



Submission by the Pat Finucane Centre - Addressing the Legacy of Northern Ireland's Past

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A. Introduction

The Pat Finucane Centre (PFC) is a non-party political, anti-sectarian human rights organisation advocating a non-violent resolution of the conflict on the island of Ireland. We provide an advocacy, advice and support service to families bereaved and/ or injured as a result of the conflict, who wish to engage with statutory agencies to establish the facts surrounding the death/s of their loved one/s or injuries sustained. These include the Police Service of Northern Ireland (PSNI), the Office for the Police Ombudsman of Northern Ireland (OPONI), An Garda Síochána in the Republic, and the Coroner's Service. This work is part of our Recovery of Living Memory Archive (ROLMA) project funded by Peace IV and includes a three phased approach to supporting families including advocacy, engagement and story-telling. (See appendix 1). PFC also works in partnership with Wave Trauma Centre to provide health and well-being support to victims and survivors.

We currently provide this service to approximately 200 families across Ireland through four offices in Derry, Armagh, Belfast and Dublin (in partnership with Justice for the Forgotten). PFC supports families who have been bereaved/ injured as a result of state, loyalist and republican violence (including some post-Good Friday Agreement (GFA) cases). We also support families where it is unknown who was responsible for the death. Further, PFC supports victims of state mistreatment and torture, as well as a small number of individuals who are victims of miscarriages of justice.

B. Consultation with families in preparation for this response

In preparation for this response, PFC held a number of private meetings with victims and survivors in Derry, Belfast, Armagh and Dublin where we outlined the proposals and listened to the views of families. We did this both at the start of the summer and nearer to the close of the consultation when people had had time to reflect on what was proposed and to discuss the issues with other family members.

We also facilitated individual family meetings providing an opportunity to discuss the proposals in respect of individual cases. Some families requested assistance in preparing their own submissions and we helped them with this.

A presentation of the key issues was also distributed to families to ease the dissemination of information.

PFC engaged with officials from the Northern Ireland Office (NIO), Department of Foreign Affairs (DFA) in Dublin, the Commissioner for Victims and Survivors, and the Victims and Survivors Service. We also consulted with a number of legal academics and other NGOs providing support to victims and survivors.

PFC welcomes this consultation and believes (generally) that the proposals to address the legacy of the past are positive steps for victims and survivors, provided there is a genuine commitment from the British and Irish governments and buy-in from state, loyalist and republican actors. We believe more work is needed to build the support and trust of former combatant groups.

Throughout this engagement many families have expressed disillusionment and are sceptical that such a commitment exists. Almost all stated that they have no faith in the

British government's desire to deal with the past in an honest and open way. Families have expressed their frustration at continual delays in progressing cases and an overly legalistic and adversarial approach that has become the norm, particularly following the collapse of the Historical Enquiries Team (HET). The current mechanisms to deal with the past are piecemeal and not fit for purpose. It is imperative that the mechanisms proposed under the Stormont House Agreement (SHA) are therefore established without delay.

PFC does not purport to speak for victims and survivors. We acknowledge that the conflict has impacted every victim and survivor in an individual way and requires a range of measures that can address different needs including truth, justice, acknowledgement and reparations. The views expressed in this response are informed by, and reflective of, the views expressed to us by the families we have engaged with.

Finally, we would note that it is our view that the proposals outlined in the consultation, subject to certain concerns outlined below, could provide a framework for resolution for the majority of victims and survivors, regardless of community background, perpetrator or geographical location of individual families. Great hurt has been inflicted across all communities and across these islands and beyond. All sides were responsible for human rights abuses. In this context we note with dismay that some have chosen to poison the debate on legacy by spreading disinformation and sometimes wild conspiracy theories, often spiced with hefty doses of sectarianism. This does a grave disservice to vulnerable individuals who have lost a loved one, whatever the circumstances of that loss. This may well represent the last opportunity to resolve the legacy issue in an overarching manner. Should this not succeed this will have serious implications both for victims and survivors and the future of political institutions.

C. Issues not covered in the consultation

There are a number of issues that have not been included in the draft SHA Bill that are important when considering how we address the legacy of the past:

- 1) **Definition of a victim:** PFC believes that the current, inclusive, definition of a victim under the Victims and Survivors (Northern Ireland) Order 2006 should be maintained as it reflects the wide-reaching and complex nature of the conflict;
- 2) **Pension for the severely injured:** PFC supports a pension for those severely injured (physically and psychologically) during the conflict, and believes provision should be made for these individuals, based on the current definition of a 'victim' without delay;
- 3) **Statute of limitations:** PFC objects strongly to any attempt to bring forward a statute of limitations for former or serving members of the British armed forces. A unilateral statute would be unlawful under domestic and international law, amounting to state impunity¹. Legal experts have also advised government that it would result in a *de facto* amnesty for all conflict actors². None of the families we support, including those who have been bereaved as a result of state violence (British army/ RUC), have expressed support for such a statute;
- 4) **Reform of the legacy coronial system:** PFC urges the British government to release funding to reform the legacy coronial system in line with the proposals outlined by the Lord Chief Justice, Sir Declan Morgan, in 2016. The agreement at

¹ Defence Select Committee, Investigations into fatalities in Northern Ireland involving British military personnel, 25 April 2017, para 40. Available at: https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/1064/106406.htm#_idTextAnchor018 (Accessed 23 July 2018)

² Ibid.

Stormont House (December 2015) stated that *“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”* and that *“appropriate steps”* would be taken by the Executive to improve the legacy inquest function to ensure compliance with ECHR Article 2 requirements. It is unacceptable and unlawful³ that one party to the (previous) Executive blocked funding to provide this, despite warnings from the LCJ that the current system breaches ECHR law. It is also unacceptable and unlawful for the UK government, as signatory and guarantor of the ECHR, to continue to fail to provide the necessary funding to reform the coronial system now, in the absence of an Executive. Obligation arising from the ECHR falls on the state and cannot be delegated to a devolved government. PFC urges the NIO to release the necessary funding to enable the reform to take place. (For our views concerning legacy inquests while HIU is operational see Section 10.)

5) Compensation in cases of bereavement

- a. PFC urges the UK Government to revisit the issue of compensation payments for those bereaved during the conflict. In the 1970s and 1980s a system existed, based on actual and projected earnings, which was highly discriminatory against those on low incomes. A large percentage of those who lost their lives were young men in working class areas and this in turn adversely affected women who were left to raise families alone⁴;

³ Hughes (Brigid) Application [2018] NIQB 30

⁴ Fay, MT., Morrissey M., Smyth M., (1999), Northern Ireland's Troubles - The Human Costs, Pluto Press; London.

