



House of Commons
Northern Ireland Affairs
Committee

Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past

Third Report of Session 2007–08

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The Northern Ireland Affairs Committee

The Northern Ireland Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Northern Ireland Office (but excluding individual cases and advice given by the Crown Solicitor); and other matters within the responsibilities of the Secretary of State for Northern Ireland (but excluding the expenditure, administration and policy of the Office of the Director of Public Prosecutions, Northern Ireland and the drafting of legislation by the Office of the Legislative Counsel).

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Contents

Report	<i>Page</i>
Conclusions and recommendations	3
1 Introduction	7
2 The Historical Enquiries Team	10
3 The Police Ombudsman for Northern Ireland	19
Background	19
Historic remit	19
Alternatives for the future	22
4 Statutory Inquiries	25
Background	25
Covert Human Intelligence Sources	26
Legal framework	28
ECHR Article 2 and Regulation of Investigatory Powers Act 2000	28
Inquiries Act 2005	29
Issues raised by the PSNI	30
Process for agreeing redactions with inquiry panels	30
Inquiry panel information management procedures	32
Resources	34
5 Inquests	37
Annex A Legal Background to the Inquests	39
Formal minutes	42
Witnesses	43
List of written evidence	44
List of Reports from the Committee during the current Parliament	45

2 Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past

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Conclusions and recommendations

1. We were impressed by the personal commitment, sensitivity and professionalism of the Chief Constable, the Director of HET and the other staff involved in the HET. The project is unique and challenging, and it is clear to us that there is a real determination to provide information and answers to those who were bereaved during the Troubles. Whilst the memories are painful, families have appreciated the efforts made by the HET team to listen to their questions and to attempt to explain the circumstances of their relatives' deaths. (Paragraph 25)
2. We were surprised to find that all cases are automatically reviewed by the HET. We accept that there are benefits in building a complete picture of often interconnected events. We also accept that a family which initially chooses not to participate in a case review may later change this view; and that there will be occasions where a family member (such as a grandchild) might only feel able to participate once an older relative has come to terms with the re-examination of painful past events, or has died. In such circumstances, the fact that the HET has carried out a comprehensive review of all cases will enable it to help families at a time that is right for them. Nevertheless, we conclude that in some cases scarce resources are being used to investigate historic cases where there is little likelihood of helping a family and limited opportunity of securing a conviction. (Paragraph 26)
3. It is clear that the HET project will need significant additional funding if it is to continue with its current approach and complete reviews of all of the deaths within its remit. We are not convinced that the funding is being targeted as effectively as it might be. We recommend that alternative ways of prioritising cases are identified so as to focus resources on those cases where the next of kin of the deceased specifically request it or where the existence of forensics or other exhibits provides investigative opportunities which could contribute to a successful prosecution case. We recommend that a mid-term project review is conducted, with a view to establishing the costs and benefits of continuing with the HET in its current form, and identifying ways in which the scope of the exercise and the prioritisation of cases could be adjusted so that the project can be completed within budget and with maximum benefits. (Paragraph 27)
4. The financial investment in the HET has been considerable, but little information about its progress and the benefits it has brought to families has been made available to the public. We recommend that the results of the review we call for above are published. (Paragraph 28)
5. We are concerned that the demands of running the HET project, and the likely overspend, might compromise the ability of the PSNI to fulfil its primary role of policing the present. We also recognise that some families and organisations have questioned whether the PSNI is sufficiently independent and would prefer the historic investigations to be managed by an independent agency. We return to this point in paragraph 40. (Paragraph 29)

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6. The Patten Report underlined the importance of an independent, properly resourced Ombudsman's Office which had community confidence and support. Our predecessor Committee noted in 2005 that Northern Ireland's first Police Ombudsman, Mrs Nuala O'Loan, had constructed from scratch a credible police complaints system in Northern Ireland. However, the extension of the Ombudsman's remit to include historic cases is having a damaging effect on the efficiency of the Office. The number of complaints about the former Royal Ulster Constabulary (RUC) arising from the years of the Troubles and the inadequate provision of additional resources have compromised the Ombudsman's ability to investigate complaints against the PSNI. There is a risk that this reduced capability will damage public perception of the Ombudsman's Office and public confidence in policing. (Paragraph 43)
7. We have considered the case for a transfer of responsibility to carry out historical work from the Ombudsman to a newly-created independent body. We have also considered whether the Historical Enquiries Team, part of which is based in London and is staffed entirely by officers and former officers from forces outside Northern Ireland, could take on this function, or whether the resources of the Ombudsman's office should be increased, to allow him to carry out historical work without impacting on his core responsibilities. We are, however, mindful of the Minister's comment that he prefers to await the conclusions of the Eames/Bradley Group before reaching any decision. We, too, wish to avoid pre-empting any conclusion that the Group may come to on this issue. We therefore make no recommendation in this Report, beyond noting that the question of who has responsibility for conducting investigations into grave or exceptional cases involving alleged police misconduct in the period before the establishment of the PSNI is of the utmost importance, and that it will have to be resolved sooner rather than later. We intend to return to this. (Paragraph 44)
8. The disclosure of intelligence information to inquiries clearly presents challenges for the police, and for other organisations which are required to provide sensitive information. The process of agreeing necessary redactions requires considerable input from key police staff who understand the implications of disclosing specific items of intelligence. This necessarily requires them to divert their attention from more current issues of concern, which include, most critically, monitoring the threat posed by dissident terrorists. The provisions in the Inquiries Act 2005 for agreeing and resolving disputes about redactions have yet to be tested and it is therefore possible that difficulties may emerge with the way that those provisions work in practice. It is crucially important that the workings of the Act are carefully monitored. The Committee may wish to return to this issue in a subsequent inquiry. (Paragraph 63)
9. The need for the PSNI to provide sensitive information to inquiry panels was an inevitable consequence of the Government's decision to conduct the inquiries and, as we have previously discussed, there are legal provisions to prevent the disclosure of sensitive information beyond an inquiry if necessary. The inquiries must be able to operate independently of the Government and the agencies which provide them with information. It would not be appropriate for any of those agencies to appear to attach any conditions to its cooperation, nor to dictate an inquiry's internal

procedures. The Minister of State at the Northern Ireland Office has underlined the fact that as public authorities in their own right, inquiries have the same obligations under ECHR Article 2 as any government department or the PSNI. Inquiry chairmen must take full responsibility for the management of information within their safekeeping and ensure that they meet their obligations under human rights legislation. It is important for them to recognise that the future safety and indeed possibly the lives of certain people who have supplied sensitive information could well depend upon their decisions. (Paragraph 67)

10. The loss or inadvertent disclosure of sensitive intelligence information by an inquiry panel or its staff could have serious consequences, including the risk to life. The PSNI has expressed specific concerns about the inquiries' information management procedures. These concerns must be addressed to ensure that the inquiries meet their Article 2 obligations and to enable the PSNI to work cooperatively with the inquiries, and provide them with the information they require without further delay. If the inquiries are unable to demonstrate to the Government that their procedures are adequate, steps must be taken to implement improvements. We recommend that if the particular issues raised by the PSNI were not included in the Government's review of inquiry information management procedures, they should be included in a further review which should be conducted forthwith, as a matter of urgency. (Paragraph 68)
11. The very high annual cost of inquiries into past events is financially unsustainable. We note with concern that the latest estimated cost of the Saville Inquiry alone is £183 million and that inquiry is still not completed. The cost to organisations such as the PSNI that contribute to the statutory inquiries is also considerable, in terms of money and resources. The PSNI estimates that its costs for working with the inquiries over the next two years alone will come to over £6 million. We fully accept the Chief Constable's concerns that the diversion of experts from their current duties is bound to impact upon effective policing in Northern Ireland. The cost of inquiring into the past is an issue that, at some point, will have to be faced. Such inquiries cannot become a permanent feature of life in Northern Ireland. We recommend that the NIO take further steps to control the costs of Northern Ireland's statutory inquiries and that inquiries other than those already under way or announced should only be established if agreed by the Northern Ireland Assembly. (Paragraph 73)
12. The statutory inquiries place significant demands on the PSNI at a time when police officers are still subject to attacks from dissident terrorists. No other police force in the United Kingdom is required to operate in such an environment, and at the same time to service the demands of the extensive range of historic investigations which are underway in Northern Ireland. The NIO must continue to ensure that the PSNI has a budget sufficient to fulfil its operational remit and to meet its legal obligations with regard to servicing the statutory inquiries. (Paragraph 74)
13. There are outstanding legal obligations which require the coroner to investigate a number of deaths which occurred during the Troubles. The PSNI has a duty to cooperate with the coroner and to provide him with whatever information he requires to conduct those inquests. Since some of that information might include intelligence which could identify an informant, issues similar to those raised by the

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PSNI regarding the disclosure of sensitive intelligence information to the statutory inquiries might apply to the contentious inquests. The coroner has a duty under Article 2 of the European Convention on Human Rights to take steps to protect the lives of informants who could be put at risk through disclosure of information which might identify them. We recommend that an information management code of conduct be drawn up by the coroner, after consultation with the appropriate agencies, to protect sensitive information provided to him as part of the inquest process, and that any public disclosure of such information is made in accordance with the coroner's obligations under ECHR Article 2. (Paragraph 80)

14. We note that no specific additional funding has been provided to the PSNI in recognition of the extra workload arising as a result of the inquests and that resources have instead been allocated from the main policing budget. There are already significant and unique demands on the PSNI and we are concerned that the volume of work required to cooperate fully with the inquests may compromise the PSNI's ability to direct adequate resources to other high priority areas of policing. We recommend that the impact of the inquests on the PSNI's resources and any consequential effect on current policing capacity is reviewed during 2009 and the budget revised accordingly. (Paragraph 81)

1 Introduction

1. As we prepare this Report, Ministerial responsibility for policing and criminal justice in Northern Ireland remains with the UK Government. These will be the last major policy areas to be devolved to the Northern Ireland Executive, on a date as yet to be determined. For as long as the Northern Ireland Office continues to hold these responsibilities, it will remain the duty of this Committee to exercise scrutiny on behalf of the electorate of Northern Ireland and the rest of the United Kingdom.

2. The inquiry that has led to this Report grew out of the Committee's discussions during one of its frequent visits to Northern Ireland. It became clear that there is great concern in the Police Service, in the Police Ombudsman's office and elsewhere that the cost of 'policing the past' is compromising—and will increasingly compromise—these agencies' ability to carry out their core functions. The more police resources that are committed to servicing the needs of the various historic inquiries, the fewer resources are available for crime prevention measures or for apprehending present-day criminals. Similarly, if the Ombudsman's staff are investigating an historic case, they cannot at the same time be working on a more recent one. A related concern is that the need to supply full evidence, including sensitive material, to historic inquiries may compromise the personal safety of covert sources of intelligence and undermine the position of those who still operate covertly.

3. We therefore announced in November 2007 our intention to produce a focused Report as part of a continuing, broad inquiry into policing and criminal justice in Northern Ireland.¹ The terms of reference we adopted for this initial phase of our inquiry were to inquire into:

- The financial and operational consequences for the Police Service of Northern Ireland (PSNI) of servicing the various 'historic inquiries' into past events in Northern Ireland; and
- The effect on the ability of the Police Service of Northern Ireland to bring accused persons to trial of provisions in the Inquiries Act 2005 and in other legislation requiring the police to divulge information which might identify a covert source

The bulk of our evidence, and therefore the bulk of this Report, centres on the first of these concerns.

