

# **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 which could make determinations on balancing the state's responsibilities to protect people on the one hand 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

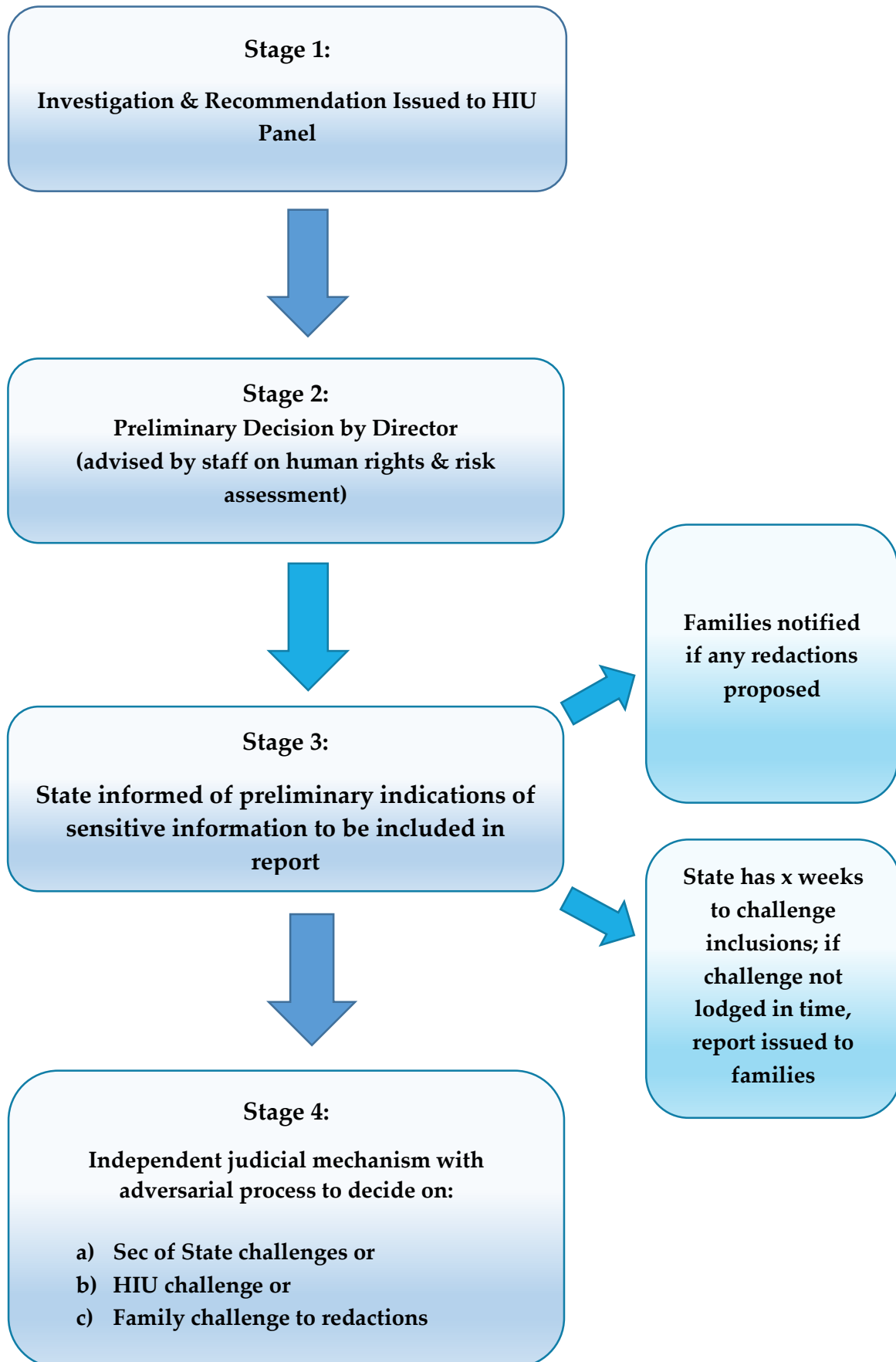
powers of the relevant institutions, free from state or other political interference.

- 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 over-seen by a judge or judges of at least high court level.
- In order to maximise public confidence in the process, the criteria which informs the HIU and (where necessary) the independent judicial mechanism should be published in the relevant enabling legislation which 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’ which 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 requires that the interests of 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 chose lawyers from that pool to represent their interests before the independent judicial mechanism. These lawyers would be vetted to ensure that they could have 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 NGO's supporting them as part of taking their instructions (see further below).

- The independent judicial mechanism should be staffed by senior judicial personnel with relevant knowledge and experience either in the jurisdiction or elsewhere; capable of commanding public confidence and support; the judge or judges should be appointed by the Lord Chief Justice of Northern Ireland in consultation with the British and Irish governments and other appropriate international institutional stakeholders including the UN Special Rapporteur on Promotion Of Truth, Justice, Reparation And Guarantees Of Non-Recurrence and 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 Panel shall be appointed by the Policing Board. 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 re Sensitive Information and Space for Resolution re 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 which 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 a report destined to go to families and make a binding determination. This would be a substantial review rather than a review of the decision making process wherein the senior judge or judges would examine the granular detail of the sensitive information to be included or redacted. Any element of the hearing which relates to sensitive information would be held *in camera*. It would involve an adversarial process with the respective interests of the Secretary of State, the HIU and the families' interest 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

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judicial mechanism shall determine whether the relevant sensitive information should be included or redacted and instruct the HIU accordingly.

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

In order to ensure that the human rights of families are properly protected, and in particular that they have 'equality of arms before the independent judicial mechanism, it will be necessary to devise a process whereby lawyers representing their interests and the public interest in disclosure can play a full part in the discussion regarding 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.<sup>1</sup>

- However termed, a pool of suitably qualified human rights lawyers should be created to take on this function.
- Families, in consultation with their lawyers, would then chose which lawyers from the pool they would wish to represent their interests before the Independent Judicial Mechanism.
- The lawyers in this pool would be vetted to the required degree.
- These lawyers would have full access to all of the sensitive information which is seen by the judge or judges and the legal representatives of the HIU and the Secretary of State and be able to participate fully in the work of the Independent Judicial Mechanism.

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<sup>1</sup> This option would be in part based on Public Interest Immunity 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 proceeding 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', she\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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- Appropriate protocols would be developed in order that the vetted lawyers appearing before the Independent Judicial Mechanism could provide a 'gist' of the discussions to unvetted lawyers representing families without disclosing sensitive information which 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.