- b. An illustrative case is that of Christopher Quinn, a father of five who was shot dead by soldiers in December 1971. Declassified MoD documents confirm that the official view was that he was innocent, posed no risk and that his widow would likely receive £10,000 from a jury if the case were to go to court. The same confidential legal advice to the MoD however argued that his widow should be 'forced' to prove his innocence. Unable to provide for proper legal representation and struggling to provide for five children his widow accepted a paltry £500 out-of-court no blame settlement (£300 of which was for funeral expenses) unaware that the case was valued at £10,000. Mrs Quinn went on to provide for her children working two and sometimes three jobs for many years.⁵ A further example is that of mother of six Kathleen Thompson, shot dead by the British army in her back garden in Derry, November 1971. The Thompson family received a cheque for £84.07 by way of compensation.⁶
- c. In addition, in those cases involving actual fatalities of women and children, derisory payments were the norm since they were usually deemed not to be wage earners. Declassified documents from the Ministry of Defence from the mid-1970s confirm an MoD policy which

⁵ Young, D., Families of those killed by British army in Troubles denounce compensation, *Irish News*, 15 November 2016. Available at <http://www.irishnews.com/paywall/tsb/irishnews/irishnews/irishnews//news/northernirelandnews/2016/11/15/news/families-of-those-killed-by-british-army-in-troubles-denounce-compensation-785308/content.html> (Accessed 15 August 2018)

⁶ Derry Journal, 'We just want the truth' - say Thompson family, 06 September 2013, Available at: <https://www.derryjournal.com/news/we-just-want-the-truth-say-thompson-family-1-5463894https://www.derryjournal.com/news/we-just-want-the-truth-say-thompson-family-1-5463894> (accessed 29 August 2018)

stated that £750 was “...the accepted rate for a minor.” This referred to cases where children had been killed by the British Army⁷;

- d. Evidence suggests that this discriminatory policy applied across the board regardless of community background or the status of those responsible for the death. For example, the families of young women who died serving in the Ulster Defence Regiment (Greenfinches) often received equally derisory compensation payments. The factor that determined compensation was the perceived economic value of the victim, and not whether the State or republicans or loyalists were responsible for the death. Some of the issues raised by this lack of official acknowledgement have been addressed in respect of a revision of pensions for widows/widowers of members of the security forces who lost their lives, but the wider hurt has not been dealt with;
- e. International legal norms and good practice are clear on the responsibility of states to provide for adequate compensation and/or reparations following violent conflict. In Ireland the government set up a scheme through the Remembrance Commission whereby all families who suffered a bereavement as a result of the northern conflict received an automatic €15,000 Acknowledgement Payment⁸;

⁷ NAUK CJ4 967 Settlements out of court of civil actions for damages brought against the NIO or jointly with the MOD 1975. See also, Families Challenge MoD and Prime Minister in London, 26 October 2017. Available at: <http://www.patfinucanecentre.org/state-violence/families-challenge-mod-and-prime-minister-london> (Accessed 15 August 2018)

⁸ Information on the Remembrance Commission can be accessed here: http://www.justice.ie/en/JELR/Pages/Remembrance_Commission

- f. The recent commendable decision to compensate the ‘Windrush generation’ in Britain was specifically set up, according to the Prime Minister, to redress the ‘anxieties and problems’ caused by official challenges to their right to be in the UK⁹. Needless to say, the loss of a family member will have caused much greater harm and trauma within families which will be intergenerational. The Consultative Group on the Past heard evidence on this issue and recommended an *ex-gratia* payment to the ‘nearest relative’¹⁰. Much to the chagrin and anger of many victims and survivors this proposal was misused to undermine the recommendations of the Consultative Group. Almost ten years on the legacy issue has still not been addressed.
- g. The recent compensation payments in respect of people injured and killed on Bloody Sunday is a welcome development, this is despite attempts by the Ministry of Defence to frustrate the process¹¹. Notwithstanding, such claims are limited to deaths and injuries where the British state can be held to be legally responsible. As such this route is not available in cases where republicans or loyalists were responsible except for limited exceptions; e.g. cases where collusion is proven and/or where state agents were involved. The wider issue of compensation remains to be addressed.

⁹ BBC news, Theresa May: Compensation for Windrush generation, 21 April 2018. Available at: <https://www.bbc.co.uk/news/uk-43846047> (Accessed 15 August 2018)

¹⁰ Report of the Consultative Group on the Past, 2009, page 93

¹¹ Madden and Finucane press statement, 1st October 2018 Available at: <https://madden-finucane.com/2018/10/01/fearghal-shiels-welcomes-settlement-with-mod-for-bloody-sunday-families-for-700000-further-vindicating-the-victims-innocence/> (Accessed 4th October 2018)

6) Independent Inquiry into the circumstances of the murder of Pat Finucane

The on-going failure by the British Government to establish the independent inquiry into the murder of Pat Finucane, as promised in the Weston Park Agreement, is currently the subject of an appeal at the UK Supreme Court. Judgement is pending. Recent revelations at the Investigatory Powers Tribunal emphasise the need for an independent inquiry as had been promised by the British Government¹².

7) Gender specific issues

Women have experienced the conflict in very different ways and have very different needs in a post-conflict society. Some of the issues raised with PFC included: Raising children alone on very low incomes; Seeking redress in a misogynistic, male dominated criminal justice and policing system; Emotional suffering due to loss of spouse; Struggling to explain to children why their father was killed; Attempting to prevent children becoming bitter; Visiting prisoners and experiencing humiliating search procedures; Hiding their grief from family view/minimising their losses.

Some or all of the above were also experienced by men who lost partners but disproportionately women were left bereaved. Making sure there are institutions and legacy pathways which effectively address the specific needs of women as part of a post-conflict and transitional model are essential. Specific attention has to be given to the issue of gender if the two governments are serious about addressing the legacy of the conflict which affected all of society.

¹² MI5 sought immunity for agents' criminal acts, tribunal told, Press statement from Pat Finucane Centre, 4th October 2018, Available at: <http://www.patfinucanecentre.org/state-violence/mi5-sought-immunity-agents-criminal-acts-tribunal-told> (Accessed 4th October 2018)

D. Historical Investigations Unit (HIU)

PFC welcomes proposals to establish an independent investigative policing body, separate from the PSNI, to investigate conflict-related deaths;

We also welcome provisions that would allow the HIU to issue reports to persons injured in incidents where someone has lost their life;

However, we think that the five-year proposed time period for completion of outstanding cases is unrealistic. Although there is provision for the SoS to extend the investigatory function of the HIU for up to one year (Clause 37 (2) (b)), PFC submits that provision should be made for an extension of funding for the HIU to ensure all cases are investigated and victims and survivors are adequately supported to engage with the legacy institutions.

12) Commitment to 'full disclosure'

- I. PFC welcomes the inclusion of statutory duty on the British government and its agencies to provide "full information disclosure" to the HIU (Clause 25). However, we remain sceptical that the security services and Ministry of Defence will comply with this requirement. In cases of non-compliance the HIU Director would have to resort to judicial review proceedings against the relevant agency that could be time-consuming and costly. PFC submits that agencies who fail to comply with the disclosure requirement should face significant sanctions/ penalties as a deterrent, something that is not currently within the proposed legislation;
- II. PFC is concerned that there has been a roll-back from the initial commitment that agencies would 'hand over' their files and materials, so that the HIU could then determine relevancy to the particular case(s) they are investigating. It is our

understanding from engaging with the NIO that a difficulty arises in respect of policing disclosure because each agency has its own system of archiving and accessing material and a new team would not know how it works or how to access the information. Steps should be taken to address this;

- III. A rigorous oversight mechanism should be established to examine the level of co-operation and disclosure from the various agencies;
- IV. The HET, Police Ombudsman and Coroner's Service have all faced difficulties in accessing material from agencies in the past, rendering their investigative role almost impossible. In each case there is a duty of disclosure that has been thwarted.