4. In the course of this inquiry, we visited Northern Ireland three times and the Republic of Ireland once, hearing formal evidence from several witnesses and holding a large number of informal meetings with interested parties. We also heard oral evidence at Westminster from witnesses and we received written evidence from a wide range of groups and individuals. To all of these we are most grateful. Our advisers for this inquiry have been Ken Armstrong, a former PSNI officer, and Jane Gordon, human rights lawyer and senior lecturer at Kingston University; we thank them for applying their considerable experience and expertise to the complex legal and procedural issues that arose during the inquiry.

1 Northern Ireland Affairs Committee Press Notice, No. 2 of 2007–08, 22 November 2007

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5. The wider context for this quite narrowly focused exercise has been the whole question of how the people of Northern Ireland should deal with the legacy of their past. Various proposals were made to us in the meetings we held. These included the creation of a memorial to the victims of violence; a day of remembrance; story-telling; and the establishment of a truth commission.² For us as a Committee to give full consideration to and to reach firm conclusions on such important matters in this Report would take us beyond our current terms of reference and into the issues that are being considered in great depth by the Consultative Group on the Past, which is co-chaired by Lord Eames of Armagh and Mr Denis Bradley.

6. The Chairman met Lord Eames and Mr Bradley at Westminster in January 2008, and the Committee met them, together with other members of the Consultative Group, in Belfast in May 2008. We had a wide-ranging discussion, in an informal setting, which we found very helpful. We welcome the moving and inspirational speeches of Lord Eames and Mr Bradley of 29 May and we await the report of the Group with great interest. While the Committee hopes that the conclusions it reaches and the recommendations it makes in this Report will be of interest to members of the Group, it does not wish, in this Report or elsewhere, to anticipate any conclusions the Group may reach. Our inquiries may have taken place at the same time, but our work has been entirely separate.

7. Some of those whom we met, or from whom we heard evidence, expressed a clear desire to see an end to the constant delving into Northern Ireland's past. We heard suggestions that a time limit on such work of five, seven or ten years should be set. It is not for us at this stage to endorse the setting of any arbitrary deadline. However, we do strongly believe that it is important that Northern Ireland moves towards a time when investigations into the events of the past are no longer needed. This does not mean that the past can or should be forgotten; and in particular, it does not mean a cessation of help to those who bear the scars of the Troubles. We endorse the suggestion made to us by Sir Kenneth Bloomfield, the first Victims Commissioner for Northern Ireland, that the whole question of compensation for the victims of violence and their families should be reconsidered. Too many people in Northern Ireland continue to suffer today as a result of events that took place in some cases decades ago; if the money spent on the public inquiries into the past had instead been spent on relieving the plight of such people, a real difference might have been made to their lives.

8. Whilst any crime committed by a person in authority is particularly reprehensible and must be investigated as thoroughly as possible, it is important that the establishment and conduct of inquiries into such crimes is not allowed to distort the overall picture. This clearly shows that responsibility for more than 90% of deaths attributable to the security situation during the Troubles rests with paramilitary groups. According to the respected publication *Lost Lives*, there were 3703 deaths attributable to the security situation between 1966 and 2003. The publication attributes alleged responsibility as follows:

Republican paramilitaries: 2158 deaths

Loyalist paramilitaries: 1099 deaths

The security forces: 365 deaths. (Most of which have not been attributed to criminal activity.)

² These initiatives, together with others, were identified by Healing Through Remembering as essential components of an integrated approach to dealing with the past in its report "Healing Through Remembering Report 2002"

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9. In this Report, we look first at the work of the Historical Enquiries Team of the Police Service of Northern Ireland. We then consider the historical investigations of the Police Ombudsman for Northern Ireland, before turning to the various statutory inquiries into the past. Finally, we look ahead to the burdens likely to be imposed by the forthcoming contentious inquests. The Minister of State in the Northern Ireland Office, Paul Goggins MP, told us that he would take our conclusions and recommendations very seriously; we welcome that statement of intent, and we await the Government's response with interest.

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2 The Historical Enquiries Team

10. The Historical Enquiries Team (HET) project was established within the PSNI in 2005 following discussions between the PSNI and the NIO about dealing with the legacy of the Troubles.³ The objective was “to assist in bringing a measure of resolution to those families of victims affected by deaths attributable to the troubles in the years 1968–1998 and to re-examine all 3,268 deaths attributable to the troubles”.⁴ The NIO is committed to provide a total budget of £34m over six years to the project,⁵ primarily for the PSNI, but with smaller allocations for the Police Ombudsman for Northern Ireland, the Forensic Service Agency of Northern Ireland and the Public Prosecution Service Northern Ireland.⁶ The aims of the project were defined by PSNI as follows:

We envisage a re-examination process for all deaths attributable to the security situation with case reviews leading to re-investigation in appropriate circumstances where there are evidential opportunities.

Families will sit at the very heart of our investigations. The primary objective will be to work with them to achieve a measure of resolution in these difficult cases. ... The second objective will be to enable a sense of confidence among those directly affected and the wider public that all these cases will be comprehensively examined to current professional standards, to the extent that as an organisation we can be satisfied that all evidential opportunities have been explored.⁷

11. We visited the HET office near Lisburn in March 2008 and met members of the management team, other members of staff and a number of families whose cases had been investigated. During this visit, we were given an overview of the HET project administration and staffing arrangements, which can be summarised as follows. During 2005, the HET office was established, premises refurbished and staff recruited, and in January 2006 the project became operational and started investigating cases. Mr Dave Cox, a former Commander in the Metropolitan Police, was recruited as the Director of HET, reporting directly to the Chief Constable. The project initially had a staff of about 80, but the Team has since grown to around 180.⁸ Staff retention has been a problem. Mr Cox told us that in the first year there had been a 40% turnover in staff, in part because of the need for staff from outside Northern Ireland to live away from home during the week.⁹ Of the 180 staff, around four are serving police officers and the remainder are retired police officers and civilian support staff, recruited within both Northern Ireland and Great

3 The Secretary of State announced in April 2005 that the NIO had allocated funding to the HET project. During 2005 the HET office was established and staff were recruited. The team became operational and began investigating cases in January 2006.

4 Ev 100. The civil rights march in October 1968 is often used as the event to define the beginning of the troubles. In practice, very few cases within HET’s remit date from 1968, and the vast majority of its cases relate to 1969 onwards. The HET website refers to the start date as 1968, but other HET documents refer to 1969.

5 The NIO quoted the total HET budget as £34m in its written evidence Ev 102 Table 1 and £38m in oral evidence Q555

6 Ev 102 Table 1

7 Police Service of Northern Ireland, *Policing the Past. Introducing the work of the Historical Enquiries Team*

8 Q 8

9 Qq 10 and 11

Britain.¹⁰ The Patten recommendation that the composition of police service staff should be broadly reflective of the population of Northern Ireland, particularly in terms of political or religious tradition and gender, has not been applied to HET staff. There are two distinct review and investigation teams within HET, one of which is staffed exclusively by officers seconded from police forces in Great Britain. This team was created to “deal with those specific cases where independence is essential and where sections of the community or individuals are not yet comfortable working with the Police Service of Northern Ireland.”¹¹ The other team is staffed by serving and retired police officers from the PSNI and the former RUC. Most staff are located in Northern Ireland except for a small team which investigates exceptional cases relating to serious collusion allegations. This is located in Putney, London, partly in order to demonstrate independence, and also to facilitate recruitment of staff from outside Northern Ireland.

12. The project’s remit includes “all deaths attributable to the security situation” between 1968 and 1998, but does not include cases relating to attempted murders, punishment shootings and other injuries.¹² HET investigators carry out an initial review of each case, including those where there have previously been convictions, and whether or not the review is requested by the family of the victim. The team aims to build up as complete a picture as possible, linking interconnected cases so as to understand the activities of organised and serial killers, identifying all of those involved in the killings (rather than just those who had previously been convicted) and providing as much information as possible for families, some of whom were now ready to engage, but others who would not perhaps be ready until an older relative who did not wish to be reminded of past events had died.¹³ In many cases, no information had previously been provided to families, partly because of the lack of resources at the time of the death, and also because of the need to avoid providing information which could have assisted paramilitaries. To date, families have participated in 62% of the completed reviews. Many families who did not respond to the initial contact chose to participate at a later stage, after the review had been completed.¹⁴ New cases are opened primarily on a chronological basis, starting with the earliest from 1968 onwards, but some are taken out of sequence for various humanitarian reasons, or where they are part of a linked series or for some other good reason. Each case goes through the same process of assessment, review, focussed re-investigation and resolution to identify if there are any realistic prospects of taking an investigation further. There has been good cooperation from retired police officers,¹⁵ and assistance and access to historical records have been provided by the Public Prosecution Service.¹⁶

13. At any stage, where evidence of serious criminal conduct by police officers is identified, the Office of the Police Ombudsman is notified, in accordance with the legislation.¹⁷ We

10 Q 11

11 Police Service of Northern Ireland, *Policing the Past. Introducing the Work of the Historical Enquiries Team*.

12 Ev 122

13 Q 500

14 Ev 132

15 Q 513

16 Q 463

17 Police (Northern Ireland) Act 1998 s.55

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were told during our visit to the HET that to date, 44 cases of alleged misconduct by a police officer have been referred to the Police Ombudsman. Since the Ombudsman has no remit to investigate paramilitary murders or deaths involving military actions, in some cases separate but parallel investigations are carried out by the HET.¹⁸

14. According to data provided in May 2008, 1,107 cases have been opened; of these, the review process has been completed for 363 cases.¹⁹ The completion of a case does not mean that it is closed, because there may still be further questions from families.²⁰ Mr Cox explained:

... that does not mean that we regard those cases as closed because ... we work to a standard of answering the questions that families put to us and in many cases these are not legal questions, the worries that families have are basically around could this have been prevented, was there a proper investigation, down to the saddest of personal questions ... We are working with over 600 families and we have logged 4,000 issues that have been raised with us.²¹

The original target had been to open and close 40 cases a month, but this has not been achieved, primarily because the final phase of providing resolutions acceptable to families has taken longer than expected but also because of the complexity of some of the cases.²² In addition, the HET has had to absorb the investigations required by the publication of the Police Ombudsman's 'Operation Ballast' report into alleged collusion, which required it to establish an entirely new external team, at a cost of approximately £1.6 million *per annum*.²³ The latest estimate is that the final set of cases, relating to 1998, will be opened in December 2011, and that after that "a considerable number may remain open whilst complex investigations are completed."²⁴

15. In May 2008, the HET had reached 1973 in its chronological process of opening new cases.²⁵ Of the completed reviews, one case has been referred to the Director of Public Prosecutions Service (DPP) for prosecution and a further eight have been forwarded for advice.²⁶ Both the Chief Constable and the Director of Public Prosecutions suggested that the number of prosecution cases might increase once the HET started to investigate more recent cases from the 1980s and 1990s, given that more computer evidence, records and witnesses might be available, but the Chief Constable made it clear that overall the opportunities for prosecutions would be limited. Sir Hugh said:

18 We consider the important question of overlapping investigations in Chapter 3, below.

19 Ev 133

20 Q 15

21 Q 15

22 Ev 133

23 Ev 133

24 Ev 133

25 Ev 132

26 Q 42

Do I see the HET as prosecuting lots of people? No, I do not. Does that mean there will be no prosecutions? No, I think there may be some but the opportunities are limited.²⁷

