information which may be provided to the ICIR, outside a death within its remit.

4.25 recommends that clause 50(3) should be amended to remove the qualifications of for 'close family' and the residency requirement in order for the broadest access to the ICIR. Alternatively, clear policy direction should be provided to the ICIR in order that the process is as inclusive as possible.

Oral History Archive

5.4 recommends that the OHA is empowered to accept collective submissions from groups, organisations and communities to ensure full meaningful participation to all rights holders.

5.9 recommends that clause 66 be amended so as to require any secondary legislation or rules to be enacted by way of affirmative resolution in the NI Assembly. Any such rules would also have to cover the situation where information is transferred into the archive from another source, to ensure that the appropriate consent is obtained.

5.12 recommends that clause 55 is amended so as to include precise detail as to when an individual's privacy can be overridden and relevant safeguards, such as the ability to challenge the decision. Alternatively, clause 55 could include a legislative requirement that this must be done by way of regulations or another mechanism.

5.16 recommends that the issue of how information, disclosing other human rights abuses or violations, can be effectively investigated is fully addressed in order that the State complies with its procedural obligations, in particular Article 3.

5.25 recommends that the Bill is amended to specify the nature and scope of any limitation on the release of information from the OHA.

Implementation and Reconciliation Group

6.6 recommends that the Bill is amended to include, in Part 5, a definition of sectarianism in order to assist the IRG in fulfilling its core task of promoting reconciliation and anti-sectarianism. Any definition should be in line with CERD and the Durban Declaration and Programme of Action.

6.9 recommends that the meaning of clause 60(3) clarifies the focused nature of the restriction on the IRG's review and assessment role.

6.16 recommends that access to information and materials should not be restricted to the publically available information listed in clauses 61(1) and 62(3), but that fully open access may be provided subject to further limitations that may be required by human rights law.

6.18 recommends an insertion into clause 62 in order to place an obligation on the Secretary of State for NI to lay a copy of the IRG report before Parliament.

Prisoner Release

7.3 welcomes the proposed amendments to the NI (Sentences) Act 1998 to extend the accelerated release scheme to those serving sentences for related offences committed on or after 1 January 1968 and before 8 August 1973, as set out in clause 64 and Schedule 18.

7.5 welcomes the confirmation within the consultation document that the proposed amendments will ensure anyone convicted of a Troubles-related offence committed between 1 January 1968 and 10 April 1998, including members of the security forces, will be eligible to apply to the accelerated release scheme, provided for by the NI (Sentences) Act 1998.

1.0 Introduction

1.1 The Northern Ireland Human Rights Commission (the Commission), pursuant to Section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. The Northern Ireland Act 1998, Section 69(3)(b), also provides "the Commission shall advise the Secretary of State… of legislative and other measures which ought to be taken to protect human rights on such other occasions as the Commission thinks appropriate". In accordance with these functions the following statutory advice is submitted to the Northern Ireland Office (NIO) in response to its consultation on addressing the legacy of Northern Ireland (NI)'s past.

1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems.[1] The relevant regional and international treaties in this context include:

- European Convention on Human Rights 1950 (ECHR);[2]
- UN International Covenant on Civil and Political Rights 1966 (ICCPR);[3]
- UN International Convention on the Elimination of All Forms of Racial Discrimination 1966 (CERD);[4]
- UN Convention against Torture 1984 (UN CAT);[5]
- UN Convention on the Rights of the Child 1989 (UN CRC);[6]
- Rome Statute of the International Criminal Court 1998;[7]

[1] The NI Executive is subject to the obligations contained within the specified regional and international treaties by virtue of the United Kingdom (UK) government's ratification. In addition, the NI Act 1998, Section 26(1) provides that "if the Secretary of State considers that any action proposed to be taken by a Minister or NI department would be incompatible with any international obligations… [s]he may by order direct that the proposed action shall be taken". The NIHRC further recalls that the NI Act 1998, Section 24(1)(a) states that "a Minister or NI department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act… is incompatible with any of the Convention rights".
[2] Ratified by the UK in 1951.
[3] Ratified by the UK in 1976.
[4] Ratified by the UK in 1969.
[5] Ratified by the UK in 1988.
[6] Ratified by the UK in 1991.
[7] Ratified by the UK in 2001.

- UN Convention on the Rights of Persons with Disabilities 2006 (UN CRPD);[8] and
- Charter of Fundamental Rights of the European Union 2007.[9]

1.3 In addition to these standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN Human Rights Committee, General Comment No 6;[10]
- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;[11]
- UN Human Rights Committee, General Comment No 16;[12]
- UN Human Rights Committee, General Comment No 34;[13]
- UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions;[14]
- UN Declaration on the Protection of All Persons from Enforced Disappearance;[15]
- UN Committee on Economic, Social and Cultural Rights, General Comment No 14;[16]
- UN Security Council Resolution 1325;[17]
- UN, Durban Declaration and Plan of Action;[18]
- Report of the UN Independent Expert on Combating Impunity, Diane Orentlicher;[19]
- UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law;[20]

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[8] Ratified by the UK in 2009.
[9] Ratified by the UK in 2000.
[10] UN Human Rights Committee, 'General Comment No 6: Article 6 (The Right to Life), 30 April 1982.
[11] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985.
[12] UN Human Rights Committee, 'CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation', 8 April 1988.
[13] CCPR/C/GC/34, 'General Comment No 34: Article 19 - Freedom of Opinion and Expression', 12 September 2011.
[14] UN Economic and Social Council, 'Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions', 24 May 1989.
[15] A/RES/47/133, 'Declaration on the Protection of All Persons from Enforced Disappearance', 18 December 1992.
[16] E/C./12/2000/4, 'UN Committee on Economic, Social and Cultural Rights General Comment 14: The Right to the Highest Attainable Standard of Health', 11 August 2000.
[17] S/RES/1325, 'UN Security Council Resolution 1325', 31 October 2000.
[18] United Nations, 'Durban Declaration and Plan of Action, Adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence', 8 September 2001.
[19] E/CN.4/2005/102/Add.1, 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher', 8 February 2005.
[20] UN General Assembly, 'Resolution 60/147: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', 16 December 2005.

- Study on the Right to Truth, Report of the Office of the United Nations High Commissioner for Human Rights;[21]
- Report of the UN Special Rapporteur, Extrajudicial Summary or Arbitrary Executions, Philip Alston;[22]
- UN Committee against Torture, General Comment No 2;[23]
- Report of the Office of the High Commissioner on Human Rights on Right to Truth;[24]
- UN Committee on Economic, Social and Cultural Rights, General Comment No 21;[25]
- Guidance Note of the UN Secretary-General on Transitional Justice;[26]
- Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed;[27]
- Guidelines of the Committee of Ministers of the Council of Europe on Eradicating impunity for serious human rights violations;[28]
- Report of the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff;[29]
- Report of the UN Special Rapporteur on the Promotion and Protection of the right to Freedom of Opinion and Expression;[30]
- Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime;[31]
- UN Committee against Torture, General Comment No 3;[32]
- UN Committee on the Elimination of Discrimination against Women, 2013 Concluding Observations on the UK;[33]
- United Nations General Assembly, Cultural Rights;[34]

[21] E/CN.4/2006/91, 'Study on the Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights', 8 February 2006.
[22] E/CN.4/2006/53, 'Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Philip Alston', 8 March 2006.
[23] CAT/C/GC/2, 'UN CAT Committee: General Comment No 2', 24 January 2008.
[24] A/HRC/12/19, 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Right to the Truth', 21 August 2009.
[25] E/C.12/GC/21, 'General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', 21 December 2009.
[26] UN General Assembly, 'Guidance Note of the Secretary-General: UN Approach to Transitional Justice' (UNGA, 2010).
[27] A/HRC/17/38, 'Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed', 21 March 2011
[28] Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, 30 March 2011.
[29] A/HRC/21/46, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff', 9 August 2012.
[30] A/67/357, 'Promotion and protection of the right to freedom of opinion and expression, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', 7 September 2012.
[31] Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, 25 October 2012.
[32] CAT/C/GC/3, 'UN Committee against Torture: General Comment No 3', 13 December 2012.
[33] CEDAW/C/GBR/CO/7, 'Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI', 30 July 2013, at para 43(b).
[34] A/68/296, 'Report of the Special Rapporteur in the Field of Cultural Rights', 9 August 2013.

- January 2014 Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed;[35]
- August 2014 Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed;[36]
- UN Committee on the Rights of Persons with Disabilities, General Comment No 2;[37]
- Revised Minnesota Protocol on the Investigation of Potentially Unlawful Death (Revised Minnesota Protocol);[38]
- UN Committee on the Elimination of All Forms of Racial Discrimination, 2016 Concluding Observations;[39]
- 2017 Report of the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff;[40]
- Revised Guidelines of the Committee of Ministers of the Council of Europe on the Protection of Victims of Terrorist Acts;[41] and
- UN Human Rights Committee, General Comment No 36.[42]

1.4 The Commission welcomes the consultation paper on addressing the legacy of NI's past. The Commission also welcomes that the general principles in clause 1 state that "human rights obligations should be complied with". However, the provisions contained within the Bill are not fully human rights compliant in law and practice and the Commission recommends that this should be remedied. The details of the areas where there are concerns are outlined in this submission.

1.5 In November 2015 and May 2016, the Special Rapporteur on Truth visited NI as part of his mission to the UK. On issues concerning dealing with the past in NI, the Special Rapporteur recommended that the:

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[35] A/HRC/25/49, 'Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, Memorialization Processes', 3 January 2014.
[36] A/69/286, 'Report of the Special Rapporteur in the Field of Cultural Rights', 8 August 2014.
[37] CRPD/C/GC/2, 'General Comment No 2 – Article 9: Accessibility', 22 May 2014.
[38] OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016).
[39] CERD/C/GBR/C0/21-23, 'UN CERD Committee: Concluding observations on the Twenty-first and Twenty-third Periodic Reports of the UK of Great Britain and NI', 26 August 2016.
[40] A/HRC/34/62/Add.1, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff on his Mission to the UK of Great Britain and NI', 17 November 2016.
[41] Revised Guidelines of the Committee of Ministers of the Council of Europe on the protection of victims of terrorist acts, 19 May 2017.
[42] UN Human Rights Committee, 'General Comment No 36 on Article 6 of the ICCPR, on the Right to Life: Revised Draft Prepared by the Rapporteur', July 2017.

links between the different elements of the architecture are critical to their success; for example, the timeline of each institution must mesh in a reasonable way. Similarly, while the [Stormont House] Agreement stipulates a different appointment and selection procedure for staffing each institution, the institutions are meant to work as a coordinated whole; however, the current draft provides no incentive for retaining a group of people that can actually work together.[43]

1.6 The Special Rapporteur on Truth further recommended that:

> the overall challenge is ensuring that this complex institutional apparatus not only performs better than the earlier efforts it seeks to replace, but also deliver results, which earlier efforts did not envision, necessary for accounting for and redressing the past.[44]

1.7 The UK government responded to this report that it is:

> committed to addressing the legacy of the past in NI in a manner that is balanced, proportionate, transparent, fair and equitable. The measures proposed by the Stormont House Agreement will help address the legacy of the past, to reduce its impact on the present and build a stronger, more prosperous NI. Consensus on the final detail of the proposed mechanisms has not yet been achieved but intensive work is ongoing between the UK government and the NI Executive parties to resolve the outstanding issues.[45]

1.8 The Commission recommends that the timeline of each institution set out in the draft Bill meshes in a reasonable way.

1.9 The Commission recommends that the consensus on the final detail of the proposed mechanisms, including their operation

[43] A/HRC/34/62/Add.1, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff on his Mission to the UK of Great Britain and NI', 17 November 2016, at para 120.
[44] Ibid, at para 121.
[45] A/HRC/34/62/Add.2, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence on his Mission to the UK of Great Britain and NI: Comments by the State', 18 November 2016, at para 3.

and outcomes, is human rights compliant, the specific detail of which is set out in this submission.

2.0 Omissions

2.1 The Commission is concerned that a number of required mechanisms that have been established in the Stormont House Agreement are missing from the draft Bill. These include introducing a mechanism to investigate other serious Troubles-related human rights abuses and violations in instances where the victims have not been killed, introduction of a pension for severely physically injured victims in NI, and introduction of advocate-counsellor assistance.[46]

2.2 The Commission is also concerned that the consultation paper does not adequately address the Lord Chief Justice's proposals to reform current legacy inquest processes.

2.3 The Commission recommends that prompt, effective steps are taken to expediently investigate other serious Troubles-related human rights abuses and violations in instances where the victims have not been killed, introduce a pension for severely physically injured victims in NI, and introduce advocate-counsellor assistance. These lacuna should be promptly and effectively addressed either in the Bill or using other effective mechanisms.

Investigations into Other Serious Abuses and Violations

2.4 Acknowledging outstanding human rights violations and abuses beyond Article 2 ECHR, the Stormont House Agreement (SHA) provides that:

> the UK and Irish governments recognise that there are outstanding investigations and allegations into Troubles-related incidents, including a number of cross-border incidents. They commit to co-operation with all bodies involved to enable their effective operation, recognising their distinctive functions, and to bring forward legislation where necessary.[47]

[46] Stormont House Agreement, 23 December 2014, at paras 26-29.
[47] Ibid, at para 55.

2.5 Freedom from torture, inhuman or degrading treatment is provided for in the following provisions:

- Article 3, ECHR;
- Article 7, ICCPR;
- Article 2(1), UN CAT;
- Article 37(a), UN CRC;
- Articles 6-8, Rome Statute;
- Article 15, UN CRPD; and
- Article 4, Charter of Fundamental Rights of the European Union.

2.6 For the purposes of this consultation paper, this section focuses on the ECHR, Article 3, the ICCPR, Article 7, and the UN CAT.

2.7 The ECHR, Article 3, provides "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". The ECHR, Article 15(2), clarifies that this is a non-derogable right and should not be interfered with under any circumstances. The ECHR's jurisprudence also clarifies that this right should be guaranteed "irrespective of the victim's conduct".[48] However, the individual's suffering must be due to State action or inaction, not an individual's own volition.[49]

2.8 The ECtHR has established that a minimum level of severity must exist for the ECHR, Article 3 to be engaged. This means that not all 'Troubles related' abuses and violations will engage Article 3. Whether Article 3 is engaged or not depends on the circumstances of the case, to determine this a number of factors should be considered. These include the treatment's duration, the physical and mental effects of the treatment on an individual, and the victim's sex, age and state of health.[50] Once the minimum threshold is achieved, the level of severity will determine whether the treatment is torture, inhuman or degrading treatment.[51]

2.9 The ECtHR has also confirmed that:

[48] *Chalal v UK* (1996) 23 EHRR 413, at para 79; *D v UK* (1997) 24 EHRR 423, at paras 47 and 49; *Bensaid v UK* (2001) 33 EHRR 205, at para 32.
[49] *Keenan v UK* (2001) 33 EHRR 913; *Ilhan v Turkey* (2002) 24 EHRR 36; *Price v UK* (2002) 34 EHRR 1285.
[50] *Ireland v UK* (1980) 2 EHRR 25, at para 162.
[51] Ibid, at point 4 of reasoning.

where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in… [the] Convention', requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.[52]

2.10 In this context, the ECtHR has also set out that an Article 3 investigation should follow the same principles as an Article 2 investigation. This includes in relation to its purpose and parameters of public scrutiny, and that the investigation is independent, of the State's own motion, prompt and conducted with reasonable expedition.[53]

2.11 ICCPR, Article 7 states "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

2.12 The UN Human Rights Committee in its General Comment No 20 confirms that the ICCPR, Article 7, "allows of no limitation" or derogation under any circumstances.[54] This extends to "acts that cause physical pain" and "acts that cause mental suffering to the victim".[55]

2.13 The UN Human Rights Committee's General Comment No 20 continues:

[52] *Assenov and Others v Bulgaria* (1998) ECHR 98, at para 102.
[53] *Mocanu and Others v Romania* (2014) ECHR 958, at paras 319-325.
[54] UN Human Rights Committee, 'General Comment No 20: Article 7', 30 September 1997, at para 3.
[55] Ibid, at para 5.

