

# **Dealing with the past and implementing the Stormont House Agreement – Key Issues to keep an eye on in the imminent implementation legislation**

**Briefing Paper, Committee on the Administration of Justice (CAJ), September 2015**

## **Background:**

The Stormont House Agreement (SHA) provides for a set of new institutions to deal with the past in Northern Ireland namely:

- The Historical Investigations Unit (HIU): ‘an independent body to take forward investigations into outstanding Troubles-related deaths.’
- An Independent Commission on Information Retrieval (ICIR) ‘to enable victims and survivors to seek and privately receive information about the deaths of their next of kin.’
- An Oral History Archive ‘to provide a central place to share experiences and narratives related to the Troubles.’
- An Implementation and Reconciliation Group ‘to oversee themes, archives, and information recovery.’

It also provides recommendations for services for victims and survivors, including a Mental Trauma Service. The implementation of the above SHA institutions requires detailed legislation which is scheduled to be introduced into Westminster in October 2015. Whilst consultation on a draft bill was planned over the summer, this has not happened.

As part of a collaborative QUB Business Alliance Project between the CAJ and QUB School of Law, led by Professor Kieran McEvoy, an expert drafting group was however established to produce an unofficial Model Bill in parallel to the official process. The Model Bill sticks within the provisions of the Stormont House Agreement, and is designed to provide a benchmark of what the bill would look like if the Agreement is legislated for in good faith.

Those involved in the drafting committee are: Professor Kieran McEvoy (QUB), Daniel Holder (CAJ), Professor Louise Mallinder (TJI), Brian Gormally (CAJ), Jeremy Hill (Visiting Fellow, TJI), Gemma McKeown (CAJ), Anna Bryson (QUB). The group instructed Daniel Greenberg, a barrister specialising in legislation, to draft provisions for the Model Bill.

A draft of the Model Bill was produced at a major conference in May organised jointly with Ulster University and Amnesty International. The conference and subsequent submissions which followed have informed the content of the Model Bill which is being launched on Wednesday 15 October, along with the report from the conference.

The following provides a brief overview of some of the key issues facing the effective implementation of the SHA institutions, and the related provision for inquests.

## Historical Investigations Unit (HIU):

- **Powers to obtain official documents:** The starting point for all investigations, whether into republicans, loyalists or the state the HIU will be the existing files and materials held by the state. Previous legacy investigations have been hampered by lack of access to official documents but in the SHA the UK government makes a unequivocal commitment to full disclosure to the HIU. In order to make this commitment a reality the HIU will need (separate to its broader policing powers) a clear disclosure power compelling state agencies to hand over the documents it needs for its investigations, including powers that set aside obligations of secrecy. Such powers already exist for agencies like the Police Ombudsman or Criminal Cases Review Commission, and are provided for in the Model Bill.
- **The HIU Caseload** – the SHA provides that HIU is to investigate outstanding ‘Troubles-related deaths’, taking on both the outstanding HET and Police Ombudsman caseloads (both of which related to pre-1988), and other cases, which have been previously investigated where there is ‘new evidence.’ There is no cut-off date in the SHA for these cases. There are international obligations to independently investigate deaths, as well as other serious matters such as torture. This is reflected in the Model Bill however there are risks that the official legislation may still seek to take a restrictive approach to certain categories of cases.
- **HIU powers onward disclosure:** The SHA provides that the only statutory duty on the independent HIU not to include certain information in its reports to families and publications will be that of ensuring it does not make disclosures that would jeopardise the safety of individuals. Whilst this is reflected in the model bill there has long been a concern that the UK government will seek to roll this back and instead legislate for a power for ministers to veto the contents of reports on the deliberately vague ground of ‘national security’. Such a move would be incompatible with the SHA.
- **Staffing, independence and equality:** The HIU is to be an independent body. There is a legal obligation that those working in the HIU have no connection to the persons or organisations that may be the subject of their investigations. The practice of organisations like the Police Ombudsman in its legacy investigations is that former members of the RUC or security forces are debarred to prevent conflicts of interest arising. Our model bill has followed this approach, and also debarred persons who at any time have been paramilitaries from employment with the HIU. The official position to date has been to defer the HIU employment framework to the HIU director, whilst acknowledging this role will have to be discharged within the law. A second issue is that investigative bodies have tended to be overwhelmingly male dominated, our Model Bill seeks to counter this through a statutory duty to take reasonable steps to ensure a gender balance, and to ensure staff have necessary experience and aptitude to take a gender-sensitive approach. It is not clear what provisions the official legislation will have on either of these matters.
- **Independence – governance:** – The SHA provides that the NI Policing Board will oversee the work of the HIU and further guarantees the HIU will be an independent body. The model bill reflects this including provisions for financial independence. It remains to be seen if the official legislation will provide similar guarantees. There are risks the SHA provisions will be rolled back and Ministers given a greater role in the oversight and governance of the HIU.