16. The HET does not have an objective system of measuring outcomes for families, although it has considered commissioning an external evaluation.²⁸ Mr Cox explained the difficulties involved in representing the range of responses from families:

HET experience of meeting and working with families indicate that there is an enormous spectrum of family responses, which must be factored into evaluation of this complex area. We work with families who feel very badly let down by 'the system', and who start with very little confidence in the HET. We meet people who have, in the absence of factual information, created their own narratives of events, and take some time to accept or even explore factual information that differs from their own perceptions. We meet with families who are openly hostile to HET, perhaps not because of the HET process, but because they are angry and dealing with their own grief or emotions. People's views change over time and we have many letters from people who start off hostile, but who six months later write to say they are very glad they engaged.²⁹

The evidence suggests that there has been a range of responses from families to the HET project. During our visit, we met some families who had been through the process. Whilst they had different reactions to the outcomes of the HET investigations, they were, without exception, grateful for the sensitivity and consideration shown to them by HET staff and complimentary about the leadership and professionalism of the Director, Mr Cox. A similar picture was presented by Ms Jane Winter, Director of British Irish Rights Watch (BIRW). She had encountered mixed reactions and said that:

Some people have been very, very pleased with the work of the HET and feel that they have really achieved some closure to the loss of their loved one and other have been critical about mistakes in the report and so on. The one thing we have always found is that the HET are very, very family friendly.³⁰

WAVE, an organisation which provides support and training services to people who have been bereaved, traumatised or injured as a result of the Troubles, noted the benefits to families of the HET's work. The Director, Mrs Peake explained that:

From speaking to a number of people who have come through that process from the early 1970s, the fact that someone is sitting down, listening, coming back with answers, adhering to promises and undertakings they have given, has validity. Even to record at the time that an investigation was not adequate or things were

27 Q 512

28 Ev 133

29 Ev 132

30 Q 367

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overlooked, there is something very positive for families in relation to having that process.³¹

17. BIRW however also noted that progress was slower than expected. It stated that:

Given the number of cases the HET has yet to investigate, and given the simple arithmetic outlined above and the complexity of many of the cases the HET is called upon to investigate, it seems likely that the £34 million budget—not all of which is attached to the HET—and the six year deadline for dealing with outstanding murders is unrealistic.³²

According to information provided to us by the NIO, the total expenditure by the HET up to 31 October 2007 was £13.7 million (of which £11.4 million was spent by PSNI).³³ The HET's projected expenditure for 2008–09 to 2012–13 is £31.37 million.³⁴ Since PSNI's original share of the NIO's HET budget was £26 million,³⁵ the projections indicate that, based on current estimates, the project will overspend its original budget allocation by 60% (£16.77 million).³⁶ Mr Cox acknowledged that additional funding would be required and told us that:

The Chief Constable of the PSNI and the NIO are aware that the HET's work will extend beyond the current project funding. However, the establishment of the Bradley/Eames Committee on dealing with the past means that all parties will await their findings and recommendations before embarking on further financial planning.³⁷

18. BIRW argued that the HET must be allowed to continue, and given the additional resources necessary to enable it to complete its work:

It is obvious when one looks at the sums and the number of cases they have managed to close so far that they are going to overshoot that target; they are not going to make it in six years. ... I am arguing that they should be given the resources that they need to finish the job, even if it takes longer than originally anticipated.³⁸

The Historical Enquiries Team, because of its openness and its willingness to engage in dialogue with families is, I think, helping to restore confidence in modern policing and some of that thinking is also taking root within the PSNI who are themselves becoming more family centred ... I feel that to just disband the HET in the middle of its work would do more harm than good.³⁹

31 Q 334

32 Ev 104

33 Ev 102 Table 1

34 Ev 125

35 Ev 133

36 See Ev 133 and Ev 124–125

37 Ev 133

38 Q 373

39 Qq 374 and 376

19. Some witnesses suggested that rather than providing additional funding, the scope of the HET should instead be reduced. The Police Federation stated that whilst it had supported the creation of the HET, what it had envisaged as a straightforward information sharing exercise with the families of victims had turned into a much bigger exercise. It suggested that one way of limiting the scope of the HET would be to confine its investigations to those referred to it through the Victims' Commissioners acting at the request of a family.⁴⁰ Mr White, Chairman of the Northern Ireland Retired Police Officers Association (NIRPOA) said that his members supported the HET's objective to provide information to families who wished to know more about the circumstances of the death of their loved one, but he expressed concern that "a Rolls Royce industry had been created" and that since £34 million had been ring-fenced for the project, "structures will be put in place to spend that money", despite the fact that "the reality of achieving a prosecution is extremely limited."⁴¹ The former Victims' Commissioner, Sir Kenneth Bloomfield's view was that funding of the various historical enquiries should be a lower priority than the provision of practical support to victims. He said that:

For me, there seems something rather perverse about a situation where over a great many years a large number of people were very properly convicted for committing atrocious crimes and then in the context of the political settlement the jails were emptied and they are all out again. For what purpose do we devote quite so much of a resource, human resource and financial resource, to pursuing all of these old cases because clearly what we are not going to do is end up locking more people up.⁴²

He stated that "there was something to be said for" scaling down the remit of the HET,⁴³ and suggested that the Chief Constable should be asked to propose how this could best be done so that historical work no longer led to the diversion of police officers away from current policing priorities.⁴⁴

20. Another issue raised by witnesses was the independence of the HET, given that its Director reports to the Chief Constable of the PSNI. BIRW stated that "One of HET's difficulties is that it is not seen as being sufficiently independent by some people."⁴⁵ Sinn Féin suggested that "PSNI cannot deal with the past" and that "there needs to be the establishment of a credible, independent mechanism which treats all victims equally without political bias."⁴⁶ It also stated that "the legacy issues need an island-wide approach".⁴⁷ The Committee on the Administration of Justice (CAJ) reported that:

40 Ev 134

41 Q 431

42 Q 228

43 Q 235

44 Q 237

45 Q 375

46 Ev 135

47 Ev 135

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11.00 hrs Monday 7 July 2008

some families will not engage with the Historic Enquiries Team because it is part of the Police Service in Northern Ireland, they see it as intimately tied in institutionally to the police and therefore they do not want to engage.⁴⁸

As we have already noted in paragraph 11, there is within the HET a separate investigation team staffed entirely by officers with a non-PSNI, non-RUC background. We did not hear any allegations of bias on the part of the HET from the five families we met.

21. The Chief Constable told us that he was committed to keeping the HET project going for as long as it was needed, because it was adding more value than it was costing in financial terms. He stated that “if it was the will of Parliament or Stormont” that the HET should be run by an alternative, independent body, he would not be against such an arrangement. However, he added that, as gatekeepers of the information, there would still be pressures on the PSNI to service the HET.⁴⁹ He explained that he did not wish “to be rid of” the HET, because it demonstrated a positive commitment by the PSNI to fulfil to duties:

...what [the establishment of HET] said was a very clear statement about modern policing, which was that we were not running away from anything, we were absolutely up for facing the issues ... it shows our determination to deal with what is a police duty, which is to investigate and not to give up on unsolved cases.⁵⁰

22. However, he accepted that if no additional funding were to be made available for the HET, then it would have an impact on the resources which he had available for current policing activities, and stated that “the reality of course, is if there is no more additional money, that, like everything else will be drawn out of my current budget”.⁵¹

23. We note that in some cases, the Government has a legal obligation to reinvestigate historic cases, and that these investigations must meet the standards set down in Article 2 of the European Convention on Human Rights (ECHR). While the obligation to carry out an effective investigation into unlawful or suspicious deaths comes into play primarily in the aftermath of a violent and suspicious death, the procedural obligation to investigate under ECHR Article 2 may be revived in certain circumstances. The European Court of Human Rights has interpreted Article 2 as meaning that

where there is a plausible or credible allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation.⁵²

The HET’s remit currently includes some cases where there is a legal obligation to investigate, and also cases where there is no legal obligation to investigate.

48 Q 175

49 Q 59

50 Q 61

51 Q 503

52 *Brecknell v UK* App No. 32457/04 (2007)

24. During our visit we noticed that whereas the material relating to some cases was extensive, that relating to others was sparse. This is hardly surprising given that computers were little used in investigative police work during most of the period covered by the HET. There were also more than 80 violent attacks on police stations and the forensic laboratories were twice destroyed during the Troubles. This is a significant factor that must be borne in mind. It underlines the fact that not all cases can be dealt with equally thoroughly.

25. We were impressed by the personal commitment, sensitivity and professionalism of the Chief Constable, the Director of HET and the other staff involved in the HET. The project is unique and challenging, and it is clear to us that there is a real determination to provide information and answers to those who were bereaved during the Troubles. Whilst the memories are painful, families have appreciated the efforts made by the HET team to listen to their questions and to attempt to explain the circumstances of their relatives' deaths.

26. We were surprised to find that all cases are automatically reviewed by the HET. We accept that there are benefits in building a complete picture of often interconnected events. We also accept that a family which initially chooses not to participate in a case review may later change this view; and that there will be occasions where a family member (such as a grandchild) might only feel able to participate once an older relative has come to terms with the re-examination of painful past events, or has died. In such circumstances, the fact that the HET has carried out a comprehensive review of all cases will enable it to help families at a time that is right for them. Nevertheless, we conclude that in some cases scarce resources are being used to investigate historic cases where there is little likelihood of helping a family and limited opportunity of securing a conviction.

27. It is clear that the HET project will need significant additional funding if it is to continue with its current approach and complete reviews of all of the deaths within its remit. We are not convinced that the funding is being targeted as effectively as it might be. We recommend that alternative ways of prioritising cases are identified so as to focus resources on those cases where the next of kin of the deceased specifically request it or where the existence of forensics or other exhibits provides investigative opportunities which could contribute to a successful prosecution case. We recommend that a mid-term project review is conducted, with a view to establishing the costs and benefits of continuing with the HET in its current form, and identifying ways in which the scope of the exercise and the prioritisation of cases could be adjusted so that the project can be completed within budget and with maximum benefits.

28. The financial investment in the HET has been considerable, but little information about its progress and the benefits it has brought to families has been made available to the public. We recommend that the results of the review we call for above are published.

29. We are concerned that the demands of running the HET project, and the likely overspend, might compromise the ability of the PSNI to fulfil its primary role of policing the present. We also recognise that some families and organisations have questioned whether the PSNI is sufficiently independent and would prefer the historic

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11.00 hrs Monday 7 July 2008

investigations to be managed by an independent agency. We return to this point in paragraph 40.

