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Dealing with the past in Northern Ireland: a proposed model for information redaction under the Stormont House Agreement

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Dealing with the Past: A Proposed Model for Information Redaction under the Stormont House Agreement

Introduction

This paper is designed to assist efforts to narrow the gap between the different actors on the outstanding issues preventing the establishment of the various past-focused institutions contained in the Stormont House Agreement (2014). In particular, it suggests an independent judicial mechanism that could make determinations on balancing the state's responsibilities to protect people, with the truth-recovery related rights of families affected by the conflict. It focuses, in particular, on the workings of the Historical Investigations Unit (HIU). In the interests of harmonising as much as possible the work of the Stormont House Agreement institutions, the proposed mechanism could be used to make independent determinations in any analogous disputes between the Independent Commission on Information Retrieval (ICIR) and the British or Irish governments or indeed any disagreements which might arise with regard to the other agreed mechanisms in the SHA.

Underpinning Principles

Having examined in some detail the relevant UK and European Court of Human Rights jurisprudence in particular, as well as analogous practical experience in the UK and elsewhere, a number of working assumptions have emerged which have underpinned and been incorporated into the model proposed below:

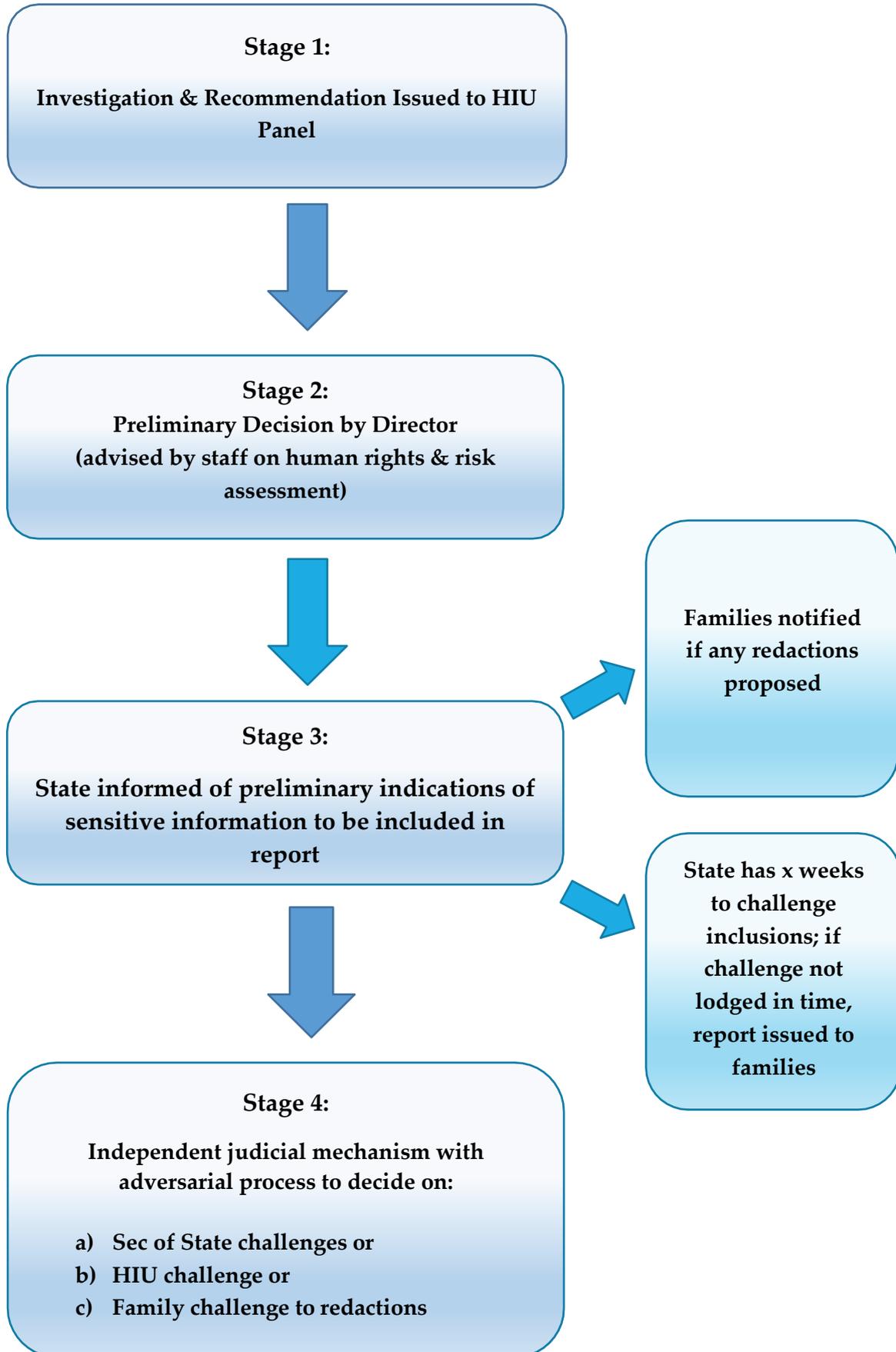
- Families who have lost relatives as a direct result of the conflict have a right to truth and the right to an investigation into the circumstances of such deaths, which is compliant with Article 2 of the European Convention on Human Rights.
- The State has an obligation to provide Article 2 compliant investigations in all conflict-related deaths.
- States have a legal obligation to protect all persons within their jurisdiction from harm. In tightly defined circumstances (see Appendix 1), this may necessitate proportionate restrictions on disclosure to protect the effectiveness of operational methods of the police and other security services which are in current use and which are lawful.
- Such restrictions cannot be used to hide human rights violations or otherwise unlawful or embarrassing activities.
- Public confidence in the HIU, ICIR and other mechanisms outlined in the SHA can only be served by maximising the independence and decision-making