Some examples are highlighted below:

HET: Staff in the PSNI intelligence branch, some of whom were former RUC special branch officers, were the gatekeepers for intelligence being passed to the HET;¹³

Coroners Service: Criticism of the senior coroner's ability to deliver an inquest into the deaths of six unarmed men, in jeopardy due to continued delays by the PSNI to disclose materials.¹⁴ Also the failure of the PSNI to disclose the existence of a military database, in their possession for over a decade, to the coroner;¹⁵

Police Ombudsman: OPONI forced to initiate judicial review proceedings against the PSNI for refusing/ delaying to provide his office with access to information linked to

¹³ HMIC Inspection of the PSNI, Historical Enquiries Team, 2013, page 92

¹⁴ Madden & Finucane Solicitors press statement, Coroner warns PSNI delays threatens his ability to hold proper inquiries, 31 May 2013, Available at: <https://madden-finucane.com/2013/05/31/coroner-warns-psni-delays-threatens-his-ability-to-hold-proper-inquiries/> (Accessed 14 August 2018)

¹⁵ Morris, A., PSNI did not disclose military database files to Troubles inquests, 31 January 2018. Available at: <http://www.irishnews.com/news/northernirelandnews/2018/01/31/news/military-intelligence-database-in-psni-possession-for-decade-was-not-searched-for-inquests-1245648/> (Accessed 10 August 2018)

conflict-related murders, including claims that OPONI officials were turned away from PSNI stations when seeking information.¹⁶

- V. Families are worried that the promise of 'full disclosure,' albeit in statutory form, is unrealistic and unlikely;
- VI. PFC welcomes the provisions whereby family reports will include a statement about the cooperation of Irish authorities in disclosure to the HIU. We submit that family reports should also include a statement outlining the level of co-operation from the different agencies;
- VII. In the interim period, before the HIU becomes operational, the UK government and its agencies should commit to securing archive material and evidence that may be of relevance to the work of the HIU. PFC is concerned that conflict-related material could be destroyed, hampering future investigations, as has happened in respect of other conflicts¹⁷.

13) Oversight and governance

- I. PFC is concerned that the HIU's funding budget is paid to the Policing Board from the NI Department of Justice (Clause 4), with no obligation on the UK Treasury centrally to fund and maintain the HIU (or other institutions.) Both the legacy inquest system and the OPONI¹⁸ have had budgets restricted or cut in recent times, hindering their ability to execute their functions (unlawfully in the case of legacy inquests¹⁹). PFC is

¹⁶ RTE, Northern Ireland's Police Ombudsman granted judicial review against PSNI, Available at <https://www.rte.ie/news/2014/0613/623687-ni-police-ombudsman/> (Accessed 10 August 2018)

¹⁷ See, for example, Cobain, I., Britain destroyed records of colonial crimes, 18 April 2012. Available at: <https://www.theguardian.com/uk/2012/apr/18/britain-destroyed-records-colonial-crimes> (Accessed 31 July 2018)

¹⁸ Press Association, (2014), Ulster police watchdog says cuts are delaying inquiries into Troubles killings, *The Guardian*, 30 September 2014, Available at: <https://www.theguardian.com/uk-news/2014/sep/30/ulster-police-watchdog-cuts-delaying-inquiries-troubles-killings>. Accessed: 25th July 2018

¹⁹ Hughes (Brigid) Application [2018] NIQB 30

- concerned that budgetary control could be politically exploited to hamper the effectiveness of the HIU if safeguards are not in place. Provision should be made to oblige the UK government to fund the SHA institutions, particularly the HIU, as it is the UK government, not the devolved Executive, which has the procedural obligations arising under ECHR. Funding should be ring-fenced and adequate, with provision for extension if the work is not completed within the requisite time-frame;
- II. PFC is also concerned that the Secretary of State for Northern Ireland has the power to veto any Policing Board inquiry into the HIU on grounds of ‘national security’, thus undermining their oversight ability;
 - III. PFC submits that the Independent Human Rights Legal Advisor role within the Policing Board should be reinstated, with powers to advise on human rights issues, arising in relation to the HIU. It is unacceptable that this function has been dispensed with;
 - IV. PFC welcomes plans for a Code of Ethics to be produced by the oversight body, to include s. 75 (NI) Act 1998 and human rights obligations and standards for HIU officers. PFC suggests that the Human Rights Legal Advisor should have an active advisory role when devising this code. (For PFC’s views on Article 2 considerations see ‘Structure and operation of investigation teams’ section below.)
 - V. The Policing Board is not currently constituted, as we have no Executive. PFC is concerned that the current difficulties faced by the PSNI, in the absence of the Policing Board holding them to account, will be replicated with the HIU. We welcome plans to introduce legislation in the near future to bridge this gap as outlined in meetings with the NIO.

14) Early Release Scheme

PFC welcomes proposals to amend the Northern Ireland (Sentences) Act 1998 to troubles-related offences between 1 January 1968 and 10 April 1998, to include members of the security forces. Since the introduction of the Early Release Scheme (ERS) there has been confusion as to whether it applied to members of the security forces convicted of troubles-related offences. PFC welcomes plans to clarify the position that also provides consistency of treatment for all conflict actors.

15) Caseload and remit

- I. PFC has concerns regarding the proposed extension to include deaths from 10 April 1998 until 31 March 2004 (Clause 5 & Schedule 3). It is our view that the signing date of the Belfast Agreement has symbolic, political and historical importance, marking the end of the conflict. However, we submit that all those bereaved as a result of the conflict, including those post-April 1998, should have the opportunity to avail of an Article 2 compliant investigation, if they so wish. This should be a choice. The families concerned should have an input into the decision-making process, with consideration given to genuine fears that a referral to the HIU may delay or stop other legal avenues that families are pursuing. In this regard we support concerns raised by our colleagues in the Omagh Support and Self-Help Group who believe such an extension could jeopardise the campaign on behalf of victims and survivors of the August 1998 Omagh bombing for a public inquiry;
- II. The proposals state that cases that were part of the HET's caseload 'requiring further investigation', and those cases currently with the Police Ombudsman's (OPONI)

- Historical Investigations Directorate (HIB) would pass to the HIU. This threshold should not be so high as to, in effect, disqualify cases from investigation;
- III. PFC is concerned that the Chief Constable is vested with powers to determine, from the outset, which cases form part of the HET's caseload before 24 December 2014 and therefore which cases fall within or outside the HIU's remit (Clause 5 & Schedule 3);
 - IV. Under the HET, families received a review into the circumstances of their loved one(s)' death(s). Under the HIU families will (hopefully) receive an Article 2 compliant police investigation. It is our view that this creates a differential between those whose cases were dealt with by the HET and those that will be dealt with by the HIU. This represents an inequality which is unacceptable. Many families have accepted reports received from the HET, however if families have outstanding issues/questions they should be able to avail of a HIU investigation;
 - V. All cases involving the British army should be investigated by the HIU;
 - VI. All cases where deaths are attributable to the RUC should be investigated. To date these cases have been outside of the HET/ OPONI remit. We welcome reassurances by the NIO²⁰ and LIB PSNI²¹ that RUC killings would be the subject of investigation, not just allegations of misconduct or flawed investigations;
 - VII. PFC submits that the HIU should be able to employ full policing powers in ALL cases, including those touching on professional misconduct by police officers. Although the proposed powers replicate those currently vested in OPONI, full policing powers

²⁰ Meeting with NIO officials and VSS Advocacy Support Workers at a meeting in Belfast, 24 July 2018.