3 The Police Ombudsman for Northern Ireland

Background

30. The Police Ombudsman for Northern Ireland provides an independent, impartial police complaints system. The powers and duties of the Ombudsman are set out in the Police (Northern Ireland) Acts 1998, 2000 and 2003 and other primary and secondary legislation.⁵³ For the year 2006–07, the office had a net operating cost of £8.4 million and 140 full time equivalent staff.⁵⁴

31. Mrs Nuala O’Loan, the first Police Ombudsman, took office on 6 November 2000 for a term of seven years; the current Ombudsman, Mr Al Hutchinson, replaced Mrs O’Loan on 6 November 2007. Our predecessor Committee conducted a brief inquiry into the functions of the Office of the Police Ombudsman for Northern Ireland, and published a Report in February 2005. That Committee commended the work of Mrs O’Loan and her staff in “constructing from scratch a credible police complaints service in Northern Ireland”.⁵⁵

32. A 2006 report from Healing Through Remembering acknowledged the important contribution made by the Police Ombudsman’s investigations:

The considerable legal powers of the office of the Police Ombudsman in terms of compelling witnesses as well as capacity to access relevant files including intelligence information, and the apparent dogged persistence with which that office has gone about its work, have made it quite a powerful tool of truth recovery in the field of policing.⁵⁶

Other commentators have been more cautious. The views of BIRW on the Ombudsman’s work were that “the outcomes there have been patchy” and “we have found the Police Ombudsman’s Office much less family friendly than the Historical Enquiries Team”.⁵⁷

Historic remit

33. In 2001, the Ombudsman’s remit was extended to include historic cases. The RUC (Complaints) Regulations 2001 created a statutory obligation for the Ombudsman to investigate ‘grave or exceptional’ cases where the incident occurred more than a year ago and involved allegations of police misconduct. The Ombudsman told us that he was under a statutory obligation to investigate these issues, saying “I have no discretion and whatever comes to me I will eventually have to deal with.”⁵⁸ Historic complaints to the Ombudsman

53 The Police (Northern Ireland) Act 1998 received Royal Assent in July 1998, after the Belfast Agreement was signed (on Good Friday, 10 April 1998). However, most of its Commons stages were completed before that Agreement was concluded.

54 Police Ombudsman for Northern Ireland, *Annual Report and Accounts 2006–07*, HC (2006–07) 659, p 62–70

55 Northern Ireland Affairs Committee, Fifth Report of Session 2004–05, *The Functions of the Office of the Police Ombudsman for Northern Ireland*, HC 344, para 27

56 Healing Through Remembering, “Making Peace with the Past”, 2006, p 55

57 Q 371

58 Q 80

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11.00 hrs Monday 7 July 2008

can arise as a result of referrals from a variety of sources, including members of the public, the Director of Public Prosecutions and the Chief Constable, PSNI. Other cases have been referred to the Ombudsman by the Secretary of State as a result of judgments against the UK by the European Court of Human Rights. These include the cases of McKerr, Burns and Toman.⁵⁹ However, the number of historic complaints to the Ombudsman increased significantly after the HET project began operations in 2006, and the Office started to receive referrals from it. The Sapphire Team was established within the Ombudsman's Office to respond to these referrals from HET and there is also a Significant Investigations Team which deals with significant and historical investigations—around 35% of the staffing resource within this team is currently dedicated to historic cases.⁶⁰ According to figures provided in February 2008, there were 983 investigations then underway in the Office of which 116 were historical (54 of them HET referrals⁶¹) and it is estimated that there will be a further 300 referrals in total from the HET.⁶²

34. The Ombudsman told us that difficulties had been encountered in securing sufficient additional funding to resource the additional work created by the extended remit. He explained that “when the Police Ombudsman was required by Parliament in 2001 to undertake investigations of matters more than a year old, funding was sought on a number of occasions to facilitate this work”.⁶³ The previous Ombudsman, Mrs O’Loan had submitted a business case to the NIO in January 2006, requesting an additional £750,000 per annum for the period of the HET project. Some funding was made available, but not the full amount requested:

During the three months to the end of March 2006 a commitment of £93,000 was made and utilised in setting up the dedicated team (Sapphire Team) for responding to HET referrals. During the year 2006/2007 a further £497,000 was utilised, the costs relating primarily to the contracting of retired Police Detectives from England or Wales to undertake this specific work.

There has been a general assurance provided by the NIO after this period that in the context of the six-year resource plan established by the Chief Constable [for the HET] £895,000 per year would be allocated to the Office. This resource represents only part of the overall resource utilised by the Office on HET work and other major investigations which have been ongoing within the Office under the statutory requirement to investigate any grave or exceptional matter from the past.⁶⁴

35. Some staff have been reassigned from current investigations in order to assist with historical work. The Ombudsman observed that:

59 Q 79

60 Ev 116

61 Q 86

62 Q 86

63 Ev 115

64 Ev 116

this impacts on the capacity of the Office to respond to current referrals from the Chief Constable, for example matters such as deaths in custody or fatalities as a result of police operations, or to current significant and serious complaints.⁶⁵

We were told that there have also been difficulties recruiting suitably skilled staff:

The pressure on the Office is compounded by the limited availability of skilled, experienced and appropriate staff, to manage, lead and undertake such investigations. There has to be a balance of Investigation Officer experience and decision-maker experience to enable the 360° investigation that such cases merit and require and to comply with the requirements of Article 2 ECHR. The complexity of the cases and the gravity of the issues immediately necessitate significant managerial involvement. There are huge risks (including risks to the life of persons who may be identified in the course of an investigation) and there are public-police confidence issues present in each case. These risks have to be managed and dealt with at the highest level, and the attention given to such cases has the potential to divert focus from the work of today's police complaints system.⁶⁶

36. The volume of work arising from historic cases, in particular those arising out of the work of the HET, is causing the Ombudsman to have concerns about the ability of his Office to cope with its remit. He told us that:

I have become very concerned. I have now been three months on the job and I am concerned about quality, the impact, our capacity for the future, and strategically looking at it we could come to that point where we will be sinking.⁶⁷

The Ombudsman explained that some historic investigations had been suspended indefinitely due to lack of resources,⁶⁸ and that this too was affecting public confidence in his Office. He stated that:

it is impossible, given the number of complex investigations, to provide realistic timescales as to when an investigation will become a priority. The risk to the Office, deriving from this situation, in terms of public confidence is significant.⁶⁹

He said that:

our satisfaction levels, according to surveys, are starting to slip [and that] there is no doubt it is impacting on our current delivery of cases because what we are doing is taking the experienced police officers, investigators, and putting them onto historic investigations because that is where we need the quality.⁷⁰

In conclusion, he stated that "The work of dealing with the past and the headlines that these cases generate have the potential to undermine and reduce the perceived importance

65 Ev 116

66 Ev 117

67 Q 87

68 Ev 117

69 Ev 118

70 Q 94

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11.00 hrs Monday 7 July 2008

and relevance of today's police complaints system."⁷¹ He also suggested that confidence in policing was being eroded, stating that "the past is bleeding into the confidence of this present police organisation" and that "confidence is diminishing in present policing."⁷²

37. The Ombudsman estimated that should there be no change in the respective remits of the Ombudsman and of the HET, then his office would have to seek additional funding of around £2 million to £3 million per year to enable him to fulfil his statutory duties with regard to the historic work.⁷³ We note that the Patten report contained the following observation about the funding of the Ombudsman's Office:

The Police Ombudsman should be, and be seen to be, an important institution in the governance of Northern Ireland and should be staffed and resourced accordingly. Budgets should be negotiated with and finance provided by the Northern Ireland Office (or its successor department) both for the core staff of the office and to provide for exceptional demands created by large scale investigations.⁷⁴

38. Paul Goggins MP, Minister of State for Northern Ireland, did not accept that the Ombudsman's Office had been under funded and stated that its financial bids had been met in full. However, he also said that he had asked the Ombudsman to prepare a business case for what he regarded as necessary to meet the growing workload, and that he would then assess what investment was necessary for the future.⁷⁵

Alternatives for the future

39. The current Police Ombudsman, Mr Al Hutchinson, published his views on 'policing the past' in his final public report before standing down from his position as the Policing Oversight Commissioner.⁷⁶ In that report he identified the difficulties of dealing with the past as one of four future challenges facing policing in Northern Ireland. He suggested that "policing practices of the past are clearly influencing perceptions of present-day policing in Northern Ireland" and that such perceptions were "an issue hindering the forward progress of policing". In his view:

organisations such as the Historical Enquiries Team and the Ombudsman's office are blunt instruments too narrowly focused to use in a search for truth and justice for societal challenges [and] all the pieces are in place to deliver the new beginning to policing in Northern Ireland, but ... the issues of the past have established a barrier in the road toward re-establishing the trust necessary for fully achieving that goal.⁷⁷

40. Mr Hutchinson made it clear to us that in his view the work of the Ombudsman's historic investigations must continue, saying "this piece of work has to be done ...

71 Ev 118

72 Q 105

73 Qq 87-88

74 A New Beginning: Policing in Northern Ireland, "The Patten Report", September 1999, para 6.41, p 37

75 Q 566

76 Office of the Oversight Commissioner, Report 19, May 2007, pp 215-216

77 *Ibid.*

somebody has to continue to do that”.⁷⁸ He stressed that the Police Ombudsman would always need a role to look retrospectively beyond twelve months, but explained that it was the period from 1968 to 1998 that was causing a serious problem for his Office.⁷⁹ He suggested that, instead of the current arrangements, there could be “an independent impartial organisation separate from both the PSNI and the Police Ombudsman capable of investigating all matters in a manner that would provide a sustainable process compliant with the United Kingdom’s obligations under Article 2 ECHR.”⁸⁰ He stated that “this agency group would have to be removed from the police to have independence and to have the confidence of the broad public.”⁸¹ He explained that a single organisation would reduce unnecessary duplication of investigations and enable significant cost savings to be made:

Such a single organisation would also benefit from the ability to deal with an incident or incidents as one investigation, with one set of disclosure imperatives, as opposed to the current situation, which requires two separate investigations where police officers and non police officers may have been involved in the same incident. In those circumstances the disclosure requirements are significantly complicated, and may have the effect of undermining any subsequent trial.⁸²

41. BIRW supported the Ombudsman’s proposal, stating that

It is attractive because it would do away with any duplication between the two organisations of which there is inevitably some ... It would also overcome the problem that the Police Ombudsman has which is that his remit is limited to police misconduct and he cannot look at the bigger picture.⁸³

The Police Federation described the historic remit of the Ombudsman as a “legal straitjacket” and proposed that the legislation be amended to enable the Ombudsman to focus on complaints relating to events which had occurred after 1998.⁸⁴ As we discussed in the previous chapter, the Chief Constable told us that if the HET were to be transferred from the PSNI to a separate, independent body, he would not be against this different arrangement, but he was doubtful whether it would relieve the pressure on the PSNI.⁸⁵

42. The Minister of State acknowledged that there was a build-up of work in the Ombudsman’s Office, and was aware of the proposal that the historic work should be reassigned to an alternative body. However, his view was that it was “principally a positive thing” that the Ombudsman retained the historic remit,⁸⁶ and questioned whether any other body would command an equivalent level of expertise, independence and

78 Q 118

79 Q 124

80 Ev 118

81 Q 117

82 Ev 118

83 Q 370

84 Ev 134

85 Q 59

86 Q 563

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11.00 hrs Monday 7 July 2008

confidence.⁸⁷ He stated that he intended to “wait and hear what Lord Eames and Denis Bradley have to say about this issue” before reaching any decision.⁸⁸

43. The Patten Report underlined the importance of an independent, properly resourced Ombudsman’s Office which had community confidence and support. Our predecessor Committee noted in 2005 that Northern Ireland’s first Police Ombudsman, Mrs Nuala O’Loan, had constructed from scratch a credible police complaints system in Northern Ireland. However, the extension of the Ombudsman’s remit to include historic cases is having a damaging effect on the efficiency of the Office. The number of complaints about the former Royal Ulster Constabulary (RUC) arising from the years of the Troubles and the inadequate provision of additional resources have compromised the Ombudsman’s ability to investigate complaints against the PSNI. There is a risk that this reduced capability will damage public perception of the Ombudsman’s Office and public confidence in policing.