## Independent Commission for Information Retrieval

- ***Appointment and tenure of the Commissioners:*** ensuring ICIR's independence will be vital to its credibility and likelihood of being able to successfully retrieve information for victims' families. A key component of independence relates to the appointment and tenure of the Chair and other Commissioners. The SHA agreement only states that the Chair be of international standing. In our model bill we have sought to create more robust eligibility criteria to ensure that appropriately experienced and respected persons are appointed to the Commission, that they have security of tenure and that in line with international best practice standards at least two of the commissioners are women.
- ***Functions of the Commission:*** the SHA only briefly states that the commission will be established to 'enable victims and survivors to seek and privately receive information about the deaths of their next of kin.' We believe that in order for the Commission to be able to fulfil this overarching objective, it should have a number of recognised functions including outreach, research and analysis, and engaging with and supporting victims and survivors who seek information. Its functions should also include recommending themes to the IRG. We further stipulate that it should have complete operational independence in carrying out its functions and we include provisions to ensure that is appropriately staffed and resourced to enable it to carry out this work.
- ***Powers:*** to fulfil its broad range of functions, our model bill stipulates that ICIR be empowered to compel the production from public authorities of any information that it requires in the exercise of its functions. To maximise the opportunities for information retrieval we included in this provisions to enable the ICIR to access information held by the HIU. Our proposals place considerable emphasis on requiring the ICIR to verify as far as possible the information it receives and enable it access to information is an important part of this process. To ensure the confidentiality of the information received, we further stipulate that the Commission cannot be compelled to disclose information received to criminal justice or intelligence agencies.
- ***Duration:*** the SHA states that the ICIR should operate for no longer than five years. We were concerned that this might be too short a time period as the experience of the Independent Commission for the Location of Victims' Remains suggests that it can take time to build trust with persons who have information. In addition, we are conscious that some victims may wish to allow the HIU to complete its investigations into their case before turning to the ICIR, which as both bodies are operating in parallel may leave insufficient time for the ICIR to fulfil all requests for information retrieval processes to be launched. Our model bill therefore includes the possibility that the Secretary of State may extend the work of the ICIR.
- ***Archives:*** the SHA is silent on the fate of the archives but leaked excerpts from a discussion document produced by the British and Irish governments indicate a preference for destroying all information gathered by the ICIR upon completion of its work. We are mindful that a guarantee to destroy information might reassure those who are thinking about providing information to the commission; however, our proposals instead make arrangements for the archives to be held securely and confidentiality for 50 years. We felt this was necessary as the ICIR has the potential to gather a wealth of information that may be useful for understanding Northern Ireland's history in the generations to come.