²¹ By email to the PFC, 31 May 2018, from PSNI LIB.

would strengthen HIU's ability to conduct all investigations, rather than having a two-tiered system;

- VIII. PFC acknowledges that a number of cases are at an advanced stage with the PSNI LIB/ OPONI and will continue to progress until the HIU is established and becomes operational. Schedule 4 provides for this situation and states that the Chief Constable/ Police Ombudsman will come to an agreement regarding which body should continue with the investigation. The views of families should be sought when determining whether an advanced case is transferred to the HIU. If the transfer would result in unacceptable delay, then it should remain with LIB/ OPONI;
- IX. If, however, an OPONI investigation results in evidence regarding civilian criminality, this should be passed to the HIU for investigation (currently in these cases OPONI would pass information to the PSNI for investigation);
- X. Some cases currently within the OPONI caseload concern deaths that took place in the Republic of Ireland. Statutory provisions should be enacted to ensure a mandatory obligation on HIU to share information and evidence with An Garda Síochána (and vice versa);²²
- XI. PFC/ JFF have made representations to the Irish government calling for a dedicated Garda resource to be established (either by way of a Legacy Unit or a number of dedicated officers) who could deal with information requests from the HIU/ ICIR/ court service, and also fulfil an investigatory function when evidence is uncovered in the north that requires investigation by Irish authorities. Procedures should be in place to ensure information and evidence is shared without obstruction.

²² PFC/ JFF are making representations to DFA regarding their obligations arising under SHA.

16) HIU Director

- I. PFC submits that an international body should be included in the appointment of the HIU Director, such as the UN human rights agency (OHCHR), along with the Attorney General for Northern Ireland, Victims' Commissioner and Head of Civil Service, and a Department of Justice nominee with criminal investigations experience;
- II. We welcome the move from the previous proposals that vested the appointment of the HIU Director in the First and deputy First Ministers, in consultation with the Justice Minister. Notwithstanding the lack of a current Executive, when it was 'functioning' there was considerable and unacceptable delay in the appointment of a Victims' Commissioner, with suitable candidates blocked by one party or the other²³.

17) Structure & operation of investigating teams

- I. Clause 3 (3) and Schedule 2 outline the provisions relating to the employment and secondment of HIU investigators and states that as far as practicable the HIU must employ as officers: *"(a) persons who have experience of conducting criminal investigations in Northern Ireland, and (b) persons who do not have that experience but have experience of conducting criminal investigations outside Northern Ireland."*
- II. PFC appreciates that some families (for example those of members of the security forces who were killed during the conflict), may have no objection and indeed prefer their case to be investigated by a team comprising of former RUC and/ or serving or former PSNI officers;

²³ Gordon, G., Northern Ireland victim's commissioner delay criticised, 11 June 2015. Available at <https://www.bbc.co.uk/news/uk-northern-ireland-33103122> (Accessed 13 August 2018)

- III. Feedback from families has been mixed when discussing the recruitment/secondment of PSNI investigators. Some have expressed strongly that there should be no PSNI involvement at all in HIU. Other families have expressed a willingness to consider recruitment of PSNI officers, providing they have not formerly served in the RUC, that there are tight conflict of interest policies in place, and that families can choose to engage with teams without PSNI officers. A small number of families have experience of engaging with the PSNI LIB and some have stated that they have confidence in individual officers to carry out a thorough and professional investigation. They do not, however, have trust and confidence in the PSNI as an agency to deal with legacy cases;
- IV. As a minimum safeguard PFC submits that no former members of the RUC should be employed, in any capacity or role, within the HIU. This reflects the unanimous view of families that we have consulted;
- V. PFC is further concerned that employing or seconding officers from the PSNI could undermine the Article 2 independence of the HIU. The High Court has recently determined in the Jean Smyth case that the PSNI LIB “*lack the requisite independence required to perform an Article 2 compliant investigation in respect of (Miss Smyth’s) death.*”²⁴ PFC submits that the involvement of ‘seconded’ PSNI officers in investigations could be in breach of Article 2²⁵ and could also undermine the trust and confidence of the families in the institution;

²⁴ [2017] NIQB 28

²⁵ Seconded officers would still be employed by the PSNI, under the control of the Chief Constable. This is not the case with former PSNI officers now employed by the HIU.

- VI. The draft SHA Bill proposed that investigative teams be separated into different units, including at least one that does not include a HIU investigator with a real or perceived work-related conflict (Clause 10). This, in our view, is not sufficient to satisfy the Article 2 independence requirements. PFC notes that the proposed structure of the HIU would follow the HET model of different teams of which at least one was comprised of investigators with no prior connection to the security forces in the north. A report by Her Majesty's Inspectorate of Constabulary (HMIC) in July 2013 held that "*(although) (t)he structure of the HET... is designed to guarantee the necessary independence.....our findings raise two concerns about whether the HET's processes, in practice, reach the required level of independence for the purposes of Article 2*".²⁶ The report was highly critical of the HET's handling of, in particular, state involvement cases. They concluded that these investigations were not Article 2 compliant (hence requiring investigation now);
- VII. PFC is concerned that the proposed structures could result in deliberate or inadvertent disclosure of information between teams, diluting the independence of investigations;
- VIII. Further, it is our experience that it may not be clear from the outset which cases may involve the state;

²⁶ HMIC, Inspection of the Police Service of Northern Ireland Historical Enquiries Team, Executive Summary, July 2013. Available at <https://www.justiceinspectors.gov.uk/hmicfrs/media/inspection-of-the-police-service-of-northern-ireland-historical-enquiries-team-20130703.pdf> (Accessed 25 July 2018)

- IX. An explicit duty to recruit investigators with NI experience is likely to lead to legal challenges similar to those taken against LIB PSNI in recent times regarding Article 2 compliance;
- X. PFC submits that the HIU should follow the precedent of Operation Kenova, an investigation established under the control of the Chief Constable of Bedfordshire to investigate crimes connected to 'Stakeknife'. Operation Kenova *"(does) not include personnel who are serving in or have previously served in the Royal Ulster Constabulary, Police Service of Northern Ireland, Ministry of Defence or Security Services;"*²⁷
- XI. Further, the HIU should adopt a more robust conflict of interest policy such as that employed by OPONI²⁸. This includes actual, perceived or potential conflicts of interest and states:
- "When conducting investigations where Article 2 is engaged, the Police Ombudsman is obliged to ensure that such investigations comply with the requirements of independence under the European Convention and Human Rights Act. There are therefore specific circumstances in which the Office considers that it may not be appropriate for staff from a former RUC, PSNI or Military background to investigate certain matters;"*²⁹

²⁷ Operation Kenova, Terms of Reference available at: <http://www.opkenova.co.uk/investigation-terms-of-reference> (Accessed on 25 July 2018)

²⁸ Police Ombudsman for Northern Ireland, Conflict of Interest Policy, March 2013.

²⁹ Ibid at para 7.1

- XII. PFC argues that OPONI's Article 2 policy should be adopted to ensure the HIU's independence is robustly safeguarded. This policy states:

*"Investigators of (state-related deaths) will be required to be Article 2 compliant; that investigators have no connection in terms of previous working experience with the organisation or organisations involved in the death, (specifically previous working experience in the RUC or in a military regiment in support of the RUC at the time of death)."*³⁰

18) Disclosures

PFC believes that all families have a fundamental right to information regarding the circumstances of their loved one(s) deaths. However, we recognise that there may be legitimate reasons why information cannot be disclosed in family reports, for example, to prevent the identification of an individual when to do so may put their life at risk.