> the right to lodge complaints against maltreatment prohibited by Article 7 must be recognised in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.[56]

2.14 The UN CAT deals with the prohibition of torture, inhuman or degrading treatment or punishment in detail. The UN CAT, Article 2(1) provides "each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".

2.15 The UN CAT, Article 2(2), states that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture". Article 2(3) continues "an order from a superior officer or a public authority may not be invoked as a justification of torture". These provisions confirm that the prohibition against torture is absolute and non-derogable.[57]

2.16 The UN CAT, Article 12, specifically states:

> each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committee in any territory under its jurisdiction.

2.17 The UN CAT Article 14 continues:

> 1) each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of a victim as a result of an act of torture, his dependants shall be entitled to compensation.
>
> 2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

[56] Ibid, at para 14.
[57] CAT/C/GC/2, 'UN CAT Committee: General Comment No 2', 24 January 2008, at para 5.

2.18 The UN CAT Committee's General Comment No 3 clarifies:

> the obligations of States parties to provide redress under Article 14 are two-fold: procedural and substantive. To satisfy their procedural obligations, States parties shall enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the substantive level, States parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.[58]

2.19 The UN CAT Committee is clear that:

> a State's failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a de facto denial of redress and thus constitute a violation of the State's obligations under Article 14.[59]

2.20 The UN CAT Committee continues that:

> securing the victim's right to redress requires that a State party's competent authorities promptly, effectively and impartially investigate and examine the case of any individual who alleges that she or he has been subjected to torture or ill-treatment… Undue delays in initiating or concluding legal investigations into complaints of torture or ill-treatment compromise victim's rights under Article 14 to obtain redress, including fair and adequate compensation and the means for as full rehabilitation as possible.[60]

2.21 The UN Committee against Torture in its General Comment No 2 clarifies that the investigative obligations concerning acts of torture or ill-treatment are not limited to the acts of State actors or those acting in an official capacity (for example, a private security firm fulfilling a State contract). It states that:

[58] CAT/C/GC/3, 'UN Committee against Torture: General Comment No 3', 13 December 2012, at para 5.
[59] Ibid, at para 17.
[60] Ibid, at para 25.

where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission.[61]

2.22 The UN Special Rapporteur on Truth recommended that "truth, justice and reparation initiatives should expand their focus beyond cases leading to death to address violations and abuses largely excluded from their ambit, including torture, sexual harm, disappearance and illegal detention".[62]

2.23 The Commission notes that there are instances when a serious violation or abuse of human rights may engage a number of rights, including the right to life and as a result may fall within the HIU's remit. However, for the serious violations and abuses that do not fall within the HIU's remit, there is no mechanism within the draft Bill or otherwise that fulfils the State's human rights obligations to investigate such serious violations and abuses, in particular those engaging the right to freedom from torture, cruel, inhuman or degrading treatment or punishment.

2.24 The Commission recommends that human rights compliant provisions must be expediently made for the effective official investigation of all other serious violations or abuses of human rights, in particular allegations falling under the prohibition on torture, cruel, inhuman or degrading

[61] CAT/C/GC/2, 'UN CAT Committee: General Comment No 2', 24 January 2008, at para 18.
[62] A/HRC/34/62/Add.1, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff on his Mission to the UK of Great Britain and NI', 17 November 2016, at para 126.

treatment or punishment. A degree of flexibility is required to ensure that moving forward with investigating Article 3 ECHR cases does not delay the investigation of Article 2 ECHR cases, and vice versa. Thus, Article 3 investigations do not necessarily have to be conducted by the HIU and an additional investigative mechanism may need to be created to deal with such cases. Furthermore, any issues around the remit and operations of the investigative body tasked with investigating Article 3 cases should be expediently resolved to ensure no further delays.

Legacy Inquests

2.25 The SHA does not contain specific commitments relating to legacy inquests but states that:

> processes dealing with the past should be victim-centred. Legacy inquests will continue as a separate process to the [Historical Inquiries Unit]. Recent domestic and European judgments have demonstrated that the legacy inquest process is not providing access to a sufficiently effective investigation within an acceptable timeframe. In light of this, the Executive will take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements.[63]

2.26 The consultation paper refers to the Lord Chief Justice's proposal, stating "the UK government supports these proposals, which would implement an important commitment in the Stormont House Agreement".[64]

2.27 Following his appointment as President of the NI Coroner's Court, the Lord Chief Justice, Sir Declan Morgan, instigated a review of the state of readiness of 53 outstanding inquests into conflict related deaths. This was conducted by Lord Justice of Appeal Reg Weir QC who expressed concerns regarding delays and resourcing of legacy inquests.[65]

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[63] Stormont House Agreement, 23 December 2014, at para 31.
[64] NIO, 'Consultation Paper: Addressing the Legacy of NI's Past' (NIO, 2018), at 20.
[65] DH-DD(2016)430, 'Communication from the UK concerning the McKerr group of cases against the UK (Application No 28883/95)', 13 April 2016, at 5.

2.28 In February 2016, the Lord Chief Justice met with the families awaiting legacy inquests setting out plans to address outstanding legacy inquests. The Lord Chief Justice made clear that his plans for addressing legacy inquests were contingent upon necessary resources being allocated to allow for the creation of a Legacy Inquest Unit within the NI Courts Service to support the Coroner's Service and the full cooperation of relevant state agencies including the Police Service NI and Ministry of Defence.[66]

2.29 Following the initiative of the Lord Chief Justice, the Department of Justice prepared a funding request seeking to draw down funds from the allocated £150 million. On the basis that this proposal has not received the approval of the NI Executive, the UK government has not released the necessary funds.[67]

2.30 In March 2017, when presenting his mission report on the UK to the UN Human Rights Council the Special Rapporteur on Truth stated:

> the Lord Chief Justice recently assumed responsibility for the coronial process, implementing reforms to ensure completion of outstanding inquests within five years. Such reforms include applying a thematic approach, creating structured and systematic linkages between cases, sequencing cases, ensuring that the presiding coroner reviews all relevant material in unredacted form, and establishing a dedicated legacy inquest unit. This initiative, as a wisely designed strategy to maximise the truth-telling potential of inquests for individual cases, and illustrating the structural dimensions of violations, deserves strong support.[68]

2.31 The Special Rapporteur on Truth recommended that “the proposals made by the Lord Chief Justice of NI to improve the efficacy of coroner inquests should be supported”.[69]

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[66] ‘Legacy inquests: Lord Chief Justice disappointed over funding bid’, *BBC News*, 4 May 2016. Available at: https://www.bbc.co.uk/news/uk-northern-ireland-36198477
[67] ‘Lord Chief Justice legacy inquests plan put on hold’, *BBC News*, 3 May 2016. Available at: https://www.bbc.co.uk/news/uk-northern-ireland-36198471
[68] A/HRC/34/62/Add.1, ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence on his Mission to the UK of Great Britain and NI’, 17 November 2016, at para 28.
[69] Ibid, at para 124.

2.32 The Lord Chief Justice has continued to highlight the limited progress in dealing with the outstanding legal inquests.[70] Most recently, in June 2018, the Lord Chief Justice stressed that "the important matter now is to address the issue of resources and ensure we moved as quickly as possible to provide a resolution on the remaining cases".[71]

2.33 The Lord Chief Justice's views are supported by a NI High Court ruling, in which Sir Paul Girvan stated:

> the delay in dealing with this inquest and other legacy inquests arises from the lack of resources to fund a timely and efficient system to manage and run the statutory inquests having regard to their nature, likely length and complexity.[72]

2.34 The Commission calls on the NI Executive to fund the Lord Chief Justice's plans for addressing outstanding legacy inquests. The Commission highlights concern that, in the absence of the necessary resources, the legal obligation under Article 2 ECHR on the State to deliver these inquests will not be met. In the continued absence of a devolved government, the UK government should take responsibility to ensure the funds are in place.

Services for Victims and Survivors

2.35 The SHA included a commitment to take steps to ensure access to high quality services for Victims and Survivors including a comprehensive Mental Trauma service, seeking an acceptable way forward on the proposal for a pension for severely physically injured victims and advocate-counsellor assistance.[73]

2.36 International human rights law requires an effective remedy where an individual's rights or freedoms have been violated. The legal source of this right to a remedy will be dependent upon the origin of

[70] Vincent Kearney, 'Top judge Sir Declan Morgan criticises legacy process', *BBC News*, 5 September 2017. Available at: https://www.bbc.co.uk/news/uk-northern-ireland-41165119
[71] 'Lack of resources to hold legacy inquests "must be addressed"', *Belfast Telegraph*, 11 June 2018.
[72] *In the Matter of an Application by Brigid Hughes for Judicial Review* [2018] NIQB 30, at para 12.
[73] Stormont House Agreement, 23 December 2014, at paras 26-29.

the right violated. For example, under the ECHR, Article 13 requires:

> everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.[74]

2.37 There is no single definition of victim in international human rights law. The definition to be applied will depend on the nature of the human rights violation or abuse and consequently the legal source of the violation. The common ground between the standards is that a victim is a person who has suffered harm, whether physical, mental or emotional, as a consequence of a particular type of act or omission.[75] The UN standards also include economic loss and the substantial impairment of the victim's fundamental rights under their definitions.[76] Each of the standards clearly identify that victim status is not dependent upon whether the perpetrator is identified, apprehended, prosecuted or convicted and is irrespective of any familial relationship between the victim and perpetrator.[77]

2.38 Flowing from the general right to an effective remedy, the international standards often specify the nature of the remedy to be provided. While each of the standards is different in respect of the nature and scope of the remedy, the general understanding of reparation as an effective remedy includes; compensation, rehabilitation, restitution, satisfaction, guarantees of non-repetition.

2.39 The SHA provides that a comprehensive Mental Trauma Service, as recommended by the Commission for Victims and Survivors, will be implemented and operated within the NHS, working closely with the

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[74] Article 13 has not been incorporated into domestic law by virtue of the Human Rights Act 1998.
[75] See for example, Guidelines of the Committee of Ministers of the Council of Europe on the Protections of victims of terrorist acts, 2005, Part I, para 1; Guidelines of the Committee of Ministers of the Council of Europe on Eradicating impunity for serious human rights violations, 2011, para 5; Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, Article 1(1).
[76] See for example, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, para 1; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2006, para 8.
[77] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, para 2 Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, Preamble, para 19; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2006, Article 9; Guidelines of the Committee of Ministers of the Council of Europe on the Protections of victims of terrorist acts, 2005, Part I, para 2.

Victims and Survivors Service (VSS), and those who work directly with victims and survivors. As the service will sit within the NHS the criteria to access should be centred on a health-based needs assessment, applied without discrimination. It is unclear if this service will be solely for victims of the conflict, or any person deemed in need of such therapeutic intervention.

2.40 The Commission recommends that the implementation of the SHA commitment to a comprehensive Mental Trauma Service is realised without any further delay.

2.41 The Commission recommends that the Mental Trauma Service is adequately resourced and that those funds are ring-fenced to enable this service to meet the needs of victims to give effect to the State obligations to provide rehabilitation, as a form of effective remedy.

2.42 The commitment to progressing a pension for physically injured victims of the conflict is to be welcomed. However, there has not been any progress on this since the SHA. While the form of support for this group of victims is specified, it does not discharge the State from its duty to provide reparation to all those who would fall under the relevant definition of victim of a human rights abuse or violation. Human rights law does not require that measures for different groups are the same, but should be designed around the specific needs of the group and be responsive to individual circumstances.[78] Alternative measures may be required to better meet the needs of groups of individuals who sustained injuries during the conflict, including those with psychological injuries.

2.43 The Commission welcomes the commitment to establish a pension for those severely physically injured victims and would recommend that this is implemented without any further delay.

2.44 The Commission recognises the current provision of services to victims and survivors through the Victims and Survivors Service.

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[78] E/C./12/2000/4, 'UN Committee on Economic, Social and Cultural Rights General Comment 14: The Right to the Highest Attainable Standard of Health', 11 August 2000, at paras 18-27.

The relationship between the existing and the proposed services is not clear. The State needs to ensure that the full range of rehabilitative measures available to victims and survivors is adequate and appropriate.

2.45 The Commission recommends that provision is made for appropriate rehabilitation to those who do not fall within the pension or mental trauma service, or whom another or additional form of reparation is more appropriate to ensure that the State fulfils its obligations to provide an effective remedy.

2.46 The format of advocate-counsellor assistance remains unclear and should be further clarified. The role should be informed by human rights obligations which includes rehabilitation within the victims' right to a remedy embraces "medical and psychological care as well as legal and social services."[79] To ensure that victims receive appropriate support the design of measures should include the participation of those victims affected and facilitate participation.[80]

2.47 The Commission recommends that any specific advocate counsellor or other additional provision to support victims and survivors should be realised without further delay.

Statement of Acknowledgments

2.48 Another commitment from the SHA, which does not feature in the draft Bill is that "[i]n 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."[81]

2.49 Under human rights law, public apologies form an important part of satisfaction within the right to a remedy.[82] Providing a remedy to victims of human rights violations and abuses by state and non-

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[79] UN General Assembly, 'Guidance Note of the Secretary-General: UN Approach to Transitional Justice' (UNGA, 2010), at 9.

[80] E/C./12/2000/4, 'UN Committee on Economic, Social and Cultural Rights General Comment 14: The Right to the Highest Attainable Standard of Health', 11 August 2000, at paras 11, 17, and 54.

[81] Stormont House Agreement, 23 December 2014, at para 53.

[82] E/CN.4/2005/102/Add.1, 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher', 8 February 2005, at para 48.

state actors can be assisted through processes of acknowledging and apologising. Apologies are an important element contained within victims' rights, but alone are not enough to satisfy human rights obligations. Acknowledgements could also take the form of truth-telling, meeting a human rights-based approach as part of measures to fulfil the right to the truth and the historical truth. The ECtHR has recognised that "it is an integral part of freedom of expression to seek historical truth"[83] and has highlighted the "efforts that every country must make to debate its own history openly and dispassionately".[84]

2.50 It is not clear from the draft Bill of the consultation document if these forms of remedies are be considered as forming part of the role of the IRG, or if this is intended to be progressed between the Irish and UK governments.

2.51 The Commission recommends that the draft Bill is amended to include the IRG as having a role in making recommendations in respect of statements of acknowledgment which would be directed to the governments of the UK and Ireland. Alternatively, and separate to the Bill, the Commission recommends that there is a clear statement of intent from both governments as to how they intend to progress this commitment of the SHA.

Women and Peacebuilding

2.52 The UN Security Council Resolution 1325:

> calls on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia:
>
> a) The special needs of women and girls during repatriation and resettlement for rehabilitation, reintegration and post-conflict reconstruction;

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[83] *Chauvy and Others v. France* (2004) ECHR 295, at para 69; *Fatullayev v. Azerbaijan* (2010) ECHR 623, at para 87; *Dzhugashvili v. Russia* (2014) ECHR 1448, at para 33.
[84] *Monnat v. Switzerland* (2006) ECHR 1206, at para 64; *Chauvy and Others v. France* (2004) ECHR 295, at para 69; *Dzhugashvili v. Russia* (2014) ECHR 1448, at para 33.

b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements;

c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary.[85]

2.53 The UN Committee on the Elimination of Discrimination Against Women in its 2013 concluding observations concerning the UK called upon the UK government "to ensure the participation of women in the post-conflict process in NI, in line with Security Council Resolution 1325 (2000)".[86]

2.54 The draft Bill does not make specific provision for women's involvement in the proposed mechanisms.

2.55 The Commission recommends that the UK government accepts the application of UN Security Council Resolution 1325 in NI and that the proposed mechanisms in the Bill and any additional mechanisms introduced to address the identified omissions make specific provision for women's involvement and effective participation at all stages, including design, implementation and evaluation.

Resources

2.56 Clause 4(1) of the draft Bill is the only point in the proposed legislation that refers to resources. This clause is limited to the HIU and the only specification set out within is that the Department of Justice should provide the Policing Board with "the amount which appears to the Department to be appropriate to meet the expenses of the HIU for that financial year". The Commission is concerned

[85] S/RES/1325, 'UN Security Council Resolution 1325', 31 October 2000, at para 8.
[86] CEDAW/C/GBR/CO/7, 'Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI', 30 July 2013, at para 43(b).

that resources are not specifically referenced in relation to all of the mechanisms provided for within the draft Bill. The Commission is also concerned that on the one occasion when resources is mentioned that it is not stated that the Department should be providing adequate resources to enable the relevant mechanism to fulfil its duties.