powers of the relevant institutions, free from state or other political interference.

- ⊙ Where disputes arise between the HIU and the Secretary of State or other government departments with regard to onward disclosure of information to families, and where such disputes cannot be resolved within a reasonable period of time, decisions on balancing competing imperatives should be made by an independent mechanism.
- ⊙ This independent mechanism should be presided over by a judge, or judges, of at least high court level.
- ⊙ To maximise public confidence in the process, criteria to inform the HIU and (where necessary) the independent judicial mechanism should be published in the legislation that establishes the Stormont House Agreement institutions. Those criteria should be devised from the relevant UK, European Court of Human Rights jurisprudence and other relevant international standards (see Appendix 1 draft criteria).
- The UK government has to date indicated a desire to use the term national security as the basis for seeking to redact sensitive information from HIU reports. However, national security is not defined in UK legislation. Using this term in the implementing legislation would require defining the term – at least for the purposes of dealing with the past regarding the conflict in or related to Northern Ireland.
- A more straightforward approach would be to excise the term national security from the enabling legislation and replace it in the legislation with the actual criteria for redaction. The term that is used in the Stormont House Agreement is ‘keeping people safe and secure’ that could be used as short hand for this duty.
- ⊙ The independent judicial mechanism tasked with reviewing decisions on information redaction should involve an adversarial process wherein the respective arguments of the HIU, government departments and the public interest in disclosure would be tested.
- Such an adversarial process requires that all parties are represented by lawyers in whom they have full confidence. Steps should be taken to ensure ‘equality of arms’ between those lawyers representing the Secretary of State, the HIU Director, and the affected families. To that end, a pool of independent or ‘public interest’ advocates should be created. Families would then choose lawyers from that pool to represent their interests before the independent judicial mechanism. These lawyers would be vetted to ensure that they could access to all sensitive materials. Protocols should be developed to allow these advocates to provide a ‘gist’ of the proceedings to the families, their lawyers, and NGOs supporting them as part of taking their instructions (see further below).