We have serious concerns regarding the disclosure provisions currently outlined in the SHA Bill;

19) National Security

- I. Under the draft legislation the HIU must inform the Secretary of State (SoS) if they plan to disclose such information in a report to families. SoS can then prohibit disclosure *'if the disclosure of the sensitive information would, or would be likely to,*

³⁰ Police Ombudsman for Northern Ireland, Article 2 Policy, December 2016 para 8.

prejudice the national security interests of UK.' SoS must consider whether reasons can be given why prohibition is necessary;

- II. PFC is gravely concerned regarding this wide-reaching power of the SoS that, in our view, is open to abuse;
- III. The term 'national security' is not defined in UK legislation and PFC believes it could be used to prevent information that is politically embarrassing to the British government and/ or its agencies from being released. A definition of 'national security' should be included in the SHA Bill for the purposes of this legislation;
- IV. As a bare minimum, restrictions on the basis of 'national security' should NEVER be permitted to cover up criminality;
- V. Further, the phrase 'prejudices national security interests' of the UK is a departure from the language used in the Stormont House Agreement (which doesn't mention 'national security' at all.) The Agreement stated that information could be restricted to 'keep people safe and secure' and the onus was to ensure no individuals were 'put at risk'. PFC submits that the language used in the legislation should mirror that agreed under the agreement;
- VI. PFC acknowledges that national security obligations may require restrictions on onward disclosure of sensitive information about counter-terrorist strategies which are lawful and in current use. However, given that most of the conflict-related deaths occurred over 30 years ago, technological advances and modern methodologies would realistically mean that these strategies are no longer in current use;

- VII. PFC welcomes provisions to allow the HIU Director and/ or families, to challenge decisions by the SoS to remove information from reports. We note that to date families may not have been informed if information existed and had not been disclosed in the past (for example with the HET or OPONI);
- VIII. However, the grounds whereby families and/ or the HIU Director can appeal are very narrow, namely whether such behaviour was *'so unreasonable that no reasonable Secretary of State could have taken it.'* If the court determines that the information was withheld unreasonably then the SoS must re-consider the matter and his/her decision can be appealed again;
- IX. The draft legislation proposes that appeals be heard in closed proceedings where the family would be excluded. PFC, and some of the families we support, have had experience of Closed Material Proceedings (CMP). These are deeply flawed mechanisms. It can be very distressing to know information relevant to the death of a loved one is being withheld by the government. It feeds distrust and undermines confidence in the rule of law;
- X. PFC are reluctant to encourage families to engage in a process that, in our view, lacks transparency, equality of arms and that is not open to scrutiny;
- XI. Some families have confidence in individual members of the legal profession who are known to them and would trust them to advocate on their behalf in CMPs. However, given the restrictions regarding tainting and conflict of interest, it is likely that many lawyers would be excluded from representing families with whom they have already built a relationship. Lawyers would also be excluded from representing different families where cases are linked in some way and subject to CMP;

- XII. PFC understands that families/ HIU Director will have to apply to the High Court for leave to appeal a non-disclosure decision by the Secretary of State (this is a roll-back from previous assurances that the leave stage would be by-passed). We are concerned that proper consideration has not been given to this, that no engagement with the Court Service has taken place in this regard, and that families will face delay and legal obstacles when pursuing an appeal;
- XIII. PFC is also concerned that additional funds have not been set aside for the Court Service to deal with additional capacity needed to hear appeals. Is it anticipated that this money would come from the overall £150m that has been proposed for the SHA Legacy mechanisms? If so this may detrimentally affect the resourcing of the new SHA mechanisms;
- XIV. PFC anticipates that when families receive a report from the HIU that states information has been withheld concerning the death of their loved one(s) on the grounds of 'national security', this may leave them feeling distressed that they will never know the full truth about what happened. This will further erode their trust in the state and justice mechanisms.

9. Sensitive information

- I. PFC is concerned at how the definition of 'sensitive information' under Schedule 9 is formulated. It is so broad that it could be argued that virtually all information held by various agencies 'might prejudice national security' (not defined) and would therefore be blocked by the Secretary of State (SoS). The SoS's powers are too wide reaching - touching on virtually all information - and the discretion to block information for release is too wide and vague;

- II. PFC is concerned that M15/MI6, police etc can designate information as ‘sensitive’ before it even reaches the HIU, therefore requiring it to be considered by the SoS. (The NIO has stated that material is likely to keep the classification it currently has, thus not requiring a re-examination and reclassification of material - however this is not stipulated in the legislation.) PFC submits that this determination should be made by the HIU Director. The HIU must then tell SoS if they plan to disclose such information in a report to families;
- III. It has been widely reported that the MoD holds large repositories of materials that have not yet been assessed or classified.³¹ This material was not available to the HET (thus is potentially new evidence) and will require the MoD to examine and classify. This process is necessary, but it is also time-consuming and the MoD will have a gate-keeper function in terms of what is relevant and/ or sensitive before it is passed to the HIU. PFC is concerned that important information will not be passed on (and, as mentioned above, there is no oversight body to ensure MoD compliance with their statutory duty to disclose);
- IV. PFC has experience of agencies redacting information already in the public domain or that has been provided to families ‘in the public interest’. For example files that were open in the National Archives (NAUK) in London that have been withdrawn and reclassified as closed; Sections of HET Reports, already provided to families and in the public domain, that have been subsequently redacted and marked as subject to Public Interest Immunity (PII) in judicial review proceedings³²; Closed NAUK files that

³¹ Cobain, I., Ministry of Defence holds 66,000 files in breach of 30-year rule, *The Guardian*, 6 October 2013. Available at <https://www.theguardian.com/uk-news/2013/oct/06/ministry-of-defence-files-archive> (Accessed 15 August 2018)

³² Including information in the ‘Intelligence’ section of HET Reports into the murders of Elizabeth McDonald and Gerard McGleenan at the Step Inn Bar on 16 August 1976, available to the families and featuring in

contain information that is already in the public domain, closed on 'national security grounds. For example files relating to the death of Sammy Devenny in Derry in 1969 were closed until 2022 (over 50 years after his death.) When the PFC on behalf of the family appealed their closure some of the information contained in the files were released, namely newspapers articles already in the public domain.³³ There is no reason why this information would be retained due to national security concerns;

- V. Under the draft legislation the SoS must be given ten working days' notice before the HIU discloses sensitive material to Director of Public Prosecutions (DPP), PSNI, Criminal Justice Inspectorate (CJI), Her Majesty's Inspectorate of Constabulary (HMIC) or the Coroner. In the interests of justice and transparency this information should be shared with the relevant authorities, without potential interference by the Secretary of State. Each agency is experienced in handling sensitive materials and has protocols and legislation in place regarding the handling of such information.

10. Legacy inquests

- I. PFC has some concerns regarding provisions within the SHA Bill to limit the role of legacy inquests. The draft Bill states that once the HIU is up and running a coroner would be prevented from holding a legacy inquest until the HIU has completed an investigation into the death (or the HIU closes) and would only have power to proceed with the inquest if there were 'compelling reasons;'

Cadwallader, A., 2013, *Lethal Allies: British Collusion in Ireland*, Mercier Press: Cork. This information was redacted from the non-sensitive files provided to the coroner and families by the PSNI in advance of the inquest into the deaths.

³³ Including the files concerning the death of Sammy Devenny in Derry in 1969, *Derry Journal*, Devenny files will stay secret until 2022, 11 February 2014. Available at <https://www.derryjournal.com/news/devenny-files-will-stay-secret-until-2022-1-5869771> (Accessed on 14 August 2018)

- II. PFC is concerned that families who have been granted an inquest and have an expectation that they would 'have their day in court' would be denied this opportunity;
- III. PFC has supported many families through the coronial system and knows the importance of families seeing evidence tested in an open, public forum;
- IV. PFC does, however, recognise that an inquest is different from a criminal investigation which may (although unlikely due to the passage of time) result in a prosecution;
- V. PFC submits that the proposed reforms of the coronial system as outlined by the Lord Chief Justice (See paragraph C. 4) should proceed without delay and legacy inquests should proceed until the HIU is operational;
- VI. The views of individual families awaiting an inquest into the loved one(s)' death(s) should then be sought;
- VII. In cases where a new inquest has been granted by the Attorney General, or where no inquest has taken place at all, these should proceed regardless (as for example in the case of murdered GAA official Sean Brown³⁴).