44. We have considered the case for a transfer of responsibility to carry out historical work from the Ombudsman to a newly-created independent body. We have also considered whether the Historical Enquiries Team, part of which is based in London and is staffed entirely by officers and former officers from forces outside Northern Ireland, could take on this function, or whether the resources of the Ombudsman’s office should be increased, to allow him to carry out historical work without impacting on his core responsibilities. We are, however, mindful of the Minister’s comment that he prefers to await the conclusions of the Eames/Bradley Group before reaching any decision. We, too, wish to avoid pre-empting any conclusion that the Group may come to on this issue. We therefore make no recommendation in this Report, beyond noting that the question of who has responsibility for conducting investigations into grave or exceptional cases involving alleged police misconduct in the period before the establishment of the PSNI is of the utmost importance, and that it will have to be resolved sooner rather than later. We intend to return to this.

87 Q 562

88 Q 564

4 Statutory Inquiries

Background

45. On 1 April 2004, the Secretary of State for Northern Ireland published the reports by Justice Cory into the cases of Robert Hamill, Billy Wright, Rosemary Nelson and Patrick Finucane.⁸⁹ At the same time, he announced the establishment of public inquiries into the cases of Robert Hamill, Billy Wright and Rosemary Nelson and undertook to set out the way ahead regarding the case of Patrick Finucane at the conclusion of prosecutions in that case.⁹⁰ On 8 July 2004, the Secretary of State published a Statement on Governing Principles in respect of the inquiries into the deaths of Robert Hamill, Billy Wright and Rosemary Nelson.⁹¹ The general principles applying to the establishment and conduct of inquiries include independence, transparency consistent with the interests of justice and national security, fairness and respect for individuals and avoidance of unnecessary expenditure.

46. The Billy Wright inquiry was established under the Prison Act (Northern Ireland) 1953. The Robert Hamill and Rosemary Nelson inquiries were established under section 44 of the Police (Northern Ireland) Act 1998. Both statutes provide inquiries with powers to subpoena witnesses and compel the production of documents. These mirror the powers of the High Court and inquiries established under the Tribunals of Inquiry (Evidence) Act 1921 to compel evidence and witnesses. The Inquiries Act 2005 came into force on 7 April 2005. It repealed the Tribunals of Inquiry (Evidence) Act 1921. The Billy Wright and Robert Hamill inquiries have subsequently been converted into inquiries under the Inquiries Act 2005.

47. The demands of the statutory inquiries, and other historic investigations, have been such that the PSNI has established a dedicated team of staff to deal with this work. The PSNI's Crime Support department, headed by Assistant Chief Constable Alistair Finlay, now has lead responsibility for legacy investigations, including overseeing the work of the HET. One branch of the department acts as the Police Service's main interface with the three statutory inquiries in Northern Ireland and the two statutory inquiries in the Republic of Ireland (the Smithwick and McEntree inquiries).⁹² Within this branch are three units: one is responsible for meeting the PSNI's legal obligations to search the PSNI's archives and provide information and other material to the inquiries; another provides legal support to serving and former officers involved in the inquiries; and the third is responsible for reviewing and redacting intelligence information.⁹³ A second branch of the Crime Support department is the Retrospective Murder Review Unit which is responsible

89 "Government publishes Cory reports", www.nio.gov.uk, 1 April 2004

90 *Ibid.*

91 Public inquiries into the deaths of Robert Hamill, Billy Wright, Rosemary Nelson and Patrick Finucane. Statement on Governing Principles, 8 July 2004 (Statement on Governing Principles).

92 Police Service of Northern Ireland, *Chief Constable's Annual Report 2006–07*, p 5

93 Police Service of Northern Ireland, *Chief Constable's Annual Report 2006–07*, p 5

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11.00 hrs Monday 7 July 2008

for the re-examination of unsolved murders that were committed between 1998 and 2004.⁹⁴

48. Sir Hugh Orde told us that liaising with statutory inquiries had created a “huge amount of work” for the PSNI.⁹⁵ He said that it had been a burden in terms of recovering archive information and providing storage for it in secure accommodation. However, he said that the PSNI had now “physically searched every single building, and every murder file which we think we can find we now have in very secure accommodation ...”⁹⁶ The PSNI is required to provide to an inquiry panel on request any relevant information which it holds, including intelligence. It has expressed concern about the arrangements for protecting confidential intelligence and other sensitive information contained within the records which it has provided to an inquiry. In particular, the protection of information which might identify a covert source is a critical issue. ACC Finlay explained that:

What is not always understood ... is that there is still an appetite in Northern Ireland for people to try and research from the past those within the communities who might have been giving information to the police. Over the period of time we have seen in excess of 30 people killed, believed to be police informants ... and that is the real threat and issue that surrounds public inquiries and inquests if we are not absolutely careful ... in the redaction and the careful framing of material that should end up in the public domain, because we have an absolute duty of care to these people.⁹⁷

49. The PSNI expressed concern about the history of compromised sources being murdered; the potential difficulties of recruiting covert sources in the future if it were to become widely believed that information about them could not be kept confidential; and the financial costs to the police of relocating compromised sources. It also commented that wider knowledge of intelligence capacity and surveillance techniques could reduce the ability of the PSNI to prevent and detect crime, and highlighted the risk that international intelligence communities might become more reluctant to share intelligence information if they considered that it might ultimately be published by a public inquiry.⁹⁸ We consider the issue of source protection in the following paragraphs.

Covert Human Intelligence Sources

50. A covert human intelligence source (CHIS) is an individual who provides information to the police, or security services, on criminal activity. The intelligence provided by covert sources was of particular importance during the Troubles as there were often no eyewitnesses willing to come forward, and the paramilitaries became practised in removing evidence from the crime scene.⁹⁹ NIRPOA praised the contribution made by covert sources

94 Police Service of Northern Ireland, *Chief Constable's Annual Report 2006–07*, p 5

95 Q 13

96 Q 13

97 Q 31

98 Ev 124

99 Ev 111

in saving many lives during the Troubles and explained the importance of keeping secret the identity of covert sources and the consequences for those who were identified:

One common feature shared by every CHIS is a desire for their activities and identity to remain secret. ... Without such reassurance very few people, if any, would actually agree to provide secret intelligence to the police. Everyone in Northern Ireland knows well and understands the penalties that the terrorist and organised crime groups inflict on those whom they believe to be CHIS. The ultimate sanction of death awaits those who fall under the terrorists' suspicion ... Death is often marked with ritual humiliation and the families of informers are obliged to listen to 'confessions' and to distance themselves from their loved ones. Faced with the prospect of such a death if their relationship with the police becomes known no CHIS will operate without the belief that they will be protected by a cloak of anonymity, which they see as vital to their safety.¹⁰⁰

51. One way of providing protection to a covert source whose identity has been revealed is for the police to offer a resettlement package. However, NIRPOA pointed out that whilst this might give the individual some protection, the provision of a new identity and relocation to another country had a devastating impact on family and personal life and often left covert sources in a position where they were unable to return home even for a parent's funeral, or for a final visit to an elderly relative before they died.¹⁰¹ NIRPOA suggested that covert sources were now at greater risk of being identified because of the range of historic investigations underway which required the PSNI to share its information about the identity of sources.¹⁰²

52. The Police Ombudsman questioned whether continued reliance on covert sources was necessary or desirable. He pointed out that there were "other effective and lawful technologies and methodologies available to the police, which may be used in the fight against terrorism and serious crime and which support the rule of law." He added:

There is, regrettably, a legacy in Northern Ireland of inappropriate and on occasions unlawful practice and policy in the use of sources, and the information received from them, which has on occasion prevented good policing and has undermined the rule of law and confidence in policing.¹⁰³

The Ombudsman pointed out that the PSNI had decommissioned many covert sources, many of them because they were engaging in serious crime, and that inappropriate use of sources had the potential to impact negatively on good policing. He nevertheless recognised the need to consider the effect of disclosure of any source identity.¹⁰⁴

100 Ev 111

101 Ev 112

102 Ev 112

103 Ev 119

104 Ev 118

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11.00 hrs Monday 7 July 2008

Legal framework

53. The PSNI told us that it considered there to be a tension between different aspects of the PSNI's legislative duties in respect of covert sources. The PSNI has responsibilities to protect the identity of sources under European Convention on Human Rights (ECHR) Article 2 and under the Regulation of Investigatory Powers Act 2000 (RIPA). However, it also has a duty to provide information to inquiries, including information which might identify a source. We consider the nature of these duties in the following paragraphs.

ECHR Article 2 and Regulation of Investigatory Powers Act 2000

54. ECHR Article 2 states that "Everyone's right to life shall be protected by law." In practice, this is interpreted as placing the following obligations on states:

- i. a substantive prohibition on the taking of life;
- ii. a procedural obligation officially to investigate the taking of life in certain situations; and
- iii. a substantive obligation to protect the right to life, i.e. to take appropriate steps to safeguard the lives of those within their jurisdiction.

The Human Rights Act 1998 provided for Convention rights to be enforced through the United Kingdom's courts.¹⁰⁵

55. The PSNI and the inquiry panels are public authorities for the purposes of the Human Rights Act 1998. As such, each must act in a manner that is compatible with European Convention rights. The ECHR Article 2 substantive obligation to protect the right to life applies to both the PSNI and the inquiry panels. That obligation arises where state authorities know (or ought to know) of the existence of a real and immediate risk to the life of an individual (the *Osman* threshold)¹⁰⁶ and requires them to take preventative, operational measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Whether the obligation arises in any particular case and whether the state authorities are in breach of that obligation will depend not only upon the nature of the threat and the degree of risk to the individual, of which the authorities knew or ought to have known, but also upon the extent to which there were appropriate measures reasonably available to the authorities to alleviate or obviate that risk. However, where it is the conduct of the state authorities which has itself exposed an individual to the risk to his or her life (including for example where the individual is in a special category of vulnerable persons, or of persons required by the state to perform certain duties on its behalf which may expose them to risk) and who is therefore entitled to expect a reasonable level of protection as a result, the *Osman* threshold of a real and immediate risk is too high. If there is a risk to the individual on the facts, then there is a real risk and 'immediate' can

¹⁰⁵ A House of Lords judgment in 2004 established that the Act is not retrospective. It does not, therefore, apply to unlawful killings which took place before the coming into effect of the Act on 2 October 2000. This does not, however, displace the obligations under ECHR Article 2, which continue to bind the UK under international law.

¹⁰⁶ *Osman v United Kingdom* (2000) 29 EHRR 245

mean just that the risk is present and continuing at the material time, depending on the circumstances.¹⁰⁷

56. Part II of RIPA sets out the legislative framework for the authorisation, conduct and use of covert human intelligence sources. The RIPA Codes of Practice require authorizing authorities such as the police to take account of the safety and welfare of informers while they are actively working for them and to consider their ongoing security and welfare when the informer has completed his or her involvement. Case law has established that the police have a duty to take reasonable care to avoid unnecessary disclosure to the general public of confidential information provided by an informant.¹⁰⁸ However, public policy considerations will be relevant in determining both the scope of the duty on the police and the question of any breach of that duty, and the phrase ‘reasonable care’ limits the extent of the duty by recognizing that the police have many functions to perform, only one of which is the protection of their sources. If there is a real and immediate risk to life, then the PSNI and the inquiry panels may have a positive obligation to take preventive, operational measures to protect the identified individual whose life is at risk as a result of the criminal acts of a third party. This could include imposing strict procedures and arrangements for the storage, retention and disclosure of sensitive information and intelligence provided (by the PSNI and others) to the inquiry panels and the imposition of restrictions by the inquiry panels on disclosure or publication of any sensitive evidence or documents provided to an inquiry.