2.57 There is no consistency across the draft Bill as to who has oversight responsibility for the mechanisms contained within, for example in some instances oversight responsibility sits with the Secretary of State and in others it sits with the devolved Department of Justice. The Commission stresses that when responsibility rests with a devolved institution, that the continued lack of a devolved government should not negatively impact the operations and resourcing of the relevant mechanism.

2.58 The Commission recommends that the Bill includes a provision to ensure that all the mechanisms are adequately resourced in order to expediently and effectively perform their tasks.

2.59 The Commission recommends that safeguards should be in place to ensure that the continued lack of a devolved government should not negatively impact the operations and resourcing of the relevant mechanism.

3.0 Historical Investigations Unit (HIU)

General

3.1 The Historical Investigations Unit (HIU) is provided for in Part 2 of the draft Bill. The purpose of the HIU is to fulfil the commitment in the Stormont House Agreement that "legislation will establish a new independent body to take forward investigations into outstanding Troubles-related deaths".[87] This engages the duty to investigate suspicious deaths, an established component of the right to life.

3.2 The right to life is provided for in the following provisions:

- Article 2, ECHR;
- Article 6, ICCPR;
- Article 6, UN CRC;
- Articles 6-8, Rome Statute;
- Article 10, UN CRPD; and
- Article 2, Charter of Fundamental Rights of the European Union.

3.3 For the purposes of considering the human rights compliance of the HIU as set out in the draft Bill, this section focuses on the ECHR, Article 2, and the ICCPR, Article 6.

3.4 The ECHR, Article 2(1), states:

> everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

3.5 The right to life is a limited right, which means that the State can permit deprivations of the right to life only in exceptional circumstances. These circumstances are set out in the ECHR, Article 2(2), which states:

[87] Stormont House Agreement, 23 December 2014, at para 30.

deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

a) In defence of any person from unlawful violence;
b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
c) In action lawfully taken for the purpose of quelling a riot or insurrection.

3.6 The ECHR, Article 15(2), also states there should be "no derogation from Article 2, except in respect of deaths resulting from lawful acts of war".

3.7 The ECHR, Article 1, states "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention", which includes Article 2. The European Court of Human Rights (ECtHR) has stated that "by implication… there should be some form of effective official investigation when individuals were killed as a result of the use of force by, *inter alios*, agents of the State".[88] Inter alios is understood to extend to any suspicious death – "it is not confined to cases where it was established that the killing was caused by any agent of the State".[89] Instead "there should be some form of effective official investigation when there is reason to believe that an individual has died in suspicious circumstances".[90] The "essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility".[91] On this basis it is essential that all suspicious deaths linked to the conflict are effectively investigated.

3.8 The ICCPR, Article 6(1), states "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life". The United Nations (UN) Human Rights Committee's General Comment No 6 offers little

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[88] *McCann v United Kingdom* (1995) 21 EHRR 97, at para 161.
[89] *Ergi v Turkey* (1998), ECHR 59, at para 82.
[90] *ROD v Croatia* (2008) ECHR 1048, at Section 1.
[91] *Anguelova v Bulgaria* (2002) ECHR 489, at para 137; *Jasinskis v Latvia* (2010) ECHR 1, at para 72.

clarification on what this requires.[92] The Committee's Draft General Comment No 36 elaborates that Article 6(1):

> lays the foundation for the obligation of States parties to respect and to ensure the right to life, to give effect to it through legislative and other measures, and to provide effective remedies and reparation to all victims of violations of the right to life.[93]

3.9 The UN Human Rights Committee's Draft General Comment No 36 continues "an important element of the protection afforded to the right to life by the Covenant is the obligation to investigate and prosecute allegations of deprivation of life by State authorities or by private individuals and entities, including allegations of excessive use of lethal force".[94] It highlights that this is drawn from reading the ICCPR, Article 6(1) in conjunction with Articles 2(2) and 2(3).

3.10 The ICCPR, Article 2(2) provides that the right to life should be protected in "laws or other measures". Article 2(3) continues that victims of a violation should have an effective remedy and that any remedy granted should be enforced.

3.11 The Revised Minnesota Protocol on the Investigation of Potentially Unlawful Death (Revised Minnesota Protocol) confirms:

> the duty to investigate is an essential part of upholding the right to life. The duty gives practical effect to the duties to respect and protect the right to life, and promotes accountability and remedy where the substantive right may have been violated.[95]

3.12 The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states "there shall be thorough, prompt and impartial investigations of all suspected cases of extra-legal, arbitrary and summary executions, including

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[92] UN Human Rights Committee, 'General Comment No 6: Article 6 (The Right to Life), 30 April 1982.
[93] UN Human Rights Committee, 'General Comment No 36 on Article 6 of the ICCPR, on the Right to Life: Revised Draft Prepared by the Rapporteur', July 2017, at para 4.
[94] Ibid, at para 31.
[95] OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 8(c).

cases where complaints by relatives or other reliable reports suggest unnatural deaths”.[96]

3.13 The UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law places a duty on States to “investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law”.[97]

3.14 The UN Independent Expert on Combating Impunity, Diane Orentlicher stressed that “impunity arises from a failure by States to meet their obligations to investigate violations”.[98]

3.15 The UN Office of the High Commissioner for Human Rights highlights that:

> the right to the truth about gross violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations. This right is closely linked with other rights and has both an individual and a societal dimension and should be considered as a non-derogable right and not be subject to limitations.[99]

3.16 The UN Special Rapporteur on Truth recommends that “the structural and systemic dimension of violence and rights violations and abuses should be examined. A comprehensive understanding of the past requires instruments that do not treat it merely as a series of unconnected events”.[100]

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[96] UN Economic and Social Council, ‘Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions’, 24 May 1989, at para 9.
[97] UN General Assembly, ‘Resolution 60/147: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’, 16 December 2005, at para 3(b).
[98] E/CN.4/2005/102/Add.1, ‘Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher’, 8 February 2005, at Principle 1.
[99] E/CN.4/2006/91, ‘Study on the Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights’, 8 February 2006, at Summary.
[100] A/HRC/34/62/Add.1, ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff on his Mission to the UK of Great Britain and NI’, 17 November 2016, at para 125.

3.17 The Commission welcomes that clause 2(1) of the draft Bill requires that the HIU is established. The Commission further welcomes that clause 7(1) of the draft Bill states "that the HIU must exercise its functions in a manner that is consistent with the general principles" and that clause 1 confirms that the general principles include the requirement that "human rights obligations should be complied with".

3.18 The Commission recommends that the HIU is promptly established and effective safeguards are in place to ensure it is human rights compliant, in line with the general principles set out in clause 1.

3.19 The Commission recommends that the HIU is established for the purpose of fulfilling the Article 2 ECHR obligation that *all* Troubles-related deaths are effectively investigated. This includes considering the structural and systemic dimension of violence and rights violations and abuses.

3.20 The ECtHR has identified that for an investigation into a suspicious death to be human rights compliant it must be of the State's own motion, of an appropriate purpose, commenced promptly, reasonably expedited, thorough, independent and impartial, and subject to public scrutiny.[101]

3.21 This supported by the UN Human Rights Committee, which sets out in its Draft General Comment No 36 that:

> investigations into allegations of violation of Article 6 [of the ICCPR] must always be independent, impartial, prompt, thorough, effective, credible and transparent, and in the event that a violation is found, full reparation must be provided, including, in view of the particular circumstances of the case, adequate measures of compensation, rehabilitation, satisfaction.[102]

3.22 The HIU is the principal investigatory body within the Bill with a function to investigate deaths that are within its remit, which are

[101] *Hugh Jordan v United Kingdom* (2001) ECHR 327.
[102] UN Human Rights Committee, 'General Comment No 36 on Article 6 of the ICCPR, on the Right to Life: Revised Draft Prepared by the Rapporteur', July 2017, at para 32.

described within the consultation document as 'Troubles related deaths' in clause 6 of the draft Bill. The Commission welcomes that clause 6 requires the Director of the HIU to issue a statement setting out the manner in which the HIU is to exercise its investigatory functions, including how it will ensure Article 2 and other human rights obligations are complied with.

3.23 Clause 7 of the Bill sets out the manner in which the HIU must exercise its functions. The express language of clause 7 does not reflect the minimum human rights requirements established by the ECtHR which the HIU is required to operate within. This provision currently does not include reference to the prompt commencement and reasonable expedition of investigations or that investigations should be thorough. These elements are implied in the use of the terms "effective and efficient", but should be expressly stated.

3.24 The Commission recommends that for the HIU to be appropriate for undertaking investigations into 'Troubles-related deaths' it must operate in line with the minimum human rights requirements established by the ECHR jurisprudence and this should be reflected within the wording of clause 7.

Remit

3.25 The UK has failed to implement ECtHR judgments stipulating measures to achieve effective investigations into 'Troubles-related' deaths since 2001 and this failure is itself resulting in new findings of violations against the UK.[103] The Committee of Ministers has expressed deep regret that the implementation of the judgments has not occurred.[104]

3.26 For example, the Historical Enquiries Team (HET) was a unit of the Police Service NI set up in September 2005 to investigate Troubles-related deaths between January 1969 and 10 April 1998. It was

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[103] *Hemsworth v. United Kingdom* (2013) ECHR 683.
[104] Committee of Ministers, 'Item H46-42 McKerr group v. the United Kingdom (Application No. 28883/95) Supervision of the execution of the Court's judgments', 1259th meeting, 7-8 June 2016.

found to be non-compliant with the ECHR, Article 2, due to inconsistencies and lack of independence.[105]

3.27 The HET was replaced by the Legacy Investigative Branch (LIB), a unit within the Police Service NI headed by a Detective Chief Superintendent, tasked with investigating Troubles-related cases between 1 January 1969 and 1 March 2004. The UK House of Parliament, Joint Committee on Human Rights, has stated that "as well as having fewer resources at its disposal than its predecessor, the LIB cannot itself satisfy the requirements of Article 2 ECHR because of its lack of independence from the police service".[106]

3.28 The Police Ombudsman has established a Historical Investigations Directorate to investigate matters in which members of the Royal Ulster Constabulary "may have been responsible for deaths or serious criminality in the past, and in particular between 1968 until 10 April 1998".[107] The Directorate includes staff from a variety of professional backgrounds, including those with an expertise of investigation, complaint handling and dealing with people affected by events during the Troubles.[108] This does not eliminate the possibility of a conflict of interest, which may bring the independence of an investigation by the Directorate into question.

3.29 Noting the inadequacies of previous initiatives it is important that the HIU is empowered to investigate all deaths which have not received an effective investigation in full compliance with Article 2. This includes those deaths which have been the subject of previous initiatives. As stated by the Committee of Ministers in June 2016 when it:

> called upon the authorities to take all necessary measures to ensure the Historical Investigations Unit can be established and start its work without any further delay, particularly in light of the length of time that has already passed since these judgments became final and the failure

[105] Her Majesty's Inspectorate of Constabulary, 'Inspection of the PSNI HET' (HMIC, 2013), at 28.
[106] UK Joint Committee on Human Rights, 'HL Paper 130, HC 1088: Human Rights Judgments Seventh Report of Session 2014-15', 11 March 2015.
[107] Police Ombudsman NI, 'Historical Investigations'. Available at: https://policeombudsman.org/About-Us/Historical-Investigations
[108] Ibid.

> of previous initiatives to achieve effective, expeditious investigations.[109]

3.30 The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions further states:

> in cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, governments shall pursue investigations through an independent commission of inquiry or similar procedure.

3.31 The remit of the HIU is set out at clause 5 of the draft Bill, as including deaths that are part of the HET caseload, the Police Ombudsman's caseload or are a result of an act of violence taking place between 11 April 1998 and ending with 31 March 2004. Schedule 3 of the draft Bill elaborates on what is meant by caseload. The Commission is concerned that the definition of caseload currently set out in the draft Bill is too restrictive and does not adequately reflect the requirement that the HIU's remit should extend to any death which has not received an Article 2 compliant investigation.

3.32 The Commission recommends an assessment of all HET, Police Ombudsman and LIB cases is conducted by the HIU to determine if they are human rights compliant or not. This may require the creation of two departments within the HIU – one to conduct Article 2 investigations and one to consider the human rights compliance of previous investigations conducted by the HET, Police Ombudsman and LIB. Those cases found not to be compliant with Article 2, should be reopened and subject to an expedient and effective investigation by the HIU. The Commission recognises the resource implications of this requirement, but this approach is necessary to ensure human rights compliance, in line with the general principles set out in clause 1.

[109] Ibid.

State's Own Motion

3.33 Under the ECHR, Article 2, public authorities are required to "carry out an effective official investigation on their own motion", when they are aware of a suspicious death.[110] The ECtHR has clearly stated that public authorities "cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures".[111] The "mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation under Article 2 of the [ECHR] to carry out an effective investigation into the circumstances surrounding the death".[112] This obligation may be burdensome, but it cannot be displaced by a "high incidence of fatalities".[113] Instead, there is a specific need for cases to be investigated where the "circumstances are in many respects unclear".[114]

3.34 The ECtHR confirms that:

> it cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Nonetheless, given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further.[115]

3.35 The ECtHR further provides that:

> where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures.[116]

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[110] *McCann v United Kingdom* (1995) 21 EHRR 97, at para 173; *McKerr v United Kingdom* (2001) ECHR 329, at para 111; *Hugh Jordan v United Kingdom* (2001) ECHR 327, at para 105.
[111] *Ilhan v Turkey* (2000) ECHR 354, at para 63; *Jelic v Croatia* (2014) ECHR 809, at para 66.
[112] *Ergi v Turkey* (1998), ECHR 59, at para 82.
[113] Ibid.
[114] Ibid.
[115] *Brecknell v UK* (2007) ECHR 989, at para 70.
[116] Ibid, at para 71.

3.36 The UN Human Rights Committee's Draft General Comment No 36 states "an investigation into alleged violations of the right to life should commence when necessary ex officio - that is, even in the absence of a formal complaint".[117]

3.37 The UN Declaration on the Protection of All Persons from Enforced Disappearance, Article 13(1) states in the context of investigating enforced disappearance:

> each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.[118]

3.38 Those deaths which are not part of the caseload of the HET or LIB may be subject to further investigation if new evidence emerges. It is noted that under Schedule 6, paragraph 3 of the draft Bill, the HIU must establish a procedure under which a relative of a deceased person may bring new evidence to the attention of the HIU. The HIU must publish the procedure and may modify it. It is noted that there is no obligation to carry out a public consultation on a draft of the procedure.

3.39 The Commission recommends that Schedule 6, paragraph 3 is amended to enable the HIU to conduct, at a minimum, a targeted consultation on the procedure.

3.40 The Commission recommends further amendments of Schedule 6, paragraph 3 are required to ensure the HIU has

[117] UN Human Rights Committee, 'General Comment No 36 on Article 6 of the ICCPR, on the Right to Life: Revised Draft Prepared by the Rapporteur', July 2017, at para 32.
[118] A/RES/47/133, 'Declaration on the Protection of All Persons from Enforced Disappearance', 18 December 1992.

a duty to be accessible to members of the public who wish to provide evidence relating to a death.

3.41 Clause 5(1) of the draft Bill sets out what deaths fall within the remit of the HIU. Clause 5(1)(c) refers to death "wholly caused by physical injuries or physical illness that were or was the direct result of an act of violence or force that has the required connection with NI". Clause 5(6) clarifies what is meant by "the required connection with". There are occasions when a death is allegedly linked to the NI conflict, but the circumstances are unclear and an investigation is required to establish if this is the case. The current wording of the identified clauses ignore such situations.

3.42 The Commission recommends clause 5(6) is amended to include acts of violence or force allegedly linked to the NI conflict.