11. Collusion cases

- I. Collusion is a term widely used in relation to legacy cases, it is not a term that solely relates to deaths from one section of the community;
- II. Collusion has been accepted at the highest levels of Government and policing. As a result of the Weston Park Agreement a number of public Inquiries were to be

³⁴ BBC news, Sean Brown murder: Inquest postponed indefinitely, 12 May 2015, Available at <https://www.bbc.co.uk/news/uk-northern-ireland-foyle-west-31435038> (Accessed 14 August 2018)

established. These were all established except the Inquiry into Pat Finucane's murder.³⁵ Each of the Inquiries established different definitions of collusion, some were very narrow, others were wider. Justice Smithwick stated at the start of his inquiry into the murders of RUC officers Breen & Buchanan into IRA / Garda collusion that:

'the issue of collusion will be examined in the broadest sense of the word. While it generally means the commission of an act, I am of the view that it should also be considered in terms of an omission or failure to act. In the active sense, collusion has amongst its meanings to conspire, connive or collaborate. In addition, I intend to examine whether anybody deliberately ignored a matter, turned a blind eye to it or pretended ignorance or unawareness of something one ought morally, legally or officially, oppose'.³⁶

- III. This definition of collusion has been accepted by the PSNI³⁷, the Police Ombudsman³⁸ and unionist politicians³⁹;
- IV. The current legislation for the first time attempts to define collusion (although the term 'collusion' is not used in the draft bill). According to CAJ *'(t)he purpose is not to provide a definition on which the HIU investigations will make findings as to whether there has been collusion (the bill is silent on this) but rather as the basis for decisions*

³⁵ The failure to hold a public inquiry into the murder of Patrick Finucane is currently being appealed by the Finucane family to the Supreme Court. A hearing was held earlier this year and the family are currently awaiting judgement.

³⁶ Report of the Tribunal of Inquiry into Suggestions that Members of An Garda Siochana or Other Employees of the State Colluded in the Fatal Shootings of RUC Chief Superintendent Harry Breen and RUC Superintendent Robert Buchanan on the 20th March 1989, page 16.

³⁷ In the PSNI's written submission to the Smithwick Tribunal, page 5.

³⁸ The murders at the Heights Bar in Loughinisland, Police Ombudsman report, 9 June 2016, page 6.

³⁹ BBC News, Smithwick Tribunal: Reaction to Irish police collusion, 3 December 2013. Available at: <https://www.bbc.co.uk/news/uk-northern-ireland-25208857> (Accessed 14 August 2018)

*as to whether deaths previously reviewed by the PSNI Historical Enquiries Team (HET) can be re-investigated by the HIU;*⁴⁰

- V. For collusion to be established, the Bill sets out two criteria both of which must be met, namely that a person:
- a. Facilitated an offence or avoidance of justice in relation to the death, and
 - b. Did so with the intention of achieving an unlawful or improper purpose.
- VI. It is also up to the Chief Constable to decide if these criteria have been met. Given that some allegations of collusion relate to members of the RUC, some of whom may have migrated into the PSNI, there is an obvious issue in relation to the perceived independence of the Chief Constable when it comes to making these decisions;
- VII. According to CAJ *“(c)ases can then be recommended for reinvestigation if the Chief Constable believes that the person in doing so either may have committed a criminal offence or also if they were an RUC officer (but not other branches of the security forces) committed misconduct, and that either require further investigation;*⁴¹”
- VIII. This definition requires a degree of intent, the intention of achieving an unlawful or improper purpose. Most other definitions of collusion include the notion of ‘turning a blind eye’ as an act of omission. We urge that any definition of collusion must include omissions as well as commissions;
- IX. The SHA definition focuses on an act or acts committed by an individual and the intention of an individual when he/ she carries out an act/ omission. The HIU will be

⁴⁰ Holder, D., How the Stormont House legacy legislation tries to define Collusion, 2 July 2018. Available at <http://eamonnmallie.com/2018/07/how-the-stormont-house-legacy-legislation-tries-to-define-collusion-by-daniel-holder/> (Accessed 25 July 2018)

⁴¹ Ibid

determining whether or not the individual, therefore, had the requisite intention of achieving an unlawful or improper purpose;

- X. Although the focus is on the individual, PFC submit that HIU reports to families and to the IRG should also contain statements regarding what the Breen and Buchanan Inquiry describe as collusion in an 'active sense.⁴²' The reports should include observations of acts or omissions carried out by the RUC and/ or other agencies on a systemic basis (for example evidence from declassified NAUK documents show that the Ulster Defence Regiment (UDR) was heavily infiltrated by loyalist paramilitaries who used their position to access weapons that were then used to carry out murders;)⁴³
- XI. In summary, the draft legislation contains a very narrow view of collusion and allows the Chief Constable to decide if collusion exists in individual cases. Any definition of collusion must be wider and include systematic actions of institutions and not just the actions of an individual. For example, no-one would suggest that the issue of child abuse could be adequately addressed by focussing on the actions of individuals with no reference to the policies, omissions or actions of institutions. Nor would it be acceptable if those with historic links to such institutions were able to determine if abuse occurred. Similarly, the PSNI should not be allowed to determine whether evidence of collusion exists.

⁴² PFC assert that the failure of the British government to proscribe the Ulster Defence Regiment (UDA) until 1992 was a collusive act.

⁴³ NUAK DEFE24/835 '*Subversion in the UDR*', Available at <http://www.patfinucanecentre.org/sites/default/files/2016-11/udr.pdf> (Accessed 21 August 2018)

E. Independent Commission of Information Retrieval (ICIR)

PFC welcomes the proposal to establish an independent information commission and believes the ICIR has the potential to offer families another route to receive information concerning the circumstances of their loved one(s)' death.

Steps should be taken to highlight the successes of the Independent Commission on the Location of Victims' Remains (ICLVR) and learn from the factors that made it a success including strong leadership, trust and confidence building, and managing expectations.⁴⁴

PFC also submits that the ICIR should model itself on the approach of the ICVLR and proactively engage with families and seek information, rather than waiting passively for people to come forward.

PFC has a number of further concerns regarding the ICIR, as envisaged under the SHA Bill:

1. Role of the Secretary of State

- I. PFC is concerned that the Secretary of State has power to block information in family reports if he/ she deems that it prejudices national security or puts someone's life or safety at risk (Clause 46);
- II. Unlike the HIU, there is no appeals process available to families or Commissioners to test whether the information does pose a genuine risk;
- III. Likewise, provision should be made - to enable families to challenge the decision-making of the Irish government in respect of information withheld from a family report.⁴⁵

⁴⁴ Dempster, Dr L., The 'Disappeared,' the ICLVR, and 'Dealing with the Past' in Northern Ireland, KESS, Stormont, 18 April 2018.

⁴⁵ PFC/ JFF will be making a similar submission to the Irish government regarding this issue.