Inquiries Act 2005

57. A Minister may establish an inquiry under the Inquiries Act 2005 where it appears to him or her that (a) particular events have caused, or are capable of causing, public concern or (b) there is public concern that particular events may have occurred. The Minister defines the terms of reference of the inquiry and its setting-up date. The Minister also appoints the members of the inquiry panel. The NIO described the three mechanisms by which sensitive information might be protected:

- A restriction order may be made by the Panel Chairman to prevent the information being disclosed;
- An application may be made to the Minister for a restriction notice to prevent the information being disclosed by the Inquiry Panel; or
- An application may be made for Public Interest Immunity (PII) (either to prevent the information being disclosed *by* the Inquiry Panel, or in exceptional circumstances, an application to prevent the information being disclosed *to* the Inquiry Panel).¹⁰⁹

58. There is a presumption in favour of public access to both inquiry proceedings and information. However, restrictions may be imposed by the inquiry chairman on

107 *R (A) v Lord Saville of Newdigate* [2002] 1 WLR 1249

108 *Swinney v The Chief Constable of Northumbria Police* [1997] Q.B. 464 and *Swinney v The Chief Constable of Northumbria Police (No 2)*, the Times, May 25th 1999

109 Ev 101

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11.00 hrs Monday 7 July 2008

attendance at an inquiry and/or disclosure or publication of any evidence or documents provided to an inquiry. When considering whether to impose any restrictions, specific regard must be given to any risk or harm that could be avoided or reduced by such a restriction.¹¹⁰ This means that concerns voiced by the PSNI regarding potential threats to life or risk of harm to informants, witnesses or other individuals¹¹¹ must be considered by the inquiry chairman and thought given as to whether to impose restrictions to alleviate or obviate any such threats or risk. BIRW pointed out that it is consistent with the rule of law generally that it is the independent person presiding over proceedings (in this case the inquiry chairman) who determines what is or is not too ‘harmful’ to disclose.¹¹² It is also consistent with ECHR Article 2 which requires the state to hold effective, independent investigations into deaths involving force.

Issues raised by the PSNI

Process for agreeing redactions with inquiry panels

59. The PSNI told us that, to date, it had been able to reach agreement with inquiry panels with regard to any redactions to information which it wished to be made prior to disclosure by the inquiry.¹¹³ However it expressed doubts about the procedures for resolving disputes between the PSNI and an inquiry about what redactions were necessary. It was not confident that the provisions in the Inquiries Act for resolving disputes would be satisfactory if there were to be a disagreement between an inquiry chairman and the PSNI about publication of a specific piece of information. The PSNI view was that the Inquiries Act does not clearly specify in what order of precedence a decision of the Minister or the chairman can be sought and which is appropriate at different stages of the proceedings.¹¹⁴ It also suggested that there had been some debate as to the capacity of inquiry chairmen to award PII, and that the view of Lord McLean, Chairman of the Billy Wright inquiry, was that he could not.¹¹⁵

60. BIRW accepted that the PSNI “obviously has a duty of care towards its covert sources” and that “any action on the part of the PSNI that adds to [the risk to life] could potentially infringe the sources’ right to life under Article 2 of the ECHR.”¹¹⁶ However, it added that “there are no provisions in the Inquiries Act 2005 which place the police under any special or new difficulties in relation to the protection of covert sources.”¹¹⁷ CAJ commented that:

It is not necessarily the case that in order for the inquiry to do its job the name has to be given of every informer and the level of detailed methodology, but that actually there is a lot of information which could be put into the public domain, more

110 Inquiries Act 2005, ss.19(5)

111 Ev 128

112 Ev 108

113 Q 72

114 Qq 529–503

115 Q 72

116 Ev 107

117 Ev 107

information certainly than is there currently, that would allow us to assess why certain decisions were made and what actually happened.¹¹⁸

The Police Ombudsman pointed out that,

Even where it is not readily apparent to an Inquiry, other individuals, better placed to realise the risk, may invoke protection of the information, or, more accurately refuse to provide the information, in accordance with Sections 22(1) and (2) [of the Inquiries Act]. Section 22(1) specifically negates compellability where to require it would be incompatible with a European Convention obligation. ... Additionally Section 22(2) preserves a public interest ‘exemption’, protecting that which would attract a claim of Public Interest Immunity (PII) in any other venue and therefore ‘copper fastens’ the ability of the PSNI, in such situations, to raise a defence to a production order.¹¹⁹

61. The Joint Committee on Human Rights and others have raised concerns about the independence of inquiries under the Inquiries Act, particularly with the Minister’s powers regarding evidence and restriction notices under Section 19 of the Act.¹²⁰ For example, BIRW told us that:

The Minister’s role is particularly troubling where the actions of that Minister or those of his or her department, or those of the government, are in question. In effect, the state will be investigating itself. ... Indeed we doubt that the Inquiries Act can deliver an effective investigation in compliance with Article 2. The Minister’s powers to interfere in every important aspect of an inquiry robs it of any independence.¹²¹

In this context, ACC Finlay suggested that if the Secretary of State were to be required to make PII decisions, it would place him in “the invidious position of seeming to intervene in the inquiry” and that the issue might therefore have to go to judicial review.¹²² The Police Ombudsman also referred to the potentially damaging effect on public confidence of issuing PII certificates, pointing out that:

Where the Police Ombudsman or the Chief Constable, under their statutory obligations, seek to protect methodologies or sources from being made public at an inquiry, this may have the effect of undermining confidence in these organisations.¹²³

62. The Minister of State accepted that there would be “real pressures” in the complex process of negotiating which redactions were necessary and confirmed that he would take a very close interest in the process to ensure that progress was maintained.¹²⁴ However, his

118 Q 204

119 Ev 118–119

120 Joint Committee on Human Rights, Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HC 224, HL Paper 26, paras 2.12–2.16

121 Ev 107

122 Q 72

123 Ev 120

124 Q 579

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11.00 hrs Monday 7 July 2008

view was that the legislation was adequate and that the provisions for agreeing redactions were clear. He confirmed that the Ministerial powers would be used when necessary:

If the Chief Constable was saying to an inquiry, ‘I do not think that information should be shared with other parties or should be in the public domain because there is an Article 2 obligation here that prevents that’ and the inquiry did not agree and they could not reach a voluntary agreement, if I or the Secretary of State was persuaded by the Chief Constable indeed that that matter should not be shared because of Article 2 obligations, then the Secretary of State would have the power to make a restriction notice. Of course, it would then be for the inquiry to challenge that in court. If we were persuaded as ministers, we would not hesitate to use those powers because Article 2 obligations are absolute.¹²⁵

63. The disclosure of intelligence information to inquiries clearly presents challenges for the police, and for other organisations which are required to provide sensitive information. The process of agreeing necessary redactions requires considerable input from key police staff who understand the implications of disclosing specific items of intelligence. This necessarily requires them to divert their attention from more current issues of concern, which include, most critically, monitoring the threat posed by dissident terrorists. The provisions in the Inquiries Act 2005 for agreeing and resolving disputes about redactions have yet to be tested and it is therefore possible that difficulties may emerge with the way that those provisions work in practice. It is crucially important that the workings of the Act are carefully monitored. The Committee may wish to return to this issue in a subsequent inquiry.

Inquiry panel information management procedures

64. Sir Hugh Orde said that one of his key concerns regarding the statutory inquiries, was that the PSNI was “losing control of more and more secret and extremely sensitive material” which previously would have been retained by the PSNI and kept within its control.¹²⁶ ACC Finlay explained that a particular issue was the arrangements made by inquiry chairmen for the safe storage and management of information by the inquiry panels and their staff to prevent the loss or inadvertent disclosure of sensitive intelligence information within their care.¹²⁷ The importance and relevance of this issue was highlighted during our own inquiry, by the news that a disk, believed to contain sensitive information, had been lost by the Rosemary Nelson Inquiry. We also discovered that each inquiry might have a staff of around 30, and that turnover of these individuals has been high. The specific concerns expressed by the PSNI are listed below:

- i. It is not clear to the PSNI whether inquiry staff with access to intelligence have been required to sign strict confidentiality agreements or been subject to a high level security vetting process.¹²⁸

125 Q 580

126 Q 526

127 Q 531

128 Ev 127

- ii. According to the PSNI, the government intelligence handling regime (STRAP) used by the Security Service, MOD and others managing intelligence information does not apply to inquiries, even though they are in possession of a “very significant volume of intelligence”.¹²⁹
- iii. The PSNI told us that it was subject to regular audits by the Office of the Surveillance Commissioner to monitor that its information was stored, managed, collected and disseminated in accordance with the required guidelines, but that the management of intelligence information which it had handed over to inquiries was not subject to an equivalent level of scrutiny.¹³⁰
- iv. With regard to the return or safekeeping of documents after the end of an inquiry, the PSNI would also like to see all the un-redacted documents to which PII and Article 2 obligations attach returned once the inquiry is closed and the report is issued, and would be satisfied for documents to which no PII attaches, in other words redacted documents, to be archived as required.¹³¹

65. In January 2008, the Billy Wright Inquiry published a paper which suggested that the PSNI had contributed to delays and difficulties in the recovery of documentation required by the Inquiry.¹³² The PSNI published its response in May 2008, in which the Chief Constable explicitly stated his commitment to supporting the work of the Inquiry. It also included an acceptance that the PSNI had “at times fallen short of the expectations of the Inquiry” and listed a number of specific areas where it accepted that the criticism had been justified.¹³³ However, the response also listed examples where the PSNI judged that the Inquiry’s management of intelligence information had fallen below the required government standards.¹³⁴

66. The Minister of State explained that the NIO, as sponsoring department for the inquiries, had reached “robust agreements” with them about the handling of sensitive information, and that the inquiries had provided assurances that all of the agreed systems were in place and were working well.¹³⁵ He added that it was “deeply concerning” that information had been lost by the Nelson Inquiry and advised that the Secretary of State had asked a security expert to work with all of the inquiries, to ensure that their systems were as robust as they needed to be.¹³⁶

67. The need for the PSNI to provide sensitive information to inquiry panels was an inevitable consequence of the Government’s decision to conduct the inquiries and, as we have previously discussed, there are legal provisions to prevent the disclosure of sensitive information beyond an inquiry if necessary. The inquiries must be able to

129 Ev 127

130 Ev 128

131 Ev 131

132 Position Paper on the PSNI’s Response to Requests for Information, January 2008, www.billywrightinquiry.org

133 Police Service of Northern Ireland Response to Billy Wright Inquiry Position Paper, May 2008, p 82

134 Police Service of Northern Ireland Response to Billy Wright Inquiry Position Paper, May 2008, p 26

135 Q 582

136 Q 582

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11.00 hrs Monday 7 July 2008

operate independently of the Government and the agencies which provide them with information. It would not be appropriate for any of those agencies to appear to attach any conditions to its cooperation, nor to dictate an inquiry's internal procedures. The Minister of State at the Northern Ireland Office has underlined the fact that as public authorities in their own right, inquiries have the same obligations under ECHR Article 2 as any government department or the PSNI. Inquiry chairmen must take full responsibility for the management of information within their safekeeping and ensure that they meet their obligations under human rights legislation. It is important for them to recognise that the future safety and indeed possibly the lives of certain people who have supplied sensitive information could well depend upon their decisions.