- ⊙ Senior judicial personnel with relevant knowledge and experience, in either the jurisdiction or elsewhere, should staff the independent judicial mechanism. The appointed judge(s) must be capable of commanding public confidence and support. The Lord Chief Justice of Northern Ireland, in consultation with the British and Irish governments, should appointed the judge(s). Other appropriate international institutional stakeholders should also be consulted, including the UN Special Rapporteur on Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence and the Council of Europe Commissioner on Human Rights.
- ⊙ The detailed reasoning for the decision taken by the independent judicial mechanism should be published, subject to the same redaction criteria.
- If a decision is taken to redact sensitive information from a report to families, the redactions must be the minimum necessary to materially reduce the risk of death or harm to the specified persons concerned and proportionate to the level of risk when balanced against the public interest in disclosure. As is the case with reports issued by the Office of the Police Ombudsman, such redactions should only relate to the narrative or 'findings' elements of HIU report and not to the conclusions reached. Such redactions cannot be used to obscure or block information below the minimum disclosure requirements as detailed in Appendix One.
- ⊙ All steps should be taken to minimise the potential for vexatious challenges to the decision of the independent judicial mechanism. One way to minimise such challenges would be to include a statutory appeal mechanism within the enabling legislation with a right of appeal to a higher judicial authority (e.g. the Northern Ireland Court of Appeal) with the grounds for appeal specified in that legislation.

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Stage One: HIU Investigation and Recommendation

HIU investigation team conducts investigation and drafts case report findings for families. The enabling legislation should specify the assumption that all relevant information shall be provided to families, subject only to the duty to keep people safe and secure. Draft reports shall indicate whether any 'sensitive information' is included relevant to the death(s) under investigation.

Stage Two: Preliminary Decision by HIU

Advised by an appropriate panel, the HIU Director shall consider whether the sensitive information should be included in the report. That panel shall include a *Human Rights Advisor* and an *Advisor on Public Safety and Security*. The Policing Board will appoint the panel members. The panel shall balance the public interest and families' truth-recovery related rights against the duty to keep people safe and secure.

Stage Three: Preliminary Indication on Sensitive Information and Space for Resolution of any Disputes

The HIU Director shall inform the Secretary of State of the intent to use any sensitive information in the report and shall specify which sensitive information is intended to be used. The Secretary of State shall have a specified period to respond; otherwise, the report including the sensitive information will be issued to the family.

This stage may include provision for a time-limited resolution of any disputes between the HIU and the relevant authorities regarding the publication of sensitive information.

If there are disputes between the HIU and the Secretary of State relating to the publication of any sensitive information that cannot be resolved, either the HIU or the Secretary of State may refer the matter to an independent judicial mechanism. Affected families members shall have a similar right of referral to the independent judicial mechanism.

Stage Four: Independent Judicial Mechanism to Review HIU Decision re Sensitive Information Redaction or Inclusion

Once engaged, the independent judicial mechanism would hear arguments on the merits regarding redaction or disclosure of sensitive information in reports destined to go to families and make binding determinations. This would be substantial review rather than a review of the decision-making process. In a review, the senior judge or judges would examine the granular detail of the sensitive information to be included or redacted. Any element of the hearing that relates to sensitive information would be held *in camera*. Throughout, the review would be an adversarial process with the respective interests of the Secretary of State, the HIU and the families' interests in disclosure being legally represented. The criteria by which the independent judicial mechanism shall make its determination will be published in the enabling legislation (see Appendix One). The detailed reasoning for the judicial decision taken shall be published, subject to the duty to keep people safe and secure. The independent judicial mechanism shall determine whether the relevant sensitive information should be included or redacted and instruct the HIU accordingly.

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As far as is legally possible, the enabling legislation should seek to narrow the grounds for vexatious challenges to the independent judicial mechanism. One effective way of doing this would be through incorporating a statutory appeal mechanism in the legislation providing for the ability to appeal a decision of the judicial mechanism to a higher judicial authority (e.g. the Appeal Court of NI) on a range of appropriately specified grounds.