2. Securing engagement-seeking information

- I. PFC believes one of the main challenges facing the ICIR will be persuading individuals and organisations to engage with the mechanism and provide information, despite the legal safeguards of limited immunity. The fear of investigation and possible prosecution is a very real deterrent;
- II. In particular, PFC is concerned that loyalists have not been involved in the discussion and design of the ICIR and groups have expressed reluctance to engage. There is a real danger that if one group do not engage, others may follow suit and this would result in a misrepresented view of the past when ICIR report to IRG;
- III. The explanatory notes accompanying the SHA Bill state at Paragraph 155 that Section 45 (4) has the effect that: “.. policing authorities or a coroner, for instance, would not be prevented from pursuing lines of inquiry based on information disclosed by the Commission in a report to a family;”
- IV. This note reflects the reality that when information enters the public domain, albeit in a private family report, that information may provide assistance to an investigative body (such as the HIU). The fear of investigation/ prosecution may be enough to deter information providers coming forward;
- V. However, PFC has undertaken a review of our current caseload and worked through hypothetical situations where information may be provided in an ICIR family report to determine whether, in our opinion, it would likely result in new lines of inquiry that could manifest in evidence;
- VI. Given the strict limitations on what information could be provided in a family report, it is unlikely in our opinion, although not impossible, for new lines of inquiry to result in new evidential opportunities;

- VII. PFC is aware that some discussions have suggested that a sequencing approach should be adopted, with the HIU concluding investigations before families can approach the ICIR (For example the ICIR could commence work 2 years after the HIU is operational, or cases would have to be deemed eligible to progress to the ICIR by the HIU certifying that the case has been closed);
- VIII. PFC understands that there may be advantages to a sequencing approach, such as minimising the risk of information providers being indirectly exposed to criminal liability by contributing to information retrieval;

There are various arguments against a sequencing model, including that;

- I. It would be confusing to families and difficult to design;
- II. Families' engagement with the different legacy institutions would take longer;
- III. Families who have engaged with the HIU, then the ICIR, may feel that they should (and there is currently not legislative reason why they couldn't) go back to the HIU with their ICIR family report if new evidence has emerged. Once again this prolongs the family's engagement with legacy institutions, which can be very distressing for families, giving false hope and expectation of a criminal justice outcome;
- IV. What would happen if new information was provided in a family (ICIR) report and the HIU had been wound up? These families would have no recourse to the HIU, other families may have - this would represent an inequality and could potentially lead to legal challenge;
- V. Those with information are getting older and vital information is being lost with information providers dying;
- VI. How would the credibility of unsolicited evidence be tested?

VII. This would delay reporting from the ICIR to the IRG for thematic assessment;

There are also arguments in favour of a form of sequencing,

- I. A number of families will no longer wish to engage in an investigative process such as the HIU and may wish to approach the ICIR directly. They may feel totally frustrated, disillusioned, scarred and/or re-traumatised after lengthy engagement with previous flawed processes such as the HET or OPONI; conversely they may feel that previous engagement did yield limited information but the 'well is now dry' from the perspective of a criminal investigation; and/or they may have no interest in a process that is intended to lead to prosecutions and would prefer an information retrieval process. Sequencing would mitigate delays for these families:
- II. The HIU option is not open to families outside the jurisdiction,⁴⁶ primarily families where conflict related deaths occurred in the Republic of Ireland. They may wish to approach the ICIR since they have no other option for information retrieval. Again sequencing would mitigate delays for these families. In addition, some families within that jurisdiction may be deemed not be eligible to access the HIU (though this is likely to be challenged in court) and they may wish to approach the ICIR;
- III. Sequencing would ensure that families are directed to the body most appropriate to their needs and rights. Were families to approach both the HIU and ICIR simultaneously this has the potential to clog up the system, disadvantaging those who only wish to avail of one or the other;

⁴⁶ See page 14 for PFC proposals on linked investigations in the Republic and the need for the Irish Government to anticipate this.

- IV. The HIU will carry out criminal investigations that may, where evidence meets the required threshold, lead to prosecutions. The ICIR will engage in an information retrieval process involving anonymity and limited protection to those providing information. Running both processes at the same time runs a very real risk of creating confusion and might therefore hinder either/or both processes. Both processes require, not just legal separation as is envisaged, a public perception that they are different routes with different outcomes;
- V. Sequencing would ensure that whichever process was first engaged and was active, either as a live criminal investigation or as an active information retrieval process, should be allowed to continue until such time as the relevant director (HIU-ICIR) deemed this was completed. Only then could the second process be engaged;
- VI. Therefore, PFC advocates for the HIU and ICIR to be established at the same time, with families given the choice of when they would like to approach the ICIR, if at all;
- VII. ICIR should prioritise cases where families have no other option.

3. Establishing credibility of information

- I. The draft legislation states that a family report must contain only information the credibility of which has been established to the satisfaction of the ICIR (Clause 42 (2));
- II. It is unclear how the ICIR intend to test the credibility of information;
- III. The ICIR should be empowered to undertake research to test the credibility of information;
- IV. They should also have the power to compel public authorities to disclose documents in the UK and Ireland. These provisions would strengthen the Commission's ability to

make credibility judgments, resulting in greater trust and confidence from families receiving information;

- V. There is danger, however, in approaching the relevant agencies seeking information in that they will be alerted to the fact that someone has come forward with information relating to a particular case. Safeguards should be adopted to ensure information is not inadvertently disclosed by the ICIR to other agencies. For example, to the HIU who may be undertaking an investigation at the same time.

F. Oral History Archive (OHA)

PFC welcomes proposals to establish an Oral History Archive (OHA) under the SHA Bill. It is an important mechanism which will allow those impacted by the conflict to record their stories, in a manner with which they are comfortable. Through our RoLMA project (See appendix one), PFC has first-hand evidence of the value of listening to victims and survivors, enabling them to reflect their experiences in their own words. In many instances families have reflected that telling the story of their loved one(s) and the impact of their death has been empowering and more beneficial than engaging with statutory agencies and/ or receiving official reports that stopped short of providing all the information and acknowledgement that the family hoped for. However, PFC has some concerns and suggestions regarding the proposals outlined in the SHA Bill regarding the establishment and operation of the OHA to ensure its independence, both real and perceived:

- I. PFC is concerned at the lack of detail outlining how the OHA will operate in practice;
- II. There should be active outreach to ensure that also those in GB, Ireland and elsewhere engage with the OHA (if they so wish);
- III. PFC is concerned that the OHA, as proposed, is not sufficiently independent as it will be situated within the Public Records Office of Northern Ireland (PRONI). It may be open to political interference as PRONI is overseen by the Minister for Communities;
- IV. Many families have faced (and continue to face) long delays and obstruction when trying to access court papers, including inquest documents, from PRONI. Some families have stated that they would not trust an OHA, based in PRONI, with their precious stories of a difficult period of their lives;

- V. Safeguards should be in place to prevent political / ministerial interference, including the establishment of a Steering Committee comprised of a group of experts to oversee the operation of the OHA and implement appropriate policies such as a Code of Ethics, Code of Conduct, acquisitions policies etc;
- VI. PFC notes that the proposed OHA would fall under the charge and superintendence of Deputy Keeper of Records, a senior civil servant vested with the power to decide which records should be publicly available, and which should be destroyed;
- VII. PFC argues that decisions regarding the constitution and operation of the OHA should be vested in the Steering Group, not the Deputy Keeper. We are persuaded by the argument put forward by the SHA Model Bill Group⁴⁷ that this represents a practical solution to limit potential political interference and generate a greater degree of trust and confidence from potential contributors;
- VIII. Decisions regarding the redaction, availability and otherwise of records should not be in the gift of the Deputy Keeper. These should be taken by the Steering Group in light of agreed policies. Contributors should also have more of a say in what happens to their records. Further, PFC submits that materials should never be destroyed. They are of significant historical, political and social importance;
- IX. Appointments to the OHA Steering group should be made in accordance with transparent criteria and processes established by the Research Council UK's (RCUK) Arts and Humanities Research Council;
- X. The Steering Group should be comprised of individuals and representatives with a range of skills and experiences. This should include those from existing groups

⁴⁷ The group includes academics and experts from Queens University Belfast, Ulster University and the Committee on the Administration of Justice and their submission was launched at an event in QUB on 30 August 2018.