Purpose of the Investigation

3.43 The ECtHR has established that the purpose of an investigation is to secure:

> the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to an determination of whether the force used was or was not justified in a particular set of circumstances.[119]

3.44 In conjunction with each other, the ECHR Articles 2 (right to life) and 13 (right to effective remedy), necessitate "in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure".[120]

3.45 An investigation must honour the rule of law, be transparent and provide effective accountability.[121]

[119] *Kaya v Turkey* (1998) ECHR 10, at para 87.
[120] Ibid, at paras 106-107.
[121] Avsar v Turkey (2001) ECHR 439.

3.46 The available criminal law remedies must be capable of altering the course of an investigation.[122] Thus, it is insufficient to offer the possibility of lodging a disciplinary complaint against the State official involved.

3.47 The nature and degree of scrutiny required by an investigation is determined by the circumstances of each case. Investigation of undisputed cases can be a mere formality, but additional scrutiny is required for disputed or suspicious cases.[123]

3.48 The UN Human Rights Committee's Draft General Comment No 36 reiterates:

> investigations and prosecutions of alleged deprivations of life must be aimed at ensuring that those responsible are brought to justice, at promoting accountability and preventing impunity, at avoiding denial of justice and at drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations.[124]

3.49 Draft General Comment No 36 continues:

> given the importance of the right to life, State parties must generally refrain from addressing violations of Article 6 [of the ICCPR] merely through administrative or disciplinary measures, and a criminal investigation, which should lead if enough incriminating evidence is gathered to a criminal prosecution, is normally required.[125]

3.50 The UN Human Rights Committee's Draft General Comment No 36 states "States parties are also under an obligation to take steps to prevent the occurrence of similar violations in the future".[126]

3.51 The Revised Minnesota Protocol states:

> investigations must be capable of: ensuring accountability for unlawful death; leading to the identification and, if justified by the evidence and seriousness of the case, the

[122] *Sirin Yilmaz v Turkey* (2004) ECHR 405, at para 86.
[123] *Velikova v Bulgaria* (2000) ECHR 198, at para 80.
[124] UN Human Rights Committee, 'General Comment No 36 on Article 6 of the ICCPR, on the Right to Life: Revised Draft Prepared by the Rapporteur', July 2017, at para 31.
[125] Ibid.
[126] Ibid, at para 32.

prosecution and punishment of all those responsible; and preventing future unlawful death.[127]

3.52 The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states "the purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about the death".[128]

3.53 The Commission is concerned about the limited grounds of discretion afforded to the Director and the grounds upon which the HIU Director must exercise his/her discretion in determining whether a case should be investigated by the HIU, as set out in clauses 9(4)-9(8) of the draft Bill.

3.54 These clauses set out three conditions, one of which must be met before the HIU Director can authorise the investigatory function. These conditions are that it will lead to the identification of a person involved in the death, prosecution of a person for a criminal offence relating to a death, or the initiation of disciplinary proceedings against a person for non-criminal police misconduct relating to the death. As these clauses are currently drafted, they state that the HIU should not undertake an investigation unless it would be capable of leading to one of these three outcomes. These three conditions set out what the purpose of a human rights compliant investigation should be, in other words, what such an investigation should aim to achieve. However, these three conditions should not be used to determine whether an investigation should be instigated. The determining factor should be whether or not a death has been subject to a human rights compliant investigation - has an investigation taken place that is prompt, reasonably expedited, independent, impartial and subject to public scrutiny. If not, the State has an obligation to ensure one is conducted. This obligation should be reflected in responsibilities of the HIU Director.

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[127] OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 24.
[128] UN Economic and Social Council, 'Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions', 24 May 1989, at para 9.

3.55 The Commission recommends that clauses 9(4)-9(8) are removed and that clause 9 is redrafted to ensure that where there are concerns that a human rights compliant investigation has not yet been conducted into a death, the Director must authorise an investigation by the HIU.

Prompt Commencement of Investigations

3.56 The ECHR, Article 2, and ICCPR, Article 6, require that investigations into a suspicious death are commenced promptly.[129] This extends to the commencement of initial evidence gathering[130] and the re-commencement of adjourned investigations.[131]

3.57 Reasons for a delay in promptly commencing investigations must be reasonable.[132]

3.58 What constitutes prompt commencement depends on the context of the case. For example, investigations of enforced disappearances must be "taken immediately after the crime was reported to the authorities" and a delay of days can constitute a violation of Article 2.[133] This combined with the principle of reasonableness indicates that a chronological approach to historical investigations is permitted, as long as there is the ability to react to a case's individual circumstances. This appears to be provided by clause 8(3) of the draft Bill, which enables the order of HIU's investigations to be altered in "exceptional circumstances" or if a different order would enable the HIU to "perform its functions more effectively".

3.59 The Revised Minnesota Protocol states "the failure of the State promptly to investigate does not relieve it of its duty to investigation at a later time: the duty does not cease even with the passing of significant time".[134]

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[129] *Mentese and Others v Turkey* (2005) ECHR 22, at para 54; *Aslakhanova and Others v Russia* (2012) ECHR 2075, at paras 11-12; *Hugh Jordan v United Kingdom* (2001) ECHR 327, at para 136; UN Human Rights Committee, 'General Comment No 36 on Article 6 of the ICCPR, on the Right to Life: Revised Draft Prepared by the Rapporteur', July 2017, at para 32.
[130] *Mentese and Others v Turkey* (2005) ECHR 22, at para 54; *Aslakhanova and Others v Russia* (2012) ECHR 2075, at paras 11-12.
[131] *Hugh Jordan v United Kingdom* (2001) ECHR 327, at para 136.
[132] Ibid, at para 136 and 138.
[133] *Betayev and Betayeva v Russia* (2008) ECHR 469, at para 85.
[134] OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 23.

3.60 The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary states "those persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation".[135]

3.61 The HIU's remit, as set out in clause 5(1) of the draft Bill, extends to 'Troubles-related' deaths that occurred between fourteen and fifty years ago. That equates to significant delays in the commencement of the required investigations.

3.62 The Commission recommends the HIU is adequately resourced to ensure it has the capacity to promptly conduct investigations and to promptly process and effectively store the case files and information that it receives.

3.63 Clauses 5(1)(a) and 5(1)(b) of the draft Bill state that the HIU may investigate a death that is part of the caseload of the HET or the Police Ombudsman if it "requires further investigation by the HIU".

3.64 The Commission recommends that the Police Service NI and Police Ombudsman are adequately resourced to ensure that these institutions can promptly transfer all relevant case files and information to the HIU.

3.65 Clause 8(2) of the draft Bill states that "the deaths that are within the HIU's remit must be investigated by the HIU in the order in which they occurred or are presumed to have occurred". Clause 8(3) permits a different order in "exceptional circumstances" and to enable the HIU to "perform its functions more effectively". This chronological approach and permitted exceptions appear to be human rights compliant. However, the clause does not sufficiently state that the overarching determinant for the order of the investigations (chronological or otherwise) should be ensuring an effective Article 2 compliant investigation.

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[135] UN Economic and Social Council, 'Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions', 24 May 1989, at para 10.

3.66 As recommended by the Commission, the HIU's remit should be extended to all 'Troubles-related' deaths that have not been subject to a human rights compliant investigation, this includes cases completed by the HET, LIB and the Police Ombudsman. Consideration should be given as to whether the current drafting of clauses 8(2) and 8(3) sufficiently deal with cases that need to be re-investigated by the HIU.

3.67 The Commission recommends that clauses 8(2) and 8(3) ensure compliance with the overriding obligation to ensure effective Article 2 compliant investigations into all deaths, this includes cases completed by the HET, LIB and the Police Ombudsman.

3.68 The Commission supports flexibility in relation to concurrent investigations for the purposes of ensuring investigations into suspicious deaths are effective and human rights compliant. Schedule 12, Paragraph 3(1) of the draft Bill inhibits a coroner's ability to hold an inquest into a death that is within the HIU's remit unless there are compelling reasons to do so or a family report has been produced or the HIU has ceased operating.

3.69 The Commission recommends Schedule 12, Paragraph 3(1) is redrafted to ensure that a coroner has the ability to hold an inquest into a death that is within the HIU's remit when this is necessary to ensure an Article 2 compliant investigation is conducted.

Reasonable Expedition of Investigations

3.70 In order to maintain "public confidence" in a State's "adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts", investigations into suspicious deaths must be carried out within reasonable expedition.[136] It is also the case that "with the passing of time, it becomes more and more difficult to gather evidence from which to determine the cause of death".[137]

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[136] *Hugh Jordan v United Kingdom* (2001) ECHR 327, at paras 108 and 138.
[137] *Slimani v Turkey* (2004), Application No 57671/00, Judgment of 27 July 2004, at para 32.

3.71 What constitutes reasonable expedition is determined by the circumstances of each individual case. The ECtHR appreciates that there "may be obstacles or difficulties which prevent progress in an investigation in a particular situation".[138] However, this "cannot relieve the authorities of their obligations under Article 2 to carry out an investigation".[139] To do otherwise "would exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle". This extends to "where there are serious allegations of misconduct and infliction of unlawful harm implicating State security officers".[140] In such instances, "it is incumbent on the authorities to respond actively and with reasonable expedition".[141]

3.72 Philip Alston, the former UN Rapporteur on Extrajudicial, Summary or Arbitrary Executions supported this approach:

> it is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate – this would eviscerate the non-derogable character of the right to life – but they may affect the modalities or particulars of the investigation.[142]

3.73 It is not sufficient that an investigation is pending, an investigation must be progressing to satisfy the requirement of reasonable expedition.[143]

3.74 The Revised Minnesota Protocol confirms that "the duty of promptness does not justify a rushed or unduly hurried investigation".[144]

3.75 Considering that the HIU's remit, as set out in clause 5(1) of the draft Bill, extends to 'Troubles-related' deaths that occurred between fourteen and fifty years ago, the Commission is conscious

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[138] *McKerr v United Kingdom* (2001) ECHR 329, at para 114.
[139] *Yasa v Turkey* (1998) ECHR 83, at para 104.
[140] *Mahmut Kaya v Turkey* (2000) ECHR 129, at para 107.
[141] Ibid.
[142] E/CN.4/2006/53, 'Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Philip Alston', 8 March 2006, para 36.
[143] *Yasa v Turkey* (1998) ECHR 83, at para 104.
[144] OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 23.

that the more time that passes, the more difficult it is to gather evidence.

3.76 The Commission recommends, that once established, the HIU conducts its investigations with reasonable expedition.

Thorough Investigations

3.77 A human rights compliant investigation is not one that is "half-hearted and dilatory".[145] To be human rights compliant, an "investigation's conclusions must be based on thorough, objective and impartial analysis of *all* relevant elements… failing to follow an obvious line of inquiry undermines the investigations' ability to establish the circumstances of the case and the person responsible".[146] This is provided for by the ECHR, Article 2, and ICCPR, Article 6.[147]

3.78 This requires State authorities to take:

> reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.[148]

3.79 The ECtHR warned that "any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard".[149]

3.80 The Revised Minnesota Protocol provides guidance on what a thorough investigation entails. It states that:

> investigations must, at a minimum, take all reasonable steps to:

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[145] *Acar and Others v Turkey* (2005) ECHR 313, at para 91.
[146] *Kolevi v Bulgaria* (2009) ECHR 1838, at para 201; *Armani da Silva v United Kingdom* (2016), Application No 5878/08, Judgment of 30 March 2016, at para 234.
[147] *Kolevi v Bulgaria* (2009) ECHR 1838, at para 201; *Armani da Silva v United Kingdom* (2016), Application No 5878/08, Judgment of 30 March 2016, at para 234; UN Human Rights Committee, 'General Comment No 36 on Article 6 of the ICCPR, on the Right to Life: Revised Draft Prepared by the Rapporteur', July 2017, at para 32.
[148] *Hugh Jordan v United Kingdom* (2001) ECHR 327, at para 107. For more information on what constitutes reasonable steps, see Hannah Russell, *The Use of Force and Article 2 of the ECHR in Light of European Conflicts* (Hart Publishing, 2017), at Chapter 7.
[149] *Ramsahai and Others v Netherlands* (2007) ECHR 393, at para 324.

a) Identify the victim(s);

b) Recover and preserve all material probative of the cause of death, the identity of the perpetrator(s) and the circumstances surrounding the death;

c) Identify possible witnesses and obtain their evidence in relation to the death and the circumstances surrounding the death;

d) Determine the cause, manner, place and time of death, and all of the surrounding circumstances. In determining the manner of death, the investigation should distinguish between natural death, accidental death, suicide and homicide; and

e) Determine who was involved in the death and their individual responsibility for the death.[150]

3.81 Under the Revised Minnesota Protocol:

> the investigation must determine whether or not there was a breach of the right to life. Investigations must seek to identify not only direct perpetrators but also all others who were responsible for the death, including, for example, officials in the chain of command who were complicit in the death. It should also seek to identify policies and systemic failures that may have contributed to a death, and identify patterns where they exist.[151]

3.82 In addition, the Revised Minnesota Protocol states:

> an investigation must be carried out diligently and in accordance with good practice. The investigative mechanism charged with conducting the investigation must be adequately empowered to do so. The mechanism must, at a minimum, have the legal power to compel witnesses and require the production of evidence, and must have sufficient financial and human resources, including qualified investigators and relevant experts.[152]

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[150] OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 25.
[151] Ibid, at para 26.
[152] Ibid, at para 27.

3.83 To enable a thorough investigation some protective measures may be required. The UN Human Rights Committee's Draft General Comment No 36 states "States parties must also take the necessary steps to protect witnesses, victims and their relatives and persons conducting the investigation from threats, attacks and any act of retaliation".[153]

3.84 This is also reflected in the Revised Minnesota Protocol, which states "any investigative mechanism must also be able to ensure the safety and security of witnesses, including, where necessary, through an effective witness protection programme".[154]

3.85 Furthermore, the Revised Minnesota Protocol states:

> family members should be protected from any ill-treatment, intimidation or sanction as a result of their participation in an investigation or their search for information concerning a deceased or disappeared person. Appropriate measures should be taken to ensure their safety, physical and psychological well-being, and privacy.[155]

3.86 The UN Declaration on the Protection of All Persons from Enforced Disappearance, Article 13(3), states in the context of investigating enforced disappearance:

> steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.[156]

3.87 The UN Declaration, Article 13(4) further states:

> Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.[157]

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[153] UN Human Rights Committee, 'General Comment No 36 on Article 6 of the ICCPR, on the Right to Life: Revised Draft Prepared by the Rapporteur', July 2017, at para 32.
[154] OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 27.
[155] Ibid, at para 36.
[156] A/RES/47/133, 'Declaration on the Protection of All Persons from Enforced Disappearance', 18 December 1992.
[157] Ibid.

3.88 The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides "the investigative authority shall have the power to obtain all the information necessary to the inquiry".[158] It also states those persons conducting the investigation:

> shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify. The same shall apply to any witness. To this end, they shall be entitled to issue summonses to witnesses, including the officials allegedly involved and to demand the production of evidence.[159]

3.89 As clauses 9(2) and 37(1) of the draft Bill state the HIU's investigatory function should cease after five years. These clauses allow for an extension, the terms of which are set out in clause 37(2). As clause 37(2)(b) is currently drafted, such an extension should not exceed one year. The Commission welcomes a defined timeframe, subject to extension, as it will encourage all pending investigations to be conducted with reasonable expedition. However, there is the risk that placing a finite deadline, with a possible extension of a maximum of one year, will inhibit the HIU to conduct thorough investigations. This is a particular concern in relation to pending investigations that are delayed due to judicial challenges, for example, around full disclosure of material which may raise issues of national security.

3.90 The Commission recommends clause 37(2)(b) is amended to enable repeat year-long extensions. A review process for whether a further extension is required should be established, with the determining factor being whether more time is required to ensure all investigations in the HIU's remit are thorough.

3.91 Clause 37(5) of the draft Bill states that the Secretary of State must consult "specified consultees" about whether to extend the HIU's investigatory function by one year and that the decision should be governed by regulations. Clause 37(6) provides that such

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[158] UN Economic and Social Council, 'Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions', 24 May 1989, at para 10.
[159] Ibid.

regulations must be made by the Department of Justice through consultation with specified consultees. Clause 37(7) sets out who qualifies as a specified consultee. The Commission welcomes the consultation and regulation process. However, the Commission is concerned that is not listed as a specified consultee.