## Oral History Archive

- ***Ensuring the Archive is 'independent and free from political interference':*** First impressions and perceptions are key. Many potential witnesses will be reluctant to come forward and must be assured that the Archive is fully independent and free from political interference. There is a real concern that it could be manipulated by vested interests. We think it vital that those tasked with running the archive are perceived to be impartial by all potential stakeholders and that they do not have financial, professional or other interests that are reasonably likely to conflict with the exercise of their functions. We have thus proposed an Executive Board consisting of three directors, assisted by an independent Advisory Board and a Secretariat. The necessary skills and attributes for office holders are set out in some detail.
- ***Broadening the canvas for 'dealing with the past':*** The scope of the HIU and ICIR is necessarily limited (focus on specific prosecutorial and truth recovery functions). We see in the OHA the potential to provide important alternatives for those whose experience is not directly relevant to the work of the HIU or ICIR or who wish to avail of the opportunity to tell their story in full and in context at a time and place that best suits their needs. Beyond this we see an important opportunity to get beyond narrow political and statistical interpretations of the past and in particular to explore with creativity, sensitivity and imagination hitherto neglected themes such as gender, mental health, rural perspectives, intergenerational change, emotions, family life, and coping mechanisms. These complex and layered themes cannot be boxed into a neat five year window. It is vital that funding is set aside to ensure that the OHA continues both to collect and preserve material in the long-term.
- ***Catering for 'people from all backgrounds (and from throughout the UK and Ireland):*** Buy-in from a suitably broad range of contributors cannot and should not be taken for granted. The identification of contributors should not be relegated to a lazy process of self-selection. The OHA will need to embark on extensive and meaningful consultation in Ireland, North and South, and in Britain to raise awareness, test interest, avoid duplication, build trust and secure participation. We emphasise the potential for memory to provoke psychosocial and traumatic harm and also the importance of gender sensitivity in exercising judgements about the function and development of the Archive. A comprehensive code of practice will set out the steps that must be taken to mitigate against potential harms (with particular guidelines for work with specific groups such as victims and young people) and to ensure adherence to international best practice at every stage of the process. We propose a central 'training the trainers' model as a cost-effective way of enabling the OHA to operate with as much flexibility as possible. A wide range of individuals throughout the UK and Ireland would be trained and facilitated in the creation of appropriate oral history material for the OHA (in line with the Code of Practice). They in turn would pick up skills and resources of benefit to their host communities and organisations. To avoid a narrow and inward-looking approach we have tailored the governance structure to ensure meaningful participation and input from agencies in the Republic of Ireland and elsewhere.
- ***Working with Existing Groups:*** This is vital to the success of the OHA but it nonetheless presents numerous challenges (practical, ethical and legal). There is a fear amongst existing oral history groups and organisations of the Tesco / Walmart effect – that a new central Oral History Archive of the Troubles could threaten or diminish them. In the interests of judicious use of public funds it is at any rate vital that this new Archive should take full account of existing materials, networks, resources and expertise. We emphasise that relations with existing groups must be underscored by a spirit of mutually beneficial partnership. We attempt to achieve this by virtue of the model of governance (in particular the composition

of the Advisory Board) and the mechanisms for collection of new material (working with and through existing groups). Beyond this we acknowledge the considerable resource implications and challenges of negotiating shared ownership of existing oral history material and propose that a designated member of the Secretariat should lead on this aspect of the work.