68. The loss or inadvertent disclosure of sensitive intelligence information by an inquiry panel or its staff could have serious consequences, including the risk to life. The PSNI has expressed specific concerns about the inquiries' information management procedures. These concerns must be addressed to ensure that the inquiries meet their Article 2 obligations and to enable the PSNI to work cooperatively with the inquiries, and provide them with the information they require without further delay. If the inquiries are unable to demonstrate to the Government that their procedures are adequate, steps must be taken to implement improvements. We recommend that if the particular issues raised by the PSNI were not included in the Government's review of inquiry information management procedures, they should be included in a further review which should be conducted forthwith, as a matter of urgency.

Resources

69. The Chief Constable has made a clear public commitment to supporting the work of inquiries.¹³⁷ The purpose of our work has been not to question that commitment, but to examine whether the PSNI is adequately enabled to fulfil its obligations without compromising its ability to police the present. The PSNI estimated that its costs relating to the inquiries for 2007–08 would be £2.05 million, with a further £2.75 million projected for 2008–09 and £0.5 million for 2009–10.¹³⁸ No specific additional funding for this work has been provided by the NIO. Whilst these are significant sums, they represent a relatively small proportion of the entire PSNI budget but the Chief Constable told us that the biggest impact was in the loss of expertise in key areas of policing where intelligence was currently critical. He explained that the PSNI had only a small pool of appropriately skilled officers able to search intelligence information and identify which parts could be used to identify covert sources. He had had to divert key staff from current policing priorities to historical work and as a result there was a risk that the quality of current policing could be compromised. He said that, "... we cannot just recruit anyone to do this; (a) it is deeply sensitive and (b) the corporate memory goes over time and trying to get that back is difficult."¹³⁹ He went on to explain the consequences for the PSNI:

... what I am having to do, if I cannot find it externally, is use some of my key players who will be delivering some of my most sensitive operations today to look to service

137 Q 534

138 Ev 124–125

139 Q 53

historic inquiries. ... all the inquiries and all the inquests, all [are] coming into a fairly small hub of experts.¹⁴⁰

70. The Police Federation stated that “We consider that this pressure on police resources should be a matter of concern to be shared at the highest level of Government. Ineffective policing will not help to stabilise the still bedding down political institutions of Northern Ireland.”¹⁴¹ The view of the Policing Board was that:

the efficiency and effectiveness of the police service in preventing and detecting crime should not be compromised by dealing with various commitments to historical inquiries ... It is the responsibility of Government to ensure that the police service be provided with adequate funding to deal with ‘policing the past’.¹⁴²

71. The Minister of State acknowledged the pressures on the Chief Constable:

I have a lot of sympathy with the Chief Constable in this. Where he is faced with public inquiries, inquests and so on, it is officer time tied up with going back through files, often very experienced officers going back through files, coming up with the information, sharing it and so on. I acknowledge that is a pressure but it is a pressure that, in his own redoubtable way, the Chief Constable gets on and deals with.

However, he stated out that the PSNI’s resource allocation was “substantially more than comparable forces across the rest of the United Kingdom”¹⁴³ and that the Chief Constable and the Policing Board had confirmed that they had balanced the budget for the current year.¹⁴⁴ He also accepted that the pressures on the PSNI were “significantly and substantially different from the pressures in other police force areas in the United Kingdom” and explained that was reflected in the PSNI’s budget settlement.¹⁴⁵

72. The Minister of State told us that he believed it was necessary to fund the statutory inquiries in order to help people achieve resolution and to build public confidence, and also to fund practical projects which helped people to rebuild their lives.¹⁴⁶ He explained:

I genuinely believe that they [inquiries] can help to build up public confidence as well as to deal with individual circumstances. I am not pretending ... that they are a perfect and complete answer in themselves. There are many issues and difficulties associated with them and, in and of themselves, they do not produce the final answer which Northern Ireland as a whole will need if it is to move forward.¹⁴⁷

73. The very high annual cost of inquiries into past events is financially unsustainable. We note with concern that the latest estimated cost of the Saville Inquiry alone is £183

140 Q 53

141 Ev 133

142 Ev 110

143 Q 576

144 Q 578

145 Q 577

146 Q 601

147 Q 597

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11.00 hrs Monday 7 July 2008

million and that inquiry is still not completed.¹⁴⁸ The cost to organisations such as the PSNI that contribute to the statutory inquiries is also considerable, in terms of money and resources. The PSNI estimates that its costs for working with the inquiries over the next two years alone will come to over £6 million. We fully accept the Chief Constable's concerns that the diversion of experts from their current duties is bound to impact upon effective policing in Northern Ireland. The cost of inquiring into the past is an issue that, at some point, will have to be faced. Such inquiries cannot become a permanent feature of life in Northern Ireland. We recommend that the NIO take further steps to control the costs of Northern Ireland's statutory inquiries and that inquiries other than those already under way or announced should only be established if agreed by the Northern Ireland Assembly.

74. The statutory inquiries place significant demands on the PSNI at a time when police officers are still subject to attacks from dissident terrorists. No other police force in the United Kingdom is required to operate in such an environment, and at the same time to service the demands of the extensive range of historic investigations which are underway in Northern Ireland. The NIO must continue to ensure that the PSNI has a budget sufficient to fulfil its operational remit and to meet its legal obligations with regard to servicing the statutory inquiries.

¹⁴⁸ HC Deb, 19 June 2008, col 148W. The Government has stated that approximately half of these costs have been incurred in legal fees, HC Deb, 20 February 2008, col 337.

5 Inquests

75. The inquest system in Northern Ireland has long been the subject of controversy. A number of inquests into contentious deaths occurring during the Troubles have been the subject of significant cases before both the domestic courts and the European Court of Human Rights. This has resulted in multiple adjournments and suspensions of these inquests, the majority of which remain to be heard. The inquest system in Northern Ireland continues to face a severe backlog of cases and the senior coroner in Northern Ireland recently criticised the PSNI at a preliminary hearing in the *Jordan*.¹⁴⁹ Inquest for causing further delays.¹⁵⁰ A detailed note on the legal background to these inquests is at Annex A.

76. The PSNI told us that approximately 100 historic inquests remain outstanding and that 48 of these deaths are classed as contentions because they involved allegations of collusion or involvement of the security forces in the death.¹⁵¹ The PSNI also stated that “these inquests have the potential to be almost akin to public inquiries. They demand complete disclosure which brings with it issues of intelligence and source handling that will require PII consideration.”¹⁵² Sir Hugh Orde commented that “a different approach has been adopted by the coroner which is a very constructive approach which may minimise the impact, but still it is an awful lot of work.”¹⁵³

77. The PSNI has estimated that its costs relating to inquests for 2007–08 were £0.19 million, with projected costs of around £4.5 million per annum for each of the subsequent five years. Sir Hugh Orde explained that:

there will be a huge amount of backward looking reporting in the context of day to day policing. There is a huge issue for me around competence in policing just around that. In terms of can it be delivered, it can be delivered but it will take time and I will have to continue taking resources out of my current budget because I have no extra money for any of this, except for ... HET which is ring-fenced.¹⁵⁴

78. Witnesses pointed out the importance of conducting the inquests and questioned whether the PSNI could itself help make the process of information provision more efficient. CAJ commented that,

As a society, what we have to do is to recognise that people do need answers and that that is an important part of us moving forward. If the coroner is now able to start the

149 On 25 November 1992, Pearse Jordan, aged 22 while unarmed, was shot three times in the back and killed in Belfast by RUC officers. On 16 November 1993, the Director of Public Prosecutions issued a direction of no prosecution on the basis of insufficient evidence to warrant a prosecution. On 4 January 1995, the Coroner's inquest into the death commenced. The inquest has been adjourned on numerous occasions pending the outcome of various applications for judicial review and a successful application to the European Court of Human Rights. The inquest proceedings have recently re-commenced.

150 The Irish News, 21 May 2008, “Coroner criticises police over delays in IRA man's inquest”

151 Ev 123

152 Ev 123

153 Q 534

154 Q 38

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11.00 hrs Monday 7 July 2008

inquests it will deal with some of the issues that families have but inquests in Northern Ireland still have more limited powers than ones in England and Wales.¹⁵⁵

Jane Winter of BIRW suggested that,

... if the PSNI were to have a dedicated disclosure unit which actually cooperates with the HET who have already done a lot of this evidence collecting to find what they really have got that they can disclose to the coroner and do it as promptly as possible that would be a cost effective way of doing it. ... I think there may be ways of making it a more streamlined and effective process that is not as expensive and difficult as it might appear if you look at each case on its own.¹⁵⁶

79. The Minister of State acknowledged that the inquests would be controversial and would place significant further demands on the PSNI, but stated that the Chief Constable would be able to build on his prior experience in handling similar issues and use that experience to work constructively with the coroner.¹⁵⁷

80. There are outstanding legal obligations which require the coroner to investigate a number of deaths which occurred during the Troubles. The PSNI has a duty to cooperate with the coroner and to provide him with whatever information he requires to conduct those inquests. Since some of that information might include intelligence which could identify an informant, issues similar to those raised by the PSNI regarding the disclosure of sensitive intelligence information to the statutory inquiries might apply to the contentious inquests. The coroner has a duty under Article 2 of the European Convention on Human Rights to take steps to protect the lives of informants who could be put at risk through disclosure of information which might identify them. We recommend that an information management code of conduct be drawn up by the coroner, after consultation with the appropriate agencies, to protect sensitive information provided to him as part of the inquest process, and that any public disclosure of such information is made in accordance with the coroner's obligations under ECHR Article 2.

81. We note that no specific additional funding has been provided to the PSNI in recognition of the extra workload arising as a result of the inquests and that resources have instead been allocated from the main policing budget. There are already significant and unique demands on the PSNI and we are concerned that the volume of work required to cooperate fully with the inquests may compromise the PSNI's ability to direct adequate resources to other high priority areas of policing. We recommend that the impact of the inquests on the PSNI's resources and any consequential effect on current policing capacity is reviewed during 2009 and the budget revised accordingly.

155 Q 167

156 Q 420

157 Q 572

Annex A Legal Background to the Inquests

1. The obligation to protect the right to life under ECHR Article 2¹⁵⁸ includes a procedural obligation to conduct some form of effective official investigation when individuals have been killed as a result of the use of force.¹⁵⁹ The essential purpose of the investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in the cases involving state agents or bodies, to ensure their accountability for death occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances, but it has been the general approach of the authorities in the UK to meet this procedural obligation by conducting inquests.

2. The conduct of inquests in Northern Ireland is governed by the Coroners Act (Northern Ireland) 1959 (the 1959 Act) and the Coroners Practice and Procedures Rules (Northern Ireland) 1963 (the 1963 Rules). These provide the framework for a procedure within which deaths by violence or in suspicious circumstances are notified to the coroner, who then has the power to hold an inquest, with or without a jury. The purpose of the inquest is to establish, with the assistance of the evidence of witnesses, post mortem and medical reports and forensic examinations, who the deceased was and how, when and where he died. The Coroners Service in Northern Ireland is headed by a High Court Judge. The coroner decides how widely the inquiry should range to establish the facts relevant to the circumstances of the death and responsibility for it and the inquiry may range more widely than the verdict or findings. Where the circumstances of a death investigated or being investigated by a coroner appear to disclose that a criminal offence may have been committed, the coroner is required to submit a report to the Director of Public Prosecutions.¹⁶⁰

3. A number of inquests into contentious deaths occurring during the Troubles have been the subject of significant judgments by the European Court of Human Rights. The seminal decision of the European Court of Human Rights is *Jordan et al v UK* (2001),¹⁶¹ where the Court found that the inquest regime fell short of the requirements of ECHR Article 2.¹⁶² As a result, the court concluded that there had been a violation of the procedural obligation imposed by ECHR Article 2. In response to the judgment, the UK presented a package of proposals to the Committee of Ministers of the Council of Europe¹⁶³ setting out the

158 Read in conjunction with the State's general duty under article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention"

159 *McCann v UK* (1995) EHRR 97.