3.92 The Commission recommends that it is added to the list of specified consultees as set out in clause 37(7).

3.93 Clause 4(1) of the draft Bill states the "Department of Justice must pay the Policing Board the amount which appears to the Department to be appropriate to meet the expenses of the HIU for that financial year". What is appropriate to meet the expenses should be determined by the amount that will provide sufficient resources for the HIU to conduct a thorough investigation into all the pending investigations within its remit.

3.94 The Commission recommends that sufficient resources are provided to the HIU to ensure all of its investigations are thorough and meet human rights standards.

3.95 Schedule 12 sets out a number of bodies which the HIU may cooperate with in its investigations, including the Police Service, the Police Ombudsman and others. The Director may make arrangements for co-operating with these bodies. The Commission supports flexibility in relation to concurrent investigations for the purposes of ensuring investigations into suspicious deaths are effective and human rights compliant. However, it is possible that individual officers cooperating with the HIU may have a direct involvement or unavoidable conflict of interest in the investigation and this will need to be effectively addressed.

3.96 The Commission recommends that Schedule 12 includes effective safeguards to address any direct involvement with a case or unavoidable conflict of interest that arises due to the HIU cooperating with another investigative body. This is required to ensure the independence and impartiality of the HIU's investigative process.

3.97 The draft Bill does not currently address the obligation on investigatory bodies to take reasonable, proactive steps to ensure that witnesses, victims, relatives and investigators are protected from threats or acts of violence or intimidation.

3.98 The Commission recommends that a provision is inserted that clearly sets out the HIU's requirement to take the necessary steps to protect witnesses, victims and their relatives and persons conducting the investigation from threats, attacks and any act of retaliation or intimidation.

3.99 Under Schedule 7, paragraph 2 of the draft Bill a HIU officer retains their powers of investigation "throughout NI and the adjacent UK waters". This means "the sea and other waters within the seaward limits of the territorial sea". There are occasions when a HIU investigation may require cooperation with investigatory bodies in other parts of the UK and outside of the UK. The Commission is concerned that provision is not made to clarify a HIU's officer's powers in situations where an investigation may require travel, evidence or cooperation with other investigatory bodies from outside of NI or its surrounding waters, for example in the rest of the UK or Ireland.

3.100 The Commission recommends that provision is included in Schedule 7, paragraph 2 to ensure all lines of evidence can be followed, in the interests of conducting a thorough investigation.

3.101 Clause 24 of the draft Bill sets out the operational powers of the HIU's Director and HIU officers. Clause 24(1) states "the Director is (by virtue of this section) designated as a person having the powers and privileges of a constable". Clause 24(2) further states that:

> the Director may designate any other HIU officer as a person having the powers and privileges of a constable, if the Director is satisfied that the HIU officer –
>
> a) is capable of effectively exercising those powers and privileges;

b) has received adequate training in respect of the exercise of those powers and privileges; and
c) is otherwise a suitable person to exercise those powers and privileges.

3.102 Clause 24(3) of the draft Bill continues that:

> the Director, and any other HIU officer who is designated under this section, may not use the powers and privileges of a constable in investigating any non-criminal police misconduct relating to a death that is within the HIU's remit.

3.103 Schedule 7 of the draft Bill clarifies the limits of these powers and privileges. Schedule 7, paragraph 2(1) provides:

> a designate HIU officer has, throughout NI and the adjacent UK waters, all the powers and privileges for the time being exercisable there by a constable (whether at common law or under any statutory provision).

3.104 Under Schedule 7, paragraph 3(1) there is no time limit to these powers and privileges, unless specifically stated within the designation. Limitations on the exercise of these powers and privileges can also be imposed, as long as they are set out within the designation, as provided in Schedule 7, paragraph 4.

3.105 In terms of general lines of inquiry related to the HIU's investigations, clause 25 of the draft Bill sets out that a "relevant authority" must make full disclosure to the HIU. This limits the HIU's powers of compellability to specified public authorities, as set out in clause 39. Clause 25 also does not set out what the penalty is for non-disclosure, only partial disclosure, or deliberately misleading disclosure.

3.106 Clause 25 further states that a relevant authority must make available information, documents and other material. It is unclear from the current wording whether this limits the HIU's powers of compellability to written and material evidence, or does it also include oral evidence.

3.107 The Commission recommends that, to ensure the HIU has the powers to conduct a thorough investigation, that clause 25 is amended to extend the HIU's powers of compellability to all reasonable lines of inquiry, which includes all relevant public authorities and relevant private individuals. This amendment should include the relevant safeguards required to ensure that the powers are not arbitrarily exercised, for example some form of judicial oversight should be available to allow for a challenge where these is a dispute. This amendment should also include the process for notification of compellability, for example the requirement of a warrant.

3.108 The Commission recommends that clause 25 is amended to make it clear that the HIU can compel all reasonable written, oral and material evidence.

3.109 The Commission recommends that clause 25 is amended to clarify what the penalty is for non-disclosure, only partial disclosure or deliberately misleading disclosure.

Independent and Impartial Investigations

3.110 It is imperative that investigations into suspicious deaths are not "theoretical and illusory".[160] This requires such investigations to be "independent and impartial" and "capable of leading to the establishment of facts and the liability of those responsible".[161] This is reflected in the ECHR, Article 2, and ICCPR, Article 6.[162]

3.111 The former European Commission on Human Rights clarified that:

> the nature and degree of scrutiny which satisfies this minimum threshold must, in the Commission's view, depend on the circumstances of the particular case. There may be cases where facts surrounding a deprivation of life are clear and undisputed and the subsequent inquisitorial examination may legitimately be reduced to a minimum formality. But equally, there may be other cases where a

[160] *Khashiyev and Akayeva v Russia* (2005) ECHR 132, at para 177.
[161] *Kamalak v Turkey* (2013), Application No 2251/11, Judgment of 8 October 2013, at para 31.
[162] Ibid; UN Human Rights Committee, 'General Comment No 36 on Article 6 of the ICCPR, on the Right to Life: Revised Draft Prepared by the Rapporteur', July 2017, at para 32.

> victim dies in circumstances which are unclear, in which event the lack of any effective procedure to investigate the cause of the deprivation of life could by itself raise an issue under Article 2 of the [ECHR].[163]

3.112 The ECtHR confirmed that for an investigation to be independent it is "necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events". This requires a "lack of hierarchical or institutional connection, but also a practical independence".[164] For example, in *McKerr v UK* (2001) and *Hugh Jordan v UK* (2001) the ECtHR considered situations where Royal Ulster Constabulary (RUC) officers were responsible for investigating RUC officers' behaviour, with the RUC Chief Constable adopting a monitoring role. The former Independent Commission for Police Complaints could require the Chief Constable to refer the investigating report to the Director of Public Prosecutions for a decision on prosecution or to initiate disciplinary proceedings, which was viewed as the ECtHR as an independent element. However, the ECtHR found it was not sufficiently independent to have police officers investigated by police officers.[165]

3.113 The Revised Minnesota Protocol provides investigators must be qualified and relevant experts.[166] It elaborates that:

> investigators and investigative mechanisms must be, and must be seen to be, independent of undue influence. They must be independent institutionally and formally, as well as in practice and perception, at all stages. Investigations must be independent of any suspected perpetrators and the units, institutions or agencies to which they belong. Investigations of law enforcement killings, for example, must be capable of being carried out free from undue influence that may arise from institutional hierarchies and chains of command.[167]

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[163] *McCann v United Kingdom* (1995) 21 EHRR 97, at para 79.193.
[164] *Ergi v Turkey* (1998), ECHR 59, at paras 83-84; *Hugh Jordan v United Kingdom* (2001) ECHR 327, at para 120; *McKerr v United Kingdom* (2001) ECHR 329, at para 128.
[165] *Hugh Jordan v United Kingdom* (2001) ECHR 327, at para 120; *McKerr v United Kingdom* (2001) ECHR 329, at para 128.
[166] OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 27.
[167] Ibid, at para 28.

3.114 The Revised Minnesota Protocol continues "investigations must also be free from undue external influence, such as the interests of political parties or powerful social groups".[168]

3.115 The Revised Minnesota Protocol also refers to impartiality. It states "investigators must be impartial and must act at all times without bias. They must analyse all evidence objectively. They must consider and appropriately pursue exculpatory as well inculpatory evidence".[169]

3.116 To ensure independence and impartiality, the Revised Minnesota Protocol provides:

> investigators must be able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and must be able to operate free from the threat of prosecution or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics. This applies equally to lawyers, whatever their relationship to the investigation.[170]

3.117 The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states members of an investigatory body "shall be chosen for their recognised impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry".[171]

3.118 Clause 3 and Schedule 2 of the draft Bill sets the employment requirements of the HIU's Director, members and officers. Clause 3(5) of the draft Bill states that the HIU must include, "as far as practicable", a mix of officers that have experience of conducting criminal investigations in and outside NI. The Commission appreciates the benefits in having persons who have experience in conducting criminal investigations in NI and outside of NI as members of the HIU.

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[168] Ibid, at para 28.
[169] Ibid, at para 31.
[170] Ibid, at para 30.
[171] UN Economic and Social Council, 'Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions', 24 May 1989, at para 11.

3.119 Clause 3(6) of the draft Bill states that in terms of the employment of the HIU's Director, members and officers, particular regard must be given to the "approach to dealing with NI's past should be balanced, proportionate, transparent, fair and equitable".

3.120 Schedule 2, Part 1, paragraph 1(1) of the draft Bill states that the HIU's appointments panel should include "a person with experience of managing major criminal investigations".

3.121 Schedule 2, Part 2, paragraph 2(1) of the draft Bill states that "the Director is to be appointed by the Minister of Justice". Schedule 2, Part 2, paragraph 2(3) continues "the Minister of Justice must act in accordance with the recommendation of the appointments panel in appointing a person to be the Director or one of the non-executive members of the HIU". Schedule 2 does not elaborate as to the principles that the Minister of Justice or the appointments panel should consider in reaching their decision.

3.122 Schedule 2, Part 2, paragraph 2(5) of the draft Bill prohibits a person that has been sentenced to a term of imprisonment or detention of three months or more, is insolvent or is disqualified from being a company director from being a member of the HIU. These same criteria are listed as circumstances leading to a conflict of interest under Schedule 2, Part 2, paragraph 8(2).

3.123 Clause 10 of the draft Bill places certain duties on the Director to ensure there are no conflicts of interest within the HIU. Clause 10(1)(b) makes reference to a requirement on a HIU officer or a person that is being considered for employment by the HIU to inform the Director of "any matter which might reasonably be expected to otherwise affect the person's "ability to carry out his or her duties fairly and impartially". Clause 10(2) continues that:

> the Director must make arrangements to secure that each of the HIU officers involved in the investigation of a particular death that is within the HIU's remit does not have, and could not reasonably be perceived as having, a conflict of interest in relation to that investigation.

3.124 The Commission welcomes that a HIU officer directly involved in or who has an unavoidable conflict of interest regarding a particular case cannot be involved in investigating that case. However, the Commission would wish to be reassured that the HIU will put in place working arrangements and procedures to ensure that a HIU officer with any conflict of interest cannot interfere with the investigation, covertly or otherwise.

3.125 Clause 10(3)(b) of the draft Bill requires "at least one investigation unit does not include any HIU officer who has, or could be perceived as having, a work-related conflict of interest in respect of the investigation of any of the deaths within the HIU's remit". The Commission recognises the challenges in ensuring that all HIU officers are independent and impartial regarding all of the HIU's cases. The Commission welcomes this provision and encourages that where possible HIU officers employed are independent and impartial, with a view to creating as many fully independent investigative units as possible

3.126 The Commission is concerned that clause 10 of the draft Bill implies independence through the use of the term 'fair', but that independence is not specifically stated.

3.127 The Commission recommends that every effort is made to ensure that the HIU's Director and as many members, officers and appointments panellists as possible are independent and impartial, in line with the ECHR's jurisprudence.

3.128 The Commission recommends that the draft Bill makes provision for safeguards to ensure that anyone appointed to the HIU that was directly involved in or had an unavoidable conflict of interest cannot interfere with the affected HIU investigation.

3.129 Schedule 4, paragraphs 1(2) and 2(2) of the draft Bill set out that the Director and the Chief Constable may, within the initial three month period, agree that it would be more appropriate for the Police Service, the police force in Great Britain, or the Police Ombudsman to continue its investigations of the death, rather than of the HIU to begin an investigation of the death. The Commission is concerned that there is no specific requirement for the new investigators to be independent and impartial.

3.130 The Commission recommends that Schedule 4, paragraphs 1(2) and 2(2) include a requirement that where any HIU case is transferred to the Police Service of NI, a police force in Great Britain, or the Police Ombudsman that the new investigators are independent and impartial in line with ECHR jurisprudence, and were not directly involved in or have a conflict of interest in any case they are tasked with investigating.

3.131 Clause 10(4) of the draft Bill requires the HIU Director to consult family members of the deceased on the allocation of the investigation of a death to a particular investigation unit. The Commission welcomes this clause, but is concerned that it is not clearly stated that the final decision should be Article 2 compliant.

3.132 The Commission recommends that it is specifically stated that a final decision regarding clause 10(4) should ensure independence and impartiality.

3.133 Schedule 1, paragraph 3(7) of the draft Bill allows persons who are not members of a committee or sub-committee to attend meetings of the committee or sub-committee. The Commission is concerned that this does not adequately safeguard the independence and impartiality of the committee and sub-committee.

3.134 The Commission recommends that, to avoid a conflict of interest, Schedule 1, paragraph 3(7) of the draft Bill is amended to require that the attendance of non-committee members at meetings of the committee and sub-committee must have a specific purpose and be reasonable.

3.135 Schedule 12, paragraph 8 of the draft Bill enables the HIU to share facilities with the Police Service of NI. This clause does not specifically mention the requirement that any such arrangements should adhere to the principles of independence and impartiality, and have no conflict of interest.

3.136 The Commission recommends that it is specifically stated within Schedule 12, paragraph 8 that any sharing of facilities are setup and secured in a way that maintains independence and impartiality.

3.137 Schedule 15 of the draft Bill provides for the regular oversight of the HIU. This includes that "the Policing Board must (in particular) consider the extent to which the HIU's functions have been exercised in accordance with… its human rights obligations (taking into account [clauses 6 and 23] statements". The Commission welcomes these provisions.

3.138 Clauses 37(5) and 37(6) of the draft Bill enable "specified consultees" to be consulted before making regulations that could make provision to wind up the HIU. The Commission welcomes this requirement however, it is concerned that clause 37(3)(b) of the draft Bill enables the Department of Justice or the Secretary of State to make provision to wind up the HIU "at any other time", without reasonable justification.

3.139 The Commission recommends that clause 37(3)(b) is amended to state that "with reasonable justification" and "in line with human rights standards", the Department of Justice or the Secretary of State can make provision to wind up the HIU at any other time. A statement setting out the reason why should be made to the NI Assembly or UK government, as appropriate.