- engaged in oral history projects and networks (who can bring practical knowledge), those with legal expertise, and those with technical/ archival experience;
- XI. A diverse and inclusive range of stories should be included in the archive, with clear guidelines stipulating what can and can't be included and the rationale for the decision;
 - XII. PFC acknowledge that for legal reasons it may not be possible to include or release some materials, but this should be clearly defined in guidelines by the Steering Group (as stated above, this should not be left to the discretion of the Deputy Keeper);
 - XIII. Community and grassroots organisations already engaged in oral history projects should be engaged and invited to submit stories and collections to join the OHA, with the informed consent of contributors. Such groups and networks should be engaged at an early stage to provide advice, experience and guidance and inform the Steering Group of best practice;
 - XIV. The Steering Group, not the Deputy keeper, should report themes to the Implementation and Reconciliation Group;
 - XV. PFC has concerns about the proposed 'timeline of the troubles' to be prepared by the OHA. It is unclear what the purpose of such a timeline would be and who would undertake the work. Again, PFC echoes the fears raised regarding the timeline by the SHA Model Bill Team.⁴⁸

⁴⁸ Ibid

G. Implementation and Reconciliation Group (IRG)

- I. IRG will assess and review the implementation of the other SHA bodies. How?
- II. The IRG will commission a report on themes after 5 years, based on evidence on the work of the other legacy institutions. PFC and others have raised concerns regarding the 5 year timescale proposed for the HIU, OHA and ICIR to complete their work. Provision should be made for an extension of this timescale to be more realistic;
- III. IRG is to be funded by the First Minister and deputy First Minister acting jointly. There is a danger that one or other could block resources to the body if they disagree with some of the emerging themes from the other bodies;
- IV. Primary focus of the IRG is to promote reconciliation. There may be a danger that some of the themes, for example, use of torture by state forces, allegations that IRA members operating in border areas conducted purely sectarian attacks, or allegations of collusion (both north and south of the border), may be considered damaging to reconciliation and ‘watered down.’ These are just some of the difficult issues that need to be tackled head on;
- V. PFC welcomes proposals that appointed individuals would work with the Economic and Social Research Council (ESRC) to support independent, quality research;
- VI. It is vital that the issue of collusion should be looked at as part of the thematic work of the IRG;
- VII. PFC note that academics commissioned by the IRG to undertake thematic analysis can, if they think it is appropriate, refer to other official sources of information outlined in s. 62 (3). PFC agree that academics and the IRG should not be limited to the four principle reports emanating from the work of the HIU, OHA, ICIR and the President of the Coroner’s Court (NI), however we submit that the exhaustive list

outlined under s. 62 (3) is too limited and proscriptive. “Expert academics” should be able to consult ANY materials they deem necessary to undertake their study, including official and non-official materials. There are other important official reports/ reviews/ inquiries that do not feature on the s.62 (3) list that should be consulted, as necessary. For example, the Barron reports⁴⁹; the Da Silva report⁵⁰; the Saville report⁵¹; the unredacted Stalker-Sampson report etc. Further, the academics should be able to consider a range of other open-source materials such as authoritative websites (such as CAIN⁵²), books, documentaries, declassified government documents etc to inform their work;

- VIII. Failure to consider a broad, non-exhaustive range of sources by the IRG could distort the history and understanding of the conflict.

Submitted by the Pat Finucane Centre 4th October 2018

⁴⁹ Joint Committee on Justice, Equality, Defence and Women’s Rights, Final Report on the Report of the Independent Commission of Inquiry into the Dublin and Monaghan Bombings, March 2004.

⁵⁰ Desmond de Silva, The Report of the Patrick Finucane Review (2012) HC 802 2012-13

⁵¹ Report of the Bloody Sunday Inquiry, 15 June 2010.

⁵² Conflict Archive on the Internet (CAIN), Available at: <http://www.cain.ulst.ac.uk/> (accessed 29 August 2018.)

APPENDIX 1

Recovery of Living Memory Archive (RoLMA)

PFC's RoLMA project provides an opportunity for families to recover the truth about the circumstances of their loved one's death, to record and express their own truth about their experience and ensure that there is a permanent tangible legacy for their own families and for the greater community.

RoLMA is supported by the European Union's Peace IV Programme, managed by the Special EU Programmes Body (SEUPB).

The Recovery of Living Memory Archive (ROLMA) is a project of the PFC and follows on from the Legacy Project.

It has developed in three phases:

Phase 1

In **Phase I** the PFC provides an advocacy, advice and support service to families, bereaved and/ or injured as a result of the conflict, who wish to engage with statutory agencies to establish the facts surrounding the death/s of their loved one/s or injuries sustained.

In both jurisdictions Phase I will result in the production of a factual document outlining, from an investigative perspective, the circumstances surrounding the death.

Phase 2

Phase II will aim to record the impact of the loss and suffering on victims' families and on survivors and provide biographical background on the deceased and injured - the human

side of the story that is missing from official accounts. This storytelling aspect has been piloted within the Legacy Project.

The need for this is very clearly apparent on both sides of the border. It has become very clear to both JFF and PFC that the forensic detail of an official report does not meet the needs of families to document the emotional, psychological and financial impact.

This is crucial for addressing the need to bring about closure and so that a negative legacy of the past is not passed to the next generation.

Phase 3

Phase III will combine the factual/ investigative information with the storytelling/ biographical aspect resulting in a final document that will be compiled in collaboration with families. This unique record will be archived at the Linenhall Library in Belfast and at the National Library in Dublin.

Objectives

The Recovery of Living Memory Archive (ROLMA) is committed to the following objectives:

1. To ensure that victims' families and survivors receive the maximum permissible disclosure of information regarding the death/s of their relative/s from those statutory agencies tasked with investigating historic conflict related fatalities on both sides of the border and where appropriate information about incidents where survivors were injured.

2. To ensure that the human impact of the bereavement and the biographical background of the victim is recorded.
3. To narrow the list of questions passed from generation to generation following a violent death and thereby lessen the impact of trans-generational trauma.
4. To collaborate with families in the production of an all-encompassing document that will record for posterity the factual background to the incident, the subsequent impact on survivors but also the positive biographical story of someone's life.
5. To make the final reports publicly accessible.
6. To provide a template on how to bridge the gap between storytelling and truth recovery. It is hoped that this will provide valuable learning on how to deal with the legacy of the conflict in a more holistic way.
7. To lessen the impact of the marginalisation experienced by victims/ survivors in the Republic who have been excluded to date from the development of policy and practice in respect of victims' issues.
8. To provide skills-sharing workshops for other support organisations in order to build capacity throughout the sector in advocacy and advice skills. In particular PFC will provide skills-sharing with those groups more likely to gain the confidence of those in the Protestant/ unionist/ loyalist community who wish to engage with statutory bodies.
9. To develop informal support networks among families bereaved by the conflict and, where appropriate signpost people to appropriate support services.
10. To create a model for addressing the impact of conflict for use by the wider community, locally and internationally.