160 Justice (Northern Ireland) Act 2002 s.35(3)

161 The proceedings before the European Court of Human Rights in this case were conducted simultaneously with proceedings in the cases of *Kelly and Others v UK* (No. 30054/96); *McKerr v UK* (No. 28883/95) and *Shanaghan v UK* (No. 37715/97).

162 On a number of grounds including (i) the non-disclosure of witness statements prejudiced the ability of the deceased's family to participate in the inquest; (ii) the PII certificates had the effect of preventing the inquest examining matters relevant to the outstanding issues in the case; (iii) the police officers who shot the deceased could not be compelled to attend the inquest; and (iv) the inquest procedure did not allow for any verdict or findings which might play an effective role in securing a prosecution in respect of any criminal offence.

163 Under article 46(2) of the Convention, the Committee of Ministers has responsibility for supervising execution of the judgment of the court.

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practicable steps that it would take to implement the judgment to ensure that future investigations complied with ECHR Article 2.

4. As a result of domestic and European litigation and the instigation of a major review by Government,¹⁶⁴ the inquest system in Northern Ireland has been substantially remodelled in the last five years. In its Interim Resolution of February 2005,¹⁶⁵ the Committee of Ministers closed its examination of several aspects of the UK's package of measures relating to inquests.¹⁶⁶ Nevertheless, The Committee of Ministers in its second Interim Resolution of June 2007 urged the Government to implement all outstanding general and individual measures and take all necessary investigative steps without further delay in order to achieve concrete and visible progress in complying with the Court's judgment.¹⁶⁷ The Committee also decided to pursue the examination of the execution of the 2001 judgments until it has satisfied itself that all necessary individual measures have been taken to erase the consequences of the violations found for the individual applicants in those cases.

5. The Government was subsequently challenged in the domestic courts following the introduction of the Human Rights Act 1998 in an attempt to compel it to conduct an effective investigation into a number of historic deaths caused by police and/or security forces.¹⁶⁸ Declarations were sought that the Government's *continuing* failure to provide an Article 2 compliant investigation was unlawful and in breach of s.6 of the Human Rights Act 1998 and ECHR Article 2. The decision of the House of Lords however made clear that the Human Rights Act 1998 is not retrospective. Thus, domestic rights created by the Human Rights Act which are available to individuals against specific public authorities cannot be applied retrospectively.¹⁶⁹ The Human Rights Act 1998 does not therefore apply to unlawful killings which took place before the coming into effect of the Act on 2 October 2000. The obligation to hold an investigation is an obligation triggered by the occurrence of a violent death. If the death itself is not within the reach of the Act because it occurred before the Act came into force, nor is the procedural obligation to investigate which, the Lords held, is necessarily consequential on the death. This does not, however, displace the obligations under ECHR Article 2, which continue to bind the UK under international law.

6. In two recent cases (heard together in 2007) concerning inquests into deaths in Northern Ireland which occurred in the 1990s,¹⁷⁰ the House of Lords was asked to consider two further questions: (a) what findings or verdict the inquest jury was allowed to return under the 1959 Act and the 1963 Rules; and (b) the extent of the Chief Constable's duty of disclosure under the 1959 Act. The Court found that an inquest jury in Northern Ireland may not return a verdict of unlawful or lawful killing (unlike inquest juries in England or

164 *Death Certification and Investigation in England, Wales and Northern Ireland – The Report of a Fundamental Review 2003* (Cm 5831) and *Death Certification and the Investigation of Deaths by Coroners – Third Report of the Shipman Inquiry, 2003* (Cm 5854).

165 Interim Resolution ResDH(2005)20.

166 Including the role of the inquest procedure in securing a prosecution in respect of any criminal offence; the scope of examination of inquests; the compellability of witnesses at inquests; the disclosure of witness statements prior to the appearance of a witness at the inquest and legal aid for the representation of the victim's family.

167 Interim Resolution ResDH(2007)73.

168 *In re McKerr* [2004] UKHL 12

169 These should be distinguished from the obligations under international law which the UK (as a State) accepted by accession to the ECHR in 1950.

170 *Jordan v Lord Chancellor; McCaughey v Chief Constable of the PSNI* [2007] UKHL 14,

Wales). However, nothing in the 1959 Act or the 1963 Rules prevents a jury finding facts directly relevant to the cause of death which may point very strongly towards a conclusion that criminal liability exists or does not exist. The Court also held that s.8 of the 1959 Act requires the PSNI to furnish to a coroner (to whom notice under s.8 is given) such information as it then has or is thereafter able to obtain (subject to any relevant privilege or public interest immunity claim) concerning the finding of the body or concerning the death, noting that “[i]t would so plainly frustrate the public interest in a full and effective investigation if the police were legally entitled, after giving the initial s.8 notice, to withhold relevant and perhaps crucial information coming to their notice thereafter.” A number of inquests¹⁷¹ which were abandoned in the early 1990s have now been re-opened or recommenced by the Senior Coroner in Northern Ireland in light of the House of Lords decision in *Jordan*.

Jane Gordon
Specialist Adviser

171 Inquests into the deaths of Eugene Toman, James Gervaise McKerr, John Frederick Burns, Michael Justin Tighe, Peter James Martin Grew and Roderick Martin Carroll.

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11.00 hrs Monday 7 July 2008

Formal minutes

Wednesday 25 June 2008

Members present:

Sir Patrick Cormack, in the Chair

Mr David Anderson

Mr Gregory Campbell

Mr Christopher Fraser

Mr Stephen Hepburn

Lady Hermon

Kate Hoey

Dr Alasdair McDonnell

Mr Denis Murphy

Stephen Pound

Sammy Wilson

Draft Report (*Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past*), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 81 read and agreed to.

Annex read and agreed to.

Resolved, That the Report be the Third Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Several Papers were order to be reported to the House for printing with the Report.

[Adjourned till 3.00pm on Wednesday 2 July.

Witnesses

Wednesday 6 February 2008	<i>Page</i>
<p>Sir Hugh Orde, Chief Constable, Mr Alistair Finlay, Assistant Chief Constable and Mr David Cox, Director of Historical Enquiries Team, Police Service of Northern Ireland</p>	Ev 1
Wednesday 20 February 2008	
<p>Mr Al Hutchinson, Police Ombudsman, Mr Sam Pollock, Chief Executive, and Mr Jim Coupland, Senior Director Investigations, Office of the Police Ombudsman for Northern Ireland</p>	Ev 15
Wednesday 12 March 2008	
<p>Miss Maggie Beirne, former Director, Committee on the Administration of Justice</p>	Ev 24
Wednesday 19 March 2008	
<p>Sir Kenneth Bloomfield, former Victims Commissioner</p>	Ev 35
<p>Dr Brandon Hamber, Director, and Ms Kate Turner, Project Coordinator, Healing Through Remembering</p>	Ev 42
<p>Mrs Sandra Peake, Director, and Mr Alan McBride, WAVE</p>	Ev 49
Wednesday 2 April 2008	
<p>Jane Winter, Director, British Irish Rights Watch</p>	Ev 57
<p>Mr White and Mr Lamont, Northern Ireland Retired Police Officers' Association</p>	Ev 66
Tuesday 13 May 2008	
<p>Sir Alasdair Fraser, Director, and Mr James Scholes, Senior Assistant Director, Public Prosecution Service for Northern Ireland</p>	Ev 76
<p>Sir Hugh Orde, Chief Constable, Mr Alistair Finlay, Assistant Chief Constable, Mr Peter Sheridan, Assistant Chief Constable and Mr John Brannigan, Historical Inquiries Team, Police Service of Northern Ireland</p>	Ev 80
Wednesday 21 May 2008	
<p>Mr Paul Goggins MP, Minister of State, Carol Moore, Associate Director, Policing and Security, Kate Pettifer, Head of Rights, Elections and Legacy, and Nichola Creagh, Policing and Security, Northern Ireland Office</p>	Ev 88

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List of written evidence

1	Northern Ireland Office	Ev 100, 136, 137, 139
2	British Irish Rights Watch	Ev 102, 138
3	Committee on the Administration of Justice	Ev 108
4	Northern Ireland Policing Board	Ev 110
5	Northern Ireland Retired Police Officer's Association	Ev 111
6	Police Ombudsman for Northern Ireland	Ev 114
7	Police Service of Northern Ireland	Ev 121, 126
8	Historical Enquiries Team, Police Service of Northern Ireland	Ev 132
9	Police Federation for Northern Ireland	Ev 133
10	Sinn Féin	Ev 135
11	RUC Widows Association	Ev 136

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2007–08

First Report	The Northern Ireland Prison Service	HC 118
Second Report	The Work of the Committee in 2007	HC 286
Third Report	Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past	HC 333
First Special Report	The Northern Ireland Prison Service: Government Response to the Committee's First Report of Session 2007-08	HC 386

Session 2006–07

First Report	Draft Protocol for Community-based Restorative Justice Schemes	HC 87
Second Report	The Work of the Committee in 2006	HC 294
Third Report	Tourism in Northern Ireland and its Economic Impact and Benefits	HC 119
First Special Report	Draft Protocol for Community-based Restorative Justice Schemes: Government Response to the Committee's First Report of Session 2006-07	HC 475
Second Special Report	Tourism in Northern Ireland and its Economic Impact and Benefits: Government Response to the Committee's Third Report of Session 2006-07	HC 545

Session 2005–06

First Report	Education in Northern Ireland	HC 726
Second Report	The Work of the Committee in 2005	HC 928
Third Report	Organised Crime in Northern Ireland	HC 886
First Special Report	The Work of the Committee in 2004: Government Response to the Committee's Fourth Report of Session 2004-05	HC 393
Second Special Report	The Functions of the Office of the Police Ombudsman for Northern Ireland: Responses by the Government and the Office of the Police Ombudsman for Northern Ireland to the Committee's Fifth Report of Session 2004-05	HC 394
Third Special Report	The Parades Commission and Public Processions (Northern Ireland) Act 1998: Government Response to the Committee's Second Report of Session 2004-05	HC 395

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Fourth Special Report	The Challenge of Diversity: Hate Crime in Northern Ireland: Government Response to the Committee's Ninth Report of Session 2004-05	HC 396
Fifth Special Report	Air Transport Services in Northern Ireland: Government Response to the Committee's Eighth Report of Session 2004-05	HC 529
Sixth Special Report	Ways of Dealing with Northern Ireland's Past: Interim Report – Victims and Survivors Government Response to the Committee's Tenth Report of Sessions 2004-05	HC 530
Seventh Special Report	The Functions of the Northern Ireland Policing Board Responses by the Government and the Northern Ireland Policing Board to the Committee's Seven Report of Session 2004-05	HC 531
Eight Special Report	Decision to Cease Stormont Prosecutions	HC 814
Ninth Special Report	Organised Crime in Northern Ireland: Government Response to the Committee's Third Report of Session 2005-06	HC 1642