The Legal Representation of Families

To ensure that the rights of families are properly protected, and in particular, that they have ‘equality of arms’ before the independent judicial mechanism, a process should be devised whereby lawyers representing their interests and the public interest in disclosure can play a full part in the discussion of sensitive information before the independent judicial mechanism. Having considered a number of alternatives, the following option has been agreed as the minimum required to ensure equality of arms for affected families. It would involve appointing an ‘Independent Advocate’ or ‘Public Interest Advocate’ to represent the interests of families in the independent judicial mechanism.¹

- A pool of suitably qualified human rights lawyers should be created to take on this function.
- The lawyers in this pool would be vetted to the required degree.
- Families, in consultation with their lawyers, would then chose which lawyer or lawyers from the pool they would wish to represent their interests before the Independent Judicial Mechanism.
- Once selected, these lawyers would have full access to all of the sensitive information that is seen by the judge or judges and the legal representatives of the HIU and the Secretary of State. They would be able to participate fully in the work of the independent judicial mechanism.
- Appropriate protocols would be developed to ensure that the vetted lawyers appearing before the Independent Judicial Mechanism could provide a ‘gist’ of the

¹ This option would be based, in part, on public interest immunity (PII) hearings, where public interest advocates are appointed by the court to assist with *ex parte* PII claims. The role of the public interest advocate is to represent the public interest in the disclosure of documents/information, providing a counterweight to the government counsel in PII hearings that represents the public interest in non-disclosure (usually on national security grounds). The public interest advocate is appointed by the court to represent ‘*the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done*’ (Conway v Rimmer [1968] AC 910 per Lord Reid at 940). This role must be distinguished from the role of Special Advocates. Special Advocates are used in closed proceedings in the UK including in appeals against immigration decisions and hearings on detention and control orders. In such settings, once a Special Advocate has seen the ‘closed material’, s/he is unable to have contact with the individual, or the individual’s solicitor, in whose interests they are acting. This system has been the subject of significant criticism including by the Parliamentary Joint Committee on Human Rights, a major Justice Report and Special Advocates themselves who have highlighted the ‘*fundamental unfairness of the system within which they operate.*’ See further Amnesty International (2012) *Submission to the Joint Committee on Human Rights Justice and Security Green Paper*. London: Amnesty International.

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discussions to unvetted lawyers representing families without disclosing sensitive information that might jeopardise the responsibilities to keep people safe and secure.

- ⊙ It would be necessary to ensure that the independent or public interest advocates lawyers are appropriately resourced both individually and collectively (e.g. in terms of administration, research, IT support etc.) to ensure that they are able to carry out their duties properly.
- The sharing of experiences amongst this pool of advocates would be encouraged as an important counter-weight to the Secretary of State's lawyers in these proceedings.

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Appendix

1

Keeping People Safe and Secure: Draft Criteria for Restrictions on Disclosure from the HIU to Families

Introduction

There will be a general presumption of disclosure of all relevant information in the possession of the HIU to families, subject only to the duty not to prejudice the administration of justice and the criteria detailed below. In circumstances where the HIU have concerns regarding whether the disclosure of information could jeopardise the administration of justice (i.e. a possible prosecution or prosecution with a reasonable chance of success), the HIU shall seek the advice and guidance of the DPP as to whether particular information should be included in a family report or indeed whether any family report should be issued in advance of a pending or ongoing prosecution.

Extent of Disclosure

In cases where the information reveals evidence of human rights abuses, criminal activity and misconduct by act or omission by any person, the information disclosed to the families shall, in all circumstances where relevant information exists, be sufficient to establish in general what measures might reasonably be taken to prevent recurrence and, without prejudice to that generality, in particular to:

- a) Identify the organisation, group, or state agency involved.
- b) Describe the nature of the wrongdoing including;
 - i) The nature of acts of commission or omission.
 - ii) Whether any relevant action or omission by a public authority was lawful (including, in particular, whether any deliberate use of force was justified in the circumstances).
 - iii) Whether any action or omission of a perpetrator was carried out with the knowledge or encouragement of, or in collusion with, a

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public authority.