Public Scrutiny

Family Members

3.140 The ECHR, Article 2, requires that an investigation into a suspicious death and its results must be subject to sufficient public scrutiny,[172] the degree of which varies from case to case.[173] In all investigations into a suspicious death, the next-of-kin of the victim must be involved in the procedure "to the extent necessary to safeguard his or her legitimate interests".[174] This does not provide families with the automatic right to have access to police files or any other information that they request.[175] It also does not require families to be kept informed throughout the investigation.[176] This is on the basis that such information may involve sensitive issues with possible prejudicial effect to private individuals or other investigations.[177] Where restrictions on families' access to information is in place, they must be provided with access at "other stages of the available procedures".[178] The ECtHR has also made clear that it is incompatible with Article 2 for victims to be denied access to information "for no valid reason".[179]

3.141 The ECHR's jurisprudence clarifies that at minimum, the next-of-kin must be informed of a decision regarding prosecution,[180] cannot be prohibited outright from access to the investigation and court documents,[181] and must be given the opportunity to tell the court their version of events.[182]

3.142 The criteria for who must be kept informed of an investigation into a suspicious death can be guided by who has victim status regarding the ECHR. A victim for the purposes of the ECHR is divided into direct and indirect victims. A direct victim is an individual who is able to show that he or she was "directly" affected by an alleged

[172] *McCann v United Kingdom* (1995) 21 EHRR 97, at para 159.
[173] *McKerr v United Kingdom* (2001) ECHR 329, at para 115.
[174] Ibid.
[175] *Hugh Jordan v United Kingdom* (2001) ECHR 327, at paras 122-124.
[176] Ibid.
[177] Ibid, at para 121.
[178] Ibid.
[179] *Eremiásová and Pechová v Czech Republic*, Application No 23944/04, Judgment of 16 May 2012, at para 149.
[180] *Gülec v Turkey*, Application No 21593/93, Judgment of 27 July 1998, at para 82.
[181] *Ogur v Turkey* (1999) ECHR 30, at para 92.
[182] *Gül v Turkey*, Application No 22676/93, Judgment of 14 December 2000, at para 93.

violation.[183] If the direct victim has died, it may be possible for an indirect victim to take action. An indirect victim is traditionally viewed as the next-of-kin,[184] but it is now accepted that such status can extend to close family members. The question of whether they were legal heirs of the deceased is not relevant.[185] The ECtHR has adopted a less strict approach to who qualifies as an indirect victim when the individual is closely linked to the death or disappearance of the direct victim. As an indication of what is meant by a close family member in the context of the ECHR, Article 2, the ECtHR has accepted married partners,[186] unmarried partners,[187] parents,[188] siblings,[189] children,[190] and nephews.[191] In other contexts, the ECtHR has been more restrictive and generally declines to grant standing to any other person unless that person could, exceptionally, demonstrate an interest of their own.[192]

3.143 There is no jurisdictional requirement for a direct or indirect victim, other than the alleged allegation must have taken place within the jurisdiction of the State in question. This includes *de jure* and *de facto* jurisdictions.[193]

3.144 Article 2's focus on close family indicates that it permits there to be a distinction made between close family member and other family members. However, it does not require such a distinction. This distinction has been created to indicate the minimum requirements for an investigation to be Article 2 compliant.

3.145 The UN Human Rights Committee's Draft General Comment No 36 requires disclosure of:

> relevant details about the investigation to the victim's next of kin and make public its findings, conclusions and

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[183] *Tanas v Moldova*, Application No 7/08, Judgment of 27 April 2010, at para 104; *Burden v United Kingdom* (2008) ECHR 356, at para 33; *Lambert and Others v France* (2015) ECHR 545, at para 89.
[184] *Varnava and Others v Turkey* (2009) ECHR 1313, at para 112.
[185] *Van Colle v United Kingdom* (2012) ECHR 1928, at para 86.
[186] *McCann v United Kingdom* (1995) 21 EHRR 97; *Salman v Turkey* (2000) ECHR 357.
[187] *Velikova v Bulgaria* (2000) ECHR 198.
[188] *Ramsahai and Others v the Netherlands* (2007) ECHR 393; *Giuliani and Gaggio v Italy* (2011) ECHR 513.
[189] *Andronicou and Constntinou v Cyprus*, Application No 86-1996-705-897, Judgment of 9 October 1997.
[190] *McKerr v United Kingdom* (2001) ECHR 329.
[191] *Yasa v Turkey* (1998) ECHR 83.
[192] *Karpylenko v Ukraine* (2016) ECHR 173, at para 104; *Nassau Verzekering Maatschappij NV v the Netherlands* (2011) ECHR 1798,at para 20.
[193] *See* Hannah Russell, *The Use of Force and Article 2 of the ECHR in Light of European Conflicts* (Hart Publishing, 2017), at Chapter 5.

recommendations, unless absolutely prevented from doing so due to a compelling need to protect the public interest or the legal rights of directly affected individuals.[194]

3.146 The UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence noted that:

> truth-seeking requires the active participation of individuals who wish to express their grievances and report on the facts and underlying causes of the violations and abuses which occurred. Truth-seeking will only be regarded a justice measure if civil society, in particular victims organisations, is adequately represented in the composition of a truth commission. Prosecutions, for their part, can only serve as actual justice measures if the victims and their families are effectively involved in the processes and provided with the necessary information relevant to their participation in proceedings.[195]

3.147 The UN Approach to Transitional Justice, states as a guiding principle, that measures should "ensure the centrality of victims in the design and implementation of transitional justice processes and mechanisms".[196]

3.148 The Revised Minnesota Protocol states:

> family members have the right to seek and obtain information on the causes of a killing and to learn the truth about the circumstances, events and causes that led to it. In cases of potentially unlawful death, families have the right, at a minimum, to information about the circumstances, location and condition of the remains and, insofar as it has been determined, the cause and manner of death.[197]

3.149 The Revised Minnesota Protocol continues "the State must enable all close relatives to participate effectively in the investigation, though

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[194] UN Human Rights Committee, 'General Comment No 36 on Article 6 of the ICCPR, on the Right to Life: Revised Draft Prepared by the Rapporteur', July 2017, at para 32.
[195] A/HRC/21/46, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff', 9 August 2012, at para 54.
[196] UN General Assembly, 'Guidance Note of the Secretary-General: UN Approach to Transitional Justice' (UNGA, 2010), at 2.
[197] OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 11.

without compromising its integrity. The relatives of a deceased person must be sought, and informed of the investigation".[198]

3.150 The UN Declaration on the Protection of All Persons from Enforced Disappearance, Article 13(4), states in the context of investigating enforced disappearance, "the findings of such an investigation shall be made available upon request by all persons concerned, unless doing so would jeopardize an ongoing criminal investigation".[199]

3.151 Clause 17 of the draft Bill requires that the HIU produces comprehensive family reports. The Commission welcomes this inclusion in the draft Bill.

3.152 Clause 7(2) of the draft Bill prohibits the HIU from doing anything in carrying out its functions which might prejudice the interests of national security. Family reports must be disclosed to the family in accordance with clause 17(6).

3.153 Schedule 9 and 10 of the draft Bill set out arrangements for the identification of prejudicial, sensitive or protected international information by relevant authorities. Under Schedule 10, paragraph 4(2):

> the Secretary of State may notify the HIU that proposed disclosure is prohibited only if, in the Secretary of State's view, the disclosure of the sensitive information would, or would be likely to, prejudice the national security interests of the UK.

3.154 Under Schedule 10, paragraph 4(3) the Secretary of State "must consider whether reasons for prohibiting" can be given without disclosing information and, if this is possible, the Secretary of State "must give those reasons". Clause 18(3) further provides that these reasons must be included within a family report.

3.155 The Commission notes that the ECHR, Article 2, permits such restrictions on families' access to information. However, the Commission is concerned that these provisions do not adequately

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[198] Ibid, at para 35.
[199] A/RES/47/133, 'Declaration on the Protection of All Persons from Enforced Disappearance', 18 December 1992.

reflect the principles of reasonableness, proportionality and legitimate aim to ensure any restrictions are not arbitrary.

3.156 The Commission recommends that clauses 7(2) and 18(3), and Schedules 9 and 10 reflect the principles of necessity, reasonableness, proportionality and legitimate aim to ensure any restrictions are not arbitrary and that the Secretary of State's decisions are guided by human rights standards.

3.157 Schedule 10, paragraph 4(3) requires that regarding information obtained in a UK context the Secretary of State must provide reasons for non-disclosure to the HIU, unless doing so "would be likely to prejudice the national security interests of the UK". By contrast, Schedule 10, paragraph 5(2) of the draft Bill states that the "Secretary of State may notify the HIU that the proposed disclosure is prohibited only if, in the Secretary of State's view, the disclosure of the protected international information would, or would be likely to damage international relations". This provides no requirement to consider whether reasons can be given in certain circumstances.

3.158 The Commission recommends that Schedule 10, paragraph 5(2) is amended to require the Secretary of State to provide reasons for prohibiting the disclosure of international information, unless it is likely to prejudice the national security interests of the UK. It should also reflect the principles of necessity, reasonableness, proportionality and legitimate aim to ensure any restrictions are not arbitrary and that the Secretary of State's decisions are guided by human rights standards.

3.159 Clause 21 of the draft Bill provides the Director of the HIU and family members with a right to appeal to the High Court against a decision of the Secretary of State not to permit the proposed disclosure in the report. Clause 21(10) provides that these procedures are to be treated as closed material proceedings, under the terms of the Justice and Security Act 2013.

3.160 The Commission has raised concerns that the use of the closed material procedure should not create obstacles to ensuring accountability for human rights violations and does not compromise a victim's right to an effective remedy.

3.161 The Commission recommends that clause 21 provides for certain safeguards to ensure the appeals process for non-disclosure decisions are effective and accessible, for example that family members can chose their legal counsel from the panel handling the closed material.

3.162 The Commission is concerned that the appeal period is only 28 days from when the report is provided to any family member of the deceased person, as provided by clause 21(3) of the draft Bill. This may not provide sufficient time for a report of this nature to be processed by persons that are emotionally involved. However, the Commission appreciates that to ensure the Article 2 requirement of reasonable expedition is fulfilled that a reasonable time limit for such appeals is required.

3.163 Clause 21(5) of the draft Bill states that in determining an appeal on non-disclosure, "the court must apply the principles applicable on an applicant for judicial review". The Commission proposes that a similar approach is adopted regarding the time limits for appeals.

3.164 The Commission recommends that closed material procedure should be used with caution to ensure that it does not create obstacles to ensuring accountability and does not compromise a victim's right to an effective remedy.

3.165 The Commission recommends that the time limit to appeal a non-disclosure of information, as set out in clause 21, is extended to three months.

3.166 The Commission is concerned that, as set out in clause 22(5) of the draft Bill, the HIU is only required to give support and other assistance to member of the families of persons whose deaths are within the HIU's remit that reside in the UK and Ireland. The Commission appreciates that clause 22(5) of the draft Bill states that the HIU is not prohibited from providing such provision, however this distinction creates a hierarchy amongst victim's family members based on jurisdiction, which has no grounding in human rights law.

3.167 The Commission recommends that reasonable support and other assistance is provided to all family members within clause 22(5).

3.168 Clause 23(5) of the draft Bill states that "on occasion when the Director issues a statement [about the exercise of the function of giving support and assistance], the HIU must arrange for the statement to be published in the manner which the Director considers appropriate". The Commission is concerned that the Director is being offered too much discretion and it should be specifically stated that appropriateness is determined by a human rights compliant approach.

3.169 The Commission recommends that the publication of statements about support and guidance, as set out in clause 23(5), should be guided by human rights obligations, including keeping family members informed.

3.170 Clause 37 of the draft Bill requires that the Department of Justice and the Secretary of State consult 'specified consultees' in the conclusion of the HIU's work. Clause 37(7) provides a definition of 'specified consultees' and makes reference to "any other person the Secretary of State considers appropriate (where the consultation concerns the making of regulations by him or her)". However, the clause does not specifically reference close family members.

3.171 The Commission recommends that close family members with respect to ongoing or pending investigations are specifically listed as 'specified consultees' under clause 37(7).

General Public

3.172 The ECtHR recognises the right to the truth in cases of gross human rights violations, which includes violations of the right to life.[200] The ECtHR indicates that this extends to "not only for the applicant and his family, but also for other victims of similar crimes and the general public".[201]

3.173 The Revised Minnesota Protocol states:

> the right to know the truth extends to society as a whole, given the public interest in the prevention of, and accountability for, international law violations. Family members and society as a whole both have a right to information held in a State's records that pertains to serious violations, even if those records are held by security agencies or military or policy units.[202]

3.174 Clause 20 of the draft Bill enables the HIU to publically publish its reports, which the Commission welcomes. In the interests of preventing further violations in the future, whether the HIU publically publishes an investigation report or not should be guided by whether it is reasonable to do so.

3.175 The Commission recommends that clause 20 specifically states that the HIU will publically publish where it is reasonable to do so.

3.176 Clauses 17(10) and 20(6) of the draft Bill allow the HIU to remove information that may cause distress to be removed from reports that are made available to people other than close family members. The Commission welcomes the option to remove such information, but is concerned that there is a lack of clarification as to how the potential for distress is determined. It is implied in the wording of clauses that this will be determined by the HIU alone and without

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200 *El-Masri v The Former Yugoslav Republic of Macedonia* (2012), Application No 39630/09, Judgment of 13 December 2012, at para 191; *Janowiec and Others v Russia* (2013) ECHR 1003, at para 9 of the Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller; *Varnava and Others v Turkey* (2009) ECHR 1313, at paras 200-202.
201 *El-Masri v The Former Yugoslav Republic of Macedonia* (2012), Application No 39630/09, Judgment of 13 December 2012, at para 191.
202 OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 13.

consultation with the close family members that the omission seeks to protect. The Commission acknowledges that there are cases when close family members may wish to avoid further distress and may wish to not be consulted on non-disclosure. However, there are other cases where close family members may wish to be reasonably informed of every detail, even if it causes distress. It should also be noted that this difference in approach may also arise between close family members of the same victim.

3.177 The Commission recommends that detailed guidance is published that sets out how the HIU decides when to remove information from public reports on the grounds that it may cause distress to close family members. This guidance should be developed, implemented, monitored and reviewed in consultation with the Commission for Victims and Survivors and the victims sector. The Bill should also require that such guidance should also be considered before the HIU makes a decision on non-disclosure of information on the grounds of distress.

3.178 The Commission recommends that the Bill contains a requirement on the HIU to publish the annual figures for the number of times information was removed from public reports on the grounds that it may cause distress to close family members.

Accessibility

3.179 The UN CRPD, Article 9, provides for accessibility. Article 9(1) states:

> to enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis to others… to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia… information,

communications and other services, including electronic services and emergency services.

3.180 The UN CRPD, Article 9(2) requires States Parties to take appropriate measures:

a) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;

b) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;

c) To provide training for stakeholders on accessibility issues facing persons with disabilities;

d) To provide buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;

e) To provide forms of live assistance and intermediaries, including guides, readers and profession sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;

f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

g) To promote access for persons with disabilities to new information and communications technologies and systems, including the internet;

h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

3.181 The UN CRPD, Article 5(3) clarifies that "in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided". The UN Committee on the Rights of Persons with Disabilities' General Comment No 2 elaborates that the duty to provide reasonable accommodation "is enforceable from the moment an individual with an impairment needs it in a given situation".[203] The aim is to ensure "accessibility for an individual with a disability in a particular situation".[204] Thus, "a person with a rare impairment might ask for accommodation that falls outside the scope of any accessibility standard".[205]

3.182 The Commission recommends that it is specifically stated in the draft Bill that all statements, reports and publications of the HIU are issued in an accessible manner and that reasonable accommodation is made for special requirements, where this is necessary.

3.183 The Commission recommends that it is specifically stated in the draft Bill that, where relevant, reasonable accommodation will be made to provide accessible family support and other assistance.

Complaints and Disciplinary Proceedings

3.184 The ECHR, Article 13, states "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

3.185 The ECtHR elaborates that for a remedy to be effective it must be accessible, capable of providing redress in respect of the complaint and offer a reasonable prospect of success.[206] In other words, it must be available, sufficient, and effective in theory and practice, having regard to the individual circumstances of the case.[207]

3.186 The Commission welcomes that a monitoring mechanism is identified and a process is set out in Schedules 15 and 16 of the

[203] CRPD/C/GC/2, 'General Comment No 2 – Article 9: Accessibility', 22 May 2014, at para 26.
[204] Ibid.
[205] Ibid.
[206] *Bityeva and Others v Russia* (2009) ECHR 672, at para 121; *Akhmadova and Akhmadov v Russia* (2008) ECHr 869, at para 103.
[207] *El-Masri v The Former Yugoslav Republic of Macedonia* (2012), Application No 39630/09, Judgment of 13 December 2012, at para 255.

draft Bill. The Commission is concerned that human rights obligations are not specifically mentioned in the clauses related to these monitoring mechanisms.

3.187 The Commission recommends that it is specifically stated within Schedules 15 and 16 that the monitoring mechanism and process operate in compliance with human rights.

3.188 Clauses 14(1), 14(2), 31(1), Schedule 13 and Schedule 14, paragraphs 1 and 2 of the draft Bill establish complaints and disciplinary mechanisms to deal with misconduct, which is welcomed by the Commission. The Commission recognises that as a public authority, the HIU is bound by the Human Rights Act 1998, but in the interests of clarity it is worth specifically setting out that such mechanisms should be independent and impartial.