- **Long-term storage:** there has to date been a critical gap between the impulse to collect and the obligation to preserve our shared cultural heritage. There is currently no central sound archive for the deposit of oral records of the conflict in Ireland, North and South. INCORE's *Accounts of the Conflict* project made a pioneering contribution by creating an online digital archive (with some capacity to digitise analogue recordings) but without further core funding it is uncertain to what extent this can be developed. An opportunity now presents to create a central dedicated sound archive with the resources necessary to safeguard and preserve contributions (new and existing) for future generations. Where existing projects choose to deposit material (in duplicate or *in toto*) the terms of the original deposit should to the fullest extent possible be respected.
- **Ethical and Legal Probity:** Recording oral history is not a risk-free activity. In tightly drawn and torn communities a word out of place can have grave and even lethal consequences. It is abundantly clear in the aftermath of the Boston College Tapes controversy that there is no such thing as a cast-iron guarantee of confidentiality. The Code of Practice and training programme that we envisage is designed to ensure that all participants (collectors, contributors and data processors) are fully briefed on all relevant legal and ethical issues arising. Balancing these various risks and obligations we propose to provide the necessary resources to enable designated material to be withheld from public access (subjecting each account to a sensitivity review, disapplying Data Protection Acts and the Freedom of Information Act 2000 to all contributions until such times as they have been finalised by the OHA and thereafter to sections deemed confidential). We furthermore propose immunity from suit for staff and agents of the OHA in respect of all acts or omissions occurring in good faith in the execution of functions in connection with the OHA.
- **Pursuit of Reconciliation:** At the same time we acknowledge the core purpose of promoting reconciliation. This pulls us in a slightly different direction and raises concerns about stories become overlaid and even suffocated by an excessively bureaucratic and legalistic approach. Opportunities must be created to enable people to tell their story in full and in context and furthermore to '**share** experiences and narratives related to the Troubles.' We thus emphasise that the first assumption is that material accruing to the OHA should be made freely and publicly available. Withholding access should be the exception rather than the rule, and would be permitted only in line with clearly established principles and guidelines. It is envisaged that the Archive will for the most part be accessible online but we think it important that a 'central space' in which people can come together and listen to recordings should also be provided.

## Implementation and Reconciliation Group

- **Will the IRG be in the legislation:** The IRG is set out in paragraphs 51-54 of the SHA with a mandate to: ‘oversee themes, archives and information recovery’, to commission a report on themes from independent academic experts; to promote reconciliation and to consider statements of acknowledgement. Members will be appointed by the NI political parties and two governments. To date the UK government has indicated the IRG will NOT be set up in legislation. This risks the detail of its establishment and its powers and duties becoming a political football down the line. The Model Bill would establish the IRG in legislation and set out its powers in detail.
- **What will be the IRGs relationship with the other SHA bodies?** The IRG is not to be the oversight / accountability mechanism for other SHA bodies, e.g. that role for the HIU is to be conducted by the Policing Board. However, the IRG will need a structured relationship with such bodies if it is to effectively conduct its work. We suggest in our Model Bill that the other SHA, institutions provide at least Annual Reports to the IRG, and that the IRG be in a position to make recommendations in relation to other SHA bodies in relation to their work.
- **The IRG report on themes:** a significant change from the SHA from the Haass-O’Sullivan Proposed Agreement was the move of work on themes to the IRG from the ICIR. The SHA does not set out proposed themes for reports– the Haass-O’Sullivan document did including themes like ‘collusion, but not themes such as gender-based violence that are usually included in the remit of such mechanisms. The SHA provided that the evidence base for themes be referred to the IRG from the other SHA legacy mechanisms. We have provided for this in our Model Bill, along with criteria for the appointment of academic experts, and provisions on evidence base which such experts can draw upon (including confidential material) in compiling their research. Unless such matters are set out in statute it is difficult to see how the IRG work could maintain its independence an effectiveness.

## Legacy Inquests

- **The SHA commits to maintaining legacy inquests, how will this be reflected in the SHA legislation?** Legacy inquests have been beset by a lack of resourcing and endemic delays linked to state agencies failing to disclose documents to them. Whilst there had been some opposition to the very continuance of legacy inquests, this approach was firmly rejected in the SHA. Paragraph 31 committed to both inquests continuing as a separate process to the HIU, but also Stormont taking steps to improve their effectiveness and independence, in accordance with the requirements of the European Convention on Human Rights. The Model Bill has reflected this with explicit provisions for the HIU to share information with and assist with disclosure to the Coroner, and also to provide investigative services for the Coroner.
- **Why have no measures been taken forward then to strengthen legacy inquests?** Since the SHA commitment to measures being taken forward to improve inquests, endemic delays and problems have continued. The resourcing issues hampering legacy inquests have not been dealt with; long sought investigative support to the Coroner is still not in place; the NI Minister for Justice has refused a request from the Policing Board to call in HM Inspector of Constabulary to examine the PSNI role in delays in disclosure; and no effective plan appears in place to take forward legacy inquests following the retirement of the senior coroner.

September 2015, CAJ