- iv) Whether the actions investigated had or may have been wholly or partly motivated by racial, religious, or other sectarian factors.
- c) Make clear the chains of command of the persons directly involved in the wrongdoing and, in the case of state involvement, the supervisory systems, or lack of them, that existed.
- d) Indicate whether the actions investigated were or may have been connected with other offences or actions (whether or not already investigated), and
- e) Detail the legislative, regulatory or policy gaps that allowed the wrongdoing to occur.

The above elements represent a minimum level of disclosure.

Redactions Of Sensitive Information

Article 2 The Duty to Protect Life

No 'sensitive information' shall be provided in a HIU report to a family that might present a real and immediate threat to the life of an identified individual or individuals from the criminal acts of a third party.

The first ground for restrictions on disclosure is the duty on the state to prevent harm to individuals deriving from Article 2 of the ECHR. The “floor” of the Article 2 substantive obligation on the state to protect life is the Osman test. The full test is that if “*the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and ... they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk,*” they have failed to meet their Article 2 obligation.¹ The HIU Panel and the Independent Judicial Mechanism would have to determine, in the context of the presumption of full disclosure of information to families gathered in the course of a HIU investigation, whether the redaction of specified sensitive material was required in order to mitigate a real and immediate risk to the life of an individual or individuals.

Article 3 The Duty to Prevent Harm to Individuals

The state also has a positive duty to prevent harm to individuals under Articles 3 of the ECHR. In relation to restrictions on disclosure, this duty should be interpreted in the following way:

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Duty is to individuals

The risk of harm must be to an identified individual or individuals, not a class of persons.

The harm to be prevented

The harm to be prevented includes physical or specific psychological injury or harassment or intimidation likely to reach the threshold of inhuman or degrading treatment.

The risk

There must be a direct, foreseeable, and describable link between the proposed disclosure and the anticipated harm. That means that the risk must be imminent or in the foreseeable future and wholly created or materially enhanced by the proposed disclosure.

The nature and source of the threat

The threat must be to carry out harm as defined above through criminal acts. The source of the threat must be either an identified individual or individuals or a clearly definable group that in either case has demonstrated the willingness and capability to carry out threats as described to either the individual(s) concerned or to a defined class of persons to which the individual(s) arguably at risk belong.

Protection of operational counter-terrorist methodologies and effectiveness

On the basis that under Articles 2 and 3 ECHR it may be necessary and proportionate, some information may be redacted from HIU reports to protect the effectiveness of operational methods of the police and other security services which are in current use and which are lawful - i.e. obsolete or “arguably illegitimate”² methods cannot be concealed by restrictions on disclosure. Information about contemporary, legitimate operational methods must not already be in the public domain to qualify for redaction. It must also be demonstrated that the proposed disclosure would, in fact, in the foreseeable future, damage the operational effectiveness of the method in question in such a way as to place a person or persons at a real and immediate risk of serious harm. In general, the reasons for restricting disclosure under this criterion must be “particularly convincing and weighty.”³

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The Redactions

Any redaction of information must be the minimum that is necessary to materially reduce the risk of death or harm to the specified persons concerned and proportionate to the level of risk when balanced against the public interest in disclosure. As is the case with reports issued by the Office of the Police Ombudsman, such redactions should only relate to the narrative or 'findings' elements of HIU report and not to the Conclusions reached. Such redactions cannot be used to obscure or block the disclosure of information below the minimum necessary elements of information outlined above.

¹ See paragraph 116, *Osman v UK* (87/1997/871/1083), ECHR Judgment 28 October 1998

² *Dil and Others v Commissioner of Police* [2014] EWHC 2184 (QB), para 42

³ *Smith and Grady v. United Kingdom* (1999)