3.189 The Commission recommends that it is expressly stated that the complaints and disciplinary mechanisms set out within clauses 14(1), 14(2), 31(1), Schedule 13 and Schedule 14, paragraphs 1 and 2 are independent and impartial.

3.190 Clause 32 and Schedules 14 and 15 deal with the inspection and oversight of the HIU. As set out in these provisions, the Policing Board has the overarching responsibility for the monitoring and oversight of the HIU. Under Schedule 14, the Chief Inspector of Criminal Justice also has the power to inspect the HIU. The Commission welcomes these oversight measures, but as the HIU Director and HIU officers have the powers of a constable, the HM Inspectorate of Constabulary and Fire and Rescue Services should have the power to inspect the HIU.

3.191 The Commission recommends that Schedule 14 is amended to provide the HM Inspectorate of Constabulary and Fire and Rescue Services with the power to inspect the HIU.

Data Retention

3.192 The ECHR, Article 8(1) states "everyone has the right to respect for his private and family life, his home and his correspondence". The ECtHR has confirmed that this right is engaged in the context of biometric material.[208]

3.193 The ECHR, Article 8, is a qualified right, meaning that it can be interfered with in certain circumstances. The circumstances in which interference may be permitted is set out in the ECHR, Article 8(2). This provision states:

> there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

3.194 For an interference to be in accordance with law, the ECtHR has elaborated that the relevant measure should "have some basis in domestic law" and "to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention" and inherent in "the object and purpose of Article 8".[209] Thus, the:

> law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[210]

3.195 Specific to retention of biometric material for suspects, the ECtHR states:

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[208] *S and Marper v United Kingdom* (2008) ECHR 1581.
[209] *Malone v United Kingdom* (1984) ECHR 10, at paras 66-68.
[210] Ibid, at para 66; *Silver and Others v United Kingdom* (1983) ECHR 5, at paras 87-88.

> the domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose which those data are stored. The domestic law must also afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse.[211]

3.196 The ECtHR further states consideration must be given to "whether the permanent retention of… all suspected but unconvicted people is based on relevant sufficient reasons".[212] Consideration should also be given as to "whether such retention is proportionate and strikes a fair balance between the competing public and private interests".[213]

3.197 The ECtHR has confirmed that "blanket and indiscriminate nature of powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences… fails to strike a fair balance between the competing public and private interests".[214] It further stated that it "overstepped any acceptable margin of appreciation in this regard".[215]

3.198 The ICCPR, Article 17, states "no one shall be subjected to arbitrary or unlawful interference with his privacy" and that "everyone has the right to the protection of the law against such interference or attacks".

3.199 The UN Human Rights Committee's General Comment No 16 states:

> the term 'unlawful' means that no interference can take place except in cases envisaged by the law. Interference authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant. The expression 'arbtirary interference' is also relevant to the protection of the right provided for in Article 17. In the Committee's view the expression 'arbitrary interference' can also extend to

[211] *S and Marper v United Kingdom* (2008) ECHR 1581, at para 103.
[212] Ibid, at para 114.
[213] Ibid, at para 118.
[214] Ibid, at para 125.
[215] Ibid, at para 125.

interference provided under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.[216]

3.200 The UN Human Rights Committee's General Comment No 16 continues:

even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorised interference must be made only by the authority designated under the law, and on a case-by-case basis.[217]

3.201 The UN Human Rights Committee's General Comment No 16 further states:

the gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorised by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law every individual should have the right to request rectification or elimination.[218]

3.202 Schedule 8 of the draft Bill provides for the retention and use of biometric material. The Commission is concerned that it currently

[216] UN Human Rights Committee, 'CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation', 8 April 1988, at paras 3-4.
[217] Ibid, at para 8.
[218] Ibid, at para 10.

does not includes any reference to how such material will be retained or the safeguards that should be in place to prevent misuse and abuse and what arrangements will be provided to challenge any decision.

3.203 Schedule 8, paragraph 1(5) states that "profile or fingerprints may be so retained for the period of five years from the day on which this Schedule comes into force". The Commission welcomes a maximum period in which biometric material can be retained. The Commission is concerned that this clause does not address if the HIU's investigative function extends beyond five years.

3.204 The Commission is also concerned that it is not specified in Schedule 8, paragraph 1(5) that the biometric material should only be retained when it is reasonable to do so for the purposes of the HIU's investigations.

3.205 The Commission recommends that Schedule 8 sets out requirements for how retained biometric material will be stored and efficient safeguards against misuse and abuse.

3.206 The Commission recommends that Schedule 8, paragraph 1(5) is amended to include reference to a "reasonable period of up to [specified number of] years" and "for the purposes of the HIU's investigations".

3.207 The Commission recommends that Schedule 8 clarifies what is permitted regarding the retention of biometric material if the HIU's investigative functions extend beyond five years. This should reflect human rights standards, in line with the general principles set out in clause 1.

3.208 The Commission recommends that an effective and accessible mechanism is in place for individuals to be informed that their biometric material is held, how it is stored, how long it will be stored for and the monitoring body to be contacted to report misuse or abuse.

4.0 Independent Commission of Information Retrieval

4.1 The Independent Commission for Informational Retrieval (ICIR) will be established by a treaty between the Irish and UK governments, supplemented by legislation in both jurisdictions.[219] The draft Bill acts as the relevant UK legislation giving effect to the treaty, with Irish legislation yet to be published.

4.2 The duration of the ICIR will be 5 years, as per Article 7(5) of the ICIR Agreement, which also provides for a preparatory period of establishment.[220] The draft Bill does not provide for such a preparatory period or any power for the Secretary of State to extend the exercise of the ICIR, only the arrangements for its winding up which includes the destruction of all information and records held.[221] Given that the ICIR is dependent on information provided to it from outside sources, it is possible that the 5 year duration could pass without the completion of its investigations. This creates the possibility of a situation in which important information and data is not passed on to the relevant families in line with its core functions.

4.3 The Commission recommends that clause 42(5) is amended to provide for an extension to the timeframe for the ICIR in the event of non-completion of its functions.

4.4 The draft Bill provides for the ICIR receiving information about relevant deaths, interpreted as meaning those within the definition of clause 50(2). As this remit is strictly defined, it is not clear what the ICIR would do with information provided in respect of other human rights violations and abuses, including for example attempted murders which would fall under the State's Article 2 obligations or serious injuries which would fall under its Article 3 obligations.

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[219] Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and NI establishing the Independent Commission on Information Retrieval, 15 October 2015.
[220] See also Clause 49(6).
[221] Clause 49(1).

4.5 The UK government is responsible for the effective official investigations of all allegations of human rights abuses under the scope of ECHR, Articles 2 and 3. A key element of such an investigation is that it is conducted under the state's own motion.[222] Therefore, information coming to the attention of the state, through the ICIR, for example disclosing Article 3 abuses may still require investigation or reinvestigation. There does not appear to be a mechanism or structure, within the ICIR or outside, to deal with this possibility. The lack of an existing procedure or mechanism will not be sufficient to discharge the State's obligations in this respect.[223]

4.6 **The Commission recommends that consideration is given to how the State will fulfil its human rights obligations in respect of information received that engages other ECHR rights, in particular Article 3, and which is outside the scope of deaths within the remit of the ICIR.**

4.7 The information obtained by the ICIR will be passed to eligible persons where they have requested information about a death by means of a family report. This will be subject to a relevant decision period, in which the Secretary of State will notify the ICIR if any information within the report is likely to prejudice national security or risk the life or safety of a person.[224] Such a notification would lead to the exclusion of that information prior to disclosure to the family.[225]

4.8 The ICIR Agreement provides that parallel arrangements will be introduced in Ireland.[226] The explanatory notes make clear that draft reports will be sent to the Government of Ireland, which also may notify of national security or risk to life issues.[227] This has not been provided for in the draft Bill.

4.9 Two issues arise from the absence of this information. First, there is no process or mechanism in the draft Bill which sets out the

[222] *Jordan v United Kingdom* (2001) ECHR 327; see also paragraphs 3.32 ff.
[223] *McCaughey and Others v United Kingdom* (2013) ECHR 682, concurring opinion of Judge Kalaydjieva.
[224] Clause 46(2).
[225] Clause 46(4).
[226] Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and NI establishing the Independent Commission on Information Retrieval, 15 October 2015, at Article 11.
[227] NI (Stormont House Agreement) Bill, Explanatory notes, at para 158.

relationship between the two governments in receipt of a report. It is unclear if the Government of Ireland will also have an effective veto on the disclosure of information and, if so, on what grounds these would be. It is also unclear how conflicts between the governments on the assessments of whether to disclose and how these would be resolved.

4.10 The Commission recommends that further detail be provided in relation to the involvement of the Government of Ireland in the disclosure assessment and how any resulting conflict will be resolved.

4.11 It is not clear from the draft Bill or explanatory notes if the family would be notified that removal of information or a re-draft of the report had taken place, as a result of notification by the Secretary of State under clause 46. Unlike redaction by the HIU, the draft Bill does not provide an appeal mechanism by which this can be challenged.

4.12 The redaction of information by the State will engage both the right to freedom of expression, protected under ECHR, Article 10, and ICCPR, Article 19, and the right to private and family life, protected under ECHR, Article 8, and ICCPR, Article 17.

4.13 The UN Human Rights Committee requires that:

> [w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[228]

4.14 The ECtHR has also found that determinations of national security threats must not be arbitrary and must contain sufficient safeguards for the individual. It has found that:

[228] CCPR/C/GC/34, 'General Comment No 34: Article 19 - Freedom of Opinion and Expression', 12 September 2011, at para 35.

> where the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.[229]

4.15 The ECtHR also holds that the rule of law requires that:

> measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural adjustments related to the use of classified information.[230]

Also that the:

> individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention (ibid.).[231]

4.16 The use of a national security exemption without the possibility of challenge raises concerns that its use will go unchecked and that there is no independent mechanism for holding the government to account. The importance of public confidence will be central to the effective operation of the ICIR, and so clarity around its role and safeguards should be explicit.

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[229] *Leander v Sweden* (1987) ECHR 4, at para 51.
[230] *M and Others v Bulgaria* (2011) ECHR 1195, at para 100.
[231] Ibid, at para 101.

4.17 The Commission recommends that the Bill be amended to require the ICIR to inform a family, in advance of receiving a report, that the Secretary of State intends to redact and on what grounds.

4.18 The Commission recommends that the draft Bill provides for an appeal mechanism to allow the decision to redact to be challenged by the family. Any mechanism similar to that under the HIU should consider the recommendations made by the Commission on closed material procedures in Section 3.0. Alternatively, recourse to a judicial review challenge should be possible.

4.19 The disclosure of information in a family report may have further consequences in respect of third party individuals, engaging their rights of privacy. It is unclear the level of detail that would be provided in the context of these reports. The storage and disclosure or private and sensitive information may have implications for the rights of others. Save for the assessment of the Secretary of State in respect of national security, or risk to life or safety issues, there does not appear to be any further consideration of the right to privacy, protected by ECHR, Article 8 and ICCPR, Article 17.[232]

4.20 The Commission recommends that the right to privacy is specifically considered in advance of the disclosure of information to a family, in addition to the considerations of national security and risk to life or safety.

4.21 The draft Bill makes clear that the provision of information to the ICIR does not create an amnesty or immunity from prosecution for a criminal offence.[233] It further provides that information originating from the ICIR will not be admissible as evidence in criminal, civil or coronial proceedings.[234] However, this does not affect information held by another person unless obtained from the ICIR. The explanatory memorandum to the draft Bill explains that the police or a coroner "would not be prevented from pursuing lines of inquiry based on information disclosed by the [ICIR] in a report to a

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[232] See Schedule 10, paragraphs 4 and 5 of the draft Bill.
[233] Clause 45(2).
[234] Clause 45(3).

family."[235] If this inquiry led to evidence being generated, that would "not fall under the admissibility provisions (despite the report itself being inadmissible)."[236]

4.22 This refers only to information about a death within the remit of the ICIR, not to information outside its scope. This again highlights an issue in respect of information not pertaining to a relevant death but to other human rights abuses or violations. As recommended in paragraph 3.6 clarity around this type of information and when and how it may be used should be addressed. This also needs to be carefully and fully explained to those seeking to provide information to the ICIR that the admissibility provisions only applies to certain information.

4.23 The Commission recommends further clarity regarding information which may be provided to the ICIR, outside a death within its remit.

4.24 An eligible family request is one made by a close family member who satisfies the residence requirement, being resident in the UK or Ireland at the time of the death or the request.[237] Where a close family member does not meet the residence qualification, the ICIR may accept the request if it considers it appropriate to do so.[238] A request may come from a relative, where a close family member objects, having regard to the relationship with the deceased and residency qualification.[239]

4.25 The Commission recommends that clause 50(3) should be amended to remove the qualifications of for 'close family' and the residency requirement in order for the broadest access to the ICIR. Alternatively, clear policy direction should be provided to the ICIR in order that the process is as inclusive as possible.

[235] NI (Stormont House Agreement) Bill, Explanatory notes, at para 155.
[236] Ibid.
[237] Clause 50(3)(a).
[238] Clause 50(3)(b).
[239] Clause 50(3)(c).

5.0 Oral History Archive

5.1 The establishment and role of an Oral History Archive (OHA) is provided under Part 4 of the draft Bill, which would act as a "central place for individuals from all backgrounds in NI and elsewhere to voluntarily share experiences and narratives related to the Troubles".[240] The OHA will also commission research to produce a "factual historical timeline of the Troubles".[241] The OHA would be established by the Public Record Office of NI (PRONI)[242] and under the charge of a Deputy Keeper of the Records.[243] The Deputy Keeper would exercise the task in accordance with the general principles of the draft Bill[244] and be free from political interference.[245] A steering group will be established, whose membership has experience of obtaining oral history records both within and outside of NI.[246]

5.2 The NIHRC recognises that the collection of experiences and narratives by the OHA engages the right to culture, protected under ICESCR, Article 15(1).[247] The UN Special Rapporteur in the field of cultural rights has highlighted the importance of remembering that:

> history is always subject to differing interpretations. While events may be proven, including in a court of law, historical narratives are viewpoints that, by definition, are partial. Accordingly, even when the facts are undisputed, conflicting parties may nevertheless fiercely debate moral legitimacy and the idea of who was right and who was wrong. Provided that historical narratives rigorously follow the highest deontological standards, they should be respected and included in the debate.[248]

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[240] NIO, 'Consultation Paper: Addressing the Legacy of NI's Past' (NIO, 2018), at para 9.1.
[241] Ibid.
[242] Clause 51(1).
[243] Clause 52(1).
[244] Clause 52(2).
[245] Clause 52(8).
[246] Clause 52(9)(a).
[247] For a further exploration of the right to culture, see NIHRC, 'Derry/Londonderry Report on Upholding the Human Right to Culture in Post-Conflict Societies' (NIHRC, 2014).
[248] A/68/296, 'Report of the Special Rapporteur in the Field of Cultural Rights', 9 August 2013, at para 6.

5.3 Historical and memorialisation processes are recognised as part of the right to culture.[249] The right to culture may be exercised by a person individually, in association with others, or as a community or group.[250] While accepting submissions from groups, organisations and communities is not expressly prevented by the draft Bill, the implementation of the OHA should be construed broadly to ensure that the widest engagement is possible to give effect to collective rights. In its report on upholding the right to culture in post-conflict societies, one of the recommendations of the Commission noted that:

> the upholding of cultural rights will only be meaningful if it integrates close and on-going participation of the holders of human rights and in particular of those individuals and communities whose cultural rights are at most risk. Such participation has value in its own right and not just for purposes of achieving other public purposes.[251]

5.4 The Commission recommends that the OHA is empowered to accept collective submissions from groups, organisations and communities to ensure full meaningful participation to all rights holders.

5.5 One of the tasks of the Deputy Keeper will be to determine which oral history records will form part of the archive; whether a significant event merits inclusion in the archive; to decide which records should not be publically available and to dispose of any records which will not be or cease to be part of the archive.[252] The focus on the independence of the office of Deputy Keeper is to be welcomed. The UN Special Rapporteur in the field of cultural rights has noted that:

> museums and curators may face particular difficulties when they are subject to political control and financial pressure and it is

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[249] A/HRC/25/49, 'Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, Memorialization Processes', 3 January 2014; A/69/286, 'Report of the Special Rapporteur in the Field of Cultural Rights', 8 August 2014.
[250] E/C.12/GC/21, 'General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', 21 December 2009, at para 9.
[251] NIHRC, 'The Derry/Londonderry Report on Upholding the Human Right to Culture in Post-Conflict Societies' (NIHRC, 2014), at 30, Recommendation 9.
[252] Clause 52(3).

crucial to ensure their independence within the framework of the right to freedom of opinion and expression, as set out in Articles 19 and 20 of the International Covenant on Civil and Political Rights.[253]

5.6 The UN Special Rapporteur has further commented that "the past constantly informs the present. History is continuously interpreted to fulfil contemporary objectives by a multiplicity of actors. The challenge is to distinguish the legitimate continuous reinterpretation of the past from manipulations of history for political ends."[254] Indeed:

> the reconstruction of human history to fit a particular world view is a phenomenon in all societies. The question is whether, and to what extent, access to resources or historical facts and earlier interpretations is obstructed and whether space is given to articulate differences freely without fear of punishment. Even without deliberate manipulation, history teaching is not exempt from bias and, too often, the diversity of historical narratives is insufficiently acknowledged. Democratic and liberal societies too must question their existing paradigms from the perspective of ensuring a multi-voice narrative inclusive of, and accessible to, all.[255]

5.7 The draft Bill provides that the department may make rules in relation to the exercise of the function of organising the OHA, including provision for persons to be informed before an oral history record is made by the archive and provision of consent.[256]

5.8 The provision of consent for information to be held by a public authority, engages an individual's right to private and family life under ECHR, Article 8 and ICCPR, Article 17. In order to ensure that any subsequent rules and regulations regarding the obtaining of consent or what happens when consent is withheld or withdrawn must take into consideration the states obligations under international human rights law.[257] Where compliance with human

[253] A/HRC/25/49, 'Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, Memorialization Processes', 3 January 2014, at para 75.
[254] A/68/296, 'Report of the Special Rapporteur in the Field of Cultural Rights', 9 August 2013, at para 7.
[255] Ibid, at para 23.
[256] Clause 56.
[257] See section on Data Retention.

rights obligations is left to secondary legislation or rules, it is important that these are effectively scrutinised to confirm compliance. The Commission notes that, pursuant to clause 66, these will be passed by negative resolution.

5.9 The Commission recommends that clause 66 be amended so as to require any secondary legislation or rules to be enacted by way of affirmative resolution in the NI Assembly. Any such rules would also have to cover the situation where information is transferred into the archive from another source, to ensure that the appropriate consent is obtained.

5.10 Despite the intended independence of role of Deputy Keeper and the OHA itself, the draft Bill makes provision for a procedure for disposal of records not forming part of the archive. This requires the Deputy Keeper to notify to the NI Assembly of proposed disposal and enables the NI Assembly to pass a resolution to require the preservation of a record.[258] It is unclear why a legislature has been afforded this task, rather than the relevant Minister. The draft legislation does not provide any further detail as to the circumstances in which this decision can be taken, any criteria to be applied or mechanism for obtaining and passing the resolution.

5.11 This role for the NI Assembly will inevitably impact the independence of the Deputy Keeper to make decisions, empowered by clause 52(4). In particular, where a record is to be disposed of by virtue of not having the requisite consent, the proposed procedure will enable the NI Assembly will be able to override this. Where consent has been refused, this effectively allows that consent to be overridden without any detail as to the circumstances in which it can occur or criteria to be taken into account. Although ECHR, Article 8 and ICCPR, Article 17 are qualified rights, and therefore, may be limited in certain respects there must be clarity around the precise circumstances in which this can take place.[259]

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[258] Clauses 55(1)-(3).
[259] UN Human Rights Committee, 'CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation', 8 April 1988, at paras 3-8; See section on Data Retention.

5.12 The Commission recommends that clause 55 is amended so as to include precise detail as to when an individual's privacy can be overridden and relevant safeguards, such as the ability to challenge the decision. Alternatively, clause 55 could include a legislative requirement that this must be done by way of regulations or another mechanism.

5.13 The OHA will be a public authority, confirmed by the consultation document's indication that PRONI would remain subject to existing laws on data protection and disclosure, including the Data Protection Act 1998, Freedom of Information Act 2000 and the Human Rights Act 1998. It further states that the OHA would not be exempt from the disclosure of data by way of court order or requests in relation to criminal investigations.[260] It would also not be exempt from any statutory duty to report crimes.[261]

5.14 The clarity in respect of disclosure by the OHA is welcomed, especially in the light of protracted litigation, in both America and NI, relating to interview transcripts held by Boston College which the PSNI had sought access to in the course of criminal investigations.[262] However, the issues that the 'Boston tapes' raised may still be pertinent if material is transferred into the OHA from other sources and the nature of the consents provided are different.

5.15 The Commission remains concerned about the prospect of information being received by the OHA which discloses human rights violations or abuses. The State remains under an obligation, pursuant to ECHR, Articles 2 and 3, to conduct an effective official investigation of its own motion.[263] There is no other mechanism or structures identified, within the draft bill or SHA, to deal with this scenario.

5.16 The Commission recommends that the issue of how information, disclosing other human rights abuses or violations, can be effectively investigated is fully addressed

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[260] NIO, 'Consultation Paper: Addressing the Legacy of NI's Past' (NIO, 2018), at para 12.12.
[261] Ibid.
[262] For example, *McIntyre's Application* [2012] NIQB 65; *Rea's (Winston Churchill) Application* [2015] NICA 8.
[263] *Jordan v the United Kingdom* (2001) ECHR 327; See also section on State's Own Motion.

in order that the State complies with its procedural obligations, in particular Article 3.

5.17 The SHA required the OHA to bring forward proposals in relation to the circumstances and timing of contributions being made public.[264] The consultation document and the draft Bill do not provide any further information in respect of this issue, other than to indicate that some information could be "kept private for an extended period, if necessary".[265]

5.18 The release of, or a decision not to release, information into the public sphere engages human rights considerations under the right to private and family life (ECHR, Article 8 and ICCPR, Article 17) and the right to freedom of expression (ECHR, Article 10 and ICCPR, Article 19). The UN Human Rights Committee confirms that ICCPR, Article 19:

> protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression.[266]

5.19 ICCPR, Article 19, further provides that the right encompasses a:

> right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.[267]

5.20 These rights often come into conflict and as qualified rights, limitations are both possible and at times, necessary. For example, where information places an identified individual at real and immediate risk, the State obligations under the right to life would be engaged.

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[264] Stormont House Agreement, 23 December 2014, at para 23.
[265] NIO, 'Consultation Paper: Addressing the Legacy of NI's Past' (NIO, 2018), at para 12.12.
[266] CCPR/C/GC/34, 'General Comment No 34: Article 19 - Freedom of Opinion and Expression', 12 September 2011, at para 12.
[267] Ibid, at para 18.

5.21 The OHA would need to have a process by which the State's human rights obligations can be considered, which is unclear from the draft Bill. The UN Human Rights Committee specifies that:

> even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorised interference must be made only by the authority designated under the law, and on a case-by-case basis.[268]

5.22 The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has clarified that a restriction under ICCPR, Article 19(3), must be "provided by law, which is clear, unambiguous, precisely worded and accessible to everyone", "proven by the State as necessary and legitimate to protect the rights or reputation of others; national security or public order, public health or morals" and "proven by the State as the least restrictive and proportionate means to achieve the purported aim".[269]

5.23 The release of personal data from the OHA will also engage cultural rights, such as the right to access and to enjoy cultural heritage and transmit it to future generations.[270] Furthermore, the release of data from the OHA, may engage the right to the truth, which has an individual and collective element, and the right to the historical truth.[271] The Office of the High Commission for Human Rights recognises that:

> a person has a right to know the truth about what happened to him/her and that society as a whole has both a right to know and a responsibility to remember.[272]

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[268] UN Human Rights Committee, 'CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation', 8 April 1988, at para 8.
[269] A/67/357, 'Promotion and protection of the right to freedom of opinion and expression, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', 7 September 2012, at para 41.
[270] A/HRC/17/38, 'Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed', 21 March 2011, at para 34.
[271] *Chauvy and Others v France* (2004) ECHR 295, at para 69; *Fatullayev v Azerbaijan* (2010) ECHR 623, at para 87; *Dzhugashvili v Russia* (2014) ECHR 1448, at para 33.
[272] A/HRC/12/19, 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Right to the Truth', 21 August 2009, at para 5.

5.24 Further consideration must be given to the circumstances in which archived material cannot be made publically available. The nature and scope of any limitation on the release of information must be fully considered on a case-by-case basis and in compliance with the government's international human rights obligations.

5.25 The Commission recommends that the Bill is amended to specify the nature and scope of any limitation on the release of information from the OHA.

6.0 Implementation and Reconciliation Group

6.1 The Implementation and Reconciliation Group (IRG) is to be established under Part 5 of the draft Bill and is tasked with three main functions: (i) the promotion of reconciliation, (ii) a review and assessment of the implementation of the Stormont House Agreement, and (iii) commissioning of research on patterns and themes identified by the HIU, ICIR, OHA and the Coroner's Court.[273]

6.2 Although a core element of the IRG's work is the promotion of reconciliation and anti-sectarianism[274] there is no further detail as to how this task will be completed. The draft Bill uses different terminology, referring to "political or sectarian hostility" in clause 60(1).

6.3 It is unclear from the draft Bill or consultation document what relationship the IRG will have with existing organisations with responsibility for issues pertaining to equality of opportunity and good relations, namely the Equality Commission NI and Community Relations Council.

6.4 Given that a previous commitment, under the Together: Building a United Community Strategy,[275] to introduce a statutory definition of sectarianism remains outstanding, the present draft Bill provides an opportunity to introduce a statutory definition of sectarianism.

6.5 The CERD Committee has previously highlighted concerns that measures to tackle racism and sectarianism in NI are kept outside the framework of protections against discrimination".[276] The CERD Committee recommended that the State party "consider the standards, duties and actions prescribed by the Convention and the Durban Declaration and Programme of Action on intersectionality between ethnic origin, religion and other forms of discrimination in its measures to combat racism and sectarianism."[277]

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[273] Clauses 60 and 62.
[274] NIO, 'Consultation Paper: Addressing the Legacy of NI's Past' (NIO, 2018), at para 10.1.
[275] The Executive Office, 'Together: Building a United Community Strategy' (TEO, 2013), at para 1.36.
[276] CERD/C/GBR/C0/21-23, 'UN CERD Committee: Concluding observations on the Twenty-first and Twenty-third Periodic Reports of the UK of Great Britain and NI', 26 August 2016, at para 36.
[277] Ibid, at para 37.

6.6 The Commission recommends that the Bill is amended to include, in Part 5, a definition of sectarianism in order to assist the IRG in fulfilling its core task of promoting reconciliation and anti-sectarianism. Any definition should be in line with CERD and the Durban Declaration and Programme of Action.

6.7 In its role of reviewing and assessing the implementation of the Stormont House Agreement, the draft Bill clarifies that this does not include by Acts of Parliament and international agreements.[278] It is not clear from the Bill itself or explanatory memorandum, if this solely refers to the legislation and international agreements establishing the proposed SHA mechanisms.

6.8 The Commission understands clause 60(3) as meaning that the IRG's review of the SHA implementation will cover the practical operation and effectiveness of the mechanisms, rather than being able to comment on the adequacy of the founding legislation. However, further clarity is required to ensure that this clause does not rule out the IRG from commenting on the implementation of the SHA in relation to other legislation or international agreement, for example, in relation to the UK's domestic and international human rights obligations.

6.9 The Commission recommends that the meaning of clause 60(3) clarifies the focused nature of the restriction on the IRG's review and assessment role.

6.10 The Commission welcomes the provision for the preparation of a report on themes and patterns originating from the mechanisms under the draft Bill, recognising that truth is fundamental to the inherent dignity of the person.[279] The right to the truth includes knowing the "full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them."[280] Such work can

[278] Clause 60(3).
[279] UN Commission on Human Rights, Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights, 8 February 2006, E/CN.4/2006/91, at para 57.
[280] Ibid, at para 59.

contribute to a greater understanding of what happened and why, and can help to prevent ongoing and future violations and abuses.

6.11 The UN Principles to Combat Impunity states that:

> every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.[281]

6.12 The ECtHR has:

> emphasised the importance of the right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the right to life.[282]

6.13 The ECtHR also underlined:

> the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened.[283]

6.14 The independent report will be drafted by academic experts, commissioned by the IRG, on the basis of materials provided by the other mechanisms of the draft Bill[284] and those publically available reports listed under clause 62(3). The Commission notes that this does not give open access to all materials that may be necessary in the completion of the patterns and themes report.

6.15 The UN Office of the High Commissioner for Human Rights recognises that "access to information and, in particular, to official archives, is crucial to the exercise of the right to truth".[285] It also

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[281] E/CN.4/2005/102/Add.1, 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher', 8 February 2005, at Principle 2.
[282] *Association "21 Decembre 1989" and Others v Romania*, Application No. 33810/07, Judgment of 25 May 2011, at para 144.
[283] *El-Masri v The Former Yugoslav Republic of Macedonia* (2012) ECHR 2067, at para 191.
[284] Clause 62(1).
[285] UN Commission on Human Rights, 'Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights', 8 February 2006, E/CN.4/2006/91, para 52.

identifies that "the right to the truth as a stand-alone right is a fundamental right of the individual and therefore should not be subject to limitation".

6.16 The Commission recommends that access to information and materials should not be restricted to the publically available information listed in clauses 61(1) and 62(3), but that fully open access may be provided subject to further limitations that may be required by human rights law.

6.17 The Commission welcomes the requirement of the First Minister and Deputy First Minister to publish the report and lay it before the NI Assembly.[286]

6.18 The Commission recommends an insertion into clause 62 in order to place an obligation on the Secretary of State for NI to lay a copy of the IRG report before Parliament.

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[286] Clause 62(8).

7.0 Prisoner Release

7.1 In its earlier advice to the NIO on the House of Common's Defence Committee report on investigations in fatalities in NI involving British military personnel, the Commission raised a concern that the eligibility criteria for the accelerated release scheme as provided for within the Sentences (NI) Act 1998 limited its application to offences committed after 1973.[287] The Commission advised that the 1998 Act be amended to ensure the accelerated release scheme is applied equally and fairly to all perpetrators of conflict-related offences throughout the period of the conflict.

7.2 Clause 64 and Schedule 18 of the draft Bill deal with prisoner releases under the NI (Sentences) Act 1998. Schedule 18, paragraph 4 states that the 1998 Act should be amended to extend accelerated releases to related offences "committed on or after 1 January 1968 and before 8 August 1973".

7.3 **The Commission welcomes the proposed amendments to the NI (Sentences) Act 1998 to extend the accelerated release scheme to those serving sentences for related offences committed on or after 1 January 1968 and before 8 August 1973, as set out in clause 64 and Schedule 18.**

7.4 In its earlier advice the Commission highlighted concerns regarding the ability of members of the security forces to apply to the accelerated release scheme.[288] It is noted that at the time of passage of the 1998 Act, the then Secretary of State for NI Dr Mo Mowlam informed the House of Commons that members of the armed forces were entitled to apply to the scheme.[289] However, it does not appear that to date any such applications have been received.

7.5 The Commission welcomes the confirmation within the consultation document that the proposed amendments will ensure anyone convicted of a Troubles-related offence

[287] NIHRC, 'Advice of the NIHRC on the House of Common's Defence Committee Report on Investigations in fatalities in NI involving British Military Personnel' (NIHRC, 2017), at para 53.
[288] Ibid.
[289] 'Orders of the Day — NI (Sentences) Bill – in the House of Commons at 3:36 pm on 10th June 1998'.

committed between 1 January 1968 and 10 April 1998, including members of the security forces, will be eligible to apply to the accelerated release scheme, provided for by the NI (Sentences) Act 1998.

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