

**NORTHERN IRELAND POLICING BOARD HISTORICAL ENQUIRIES TEAM (HET)**  
**WORKING GROUP**

**POSITION PAPER**

**Executive Summary**

On 3 July 2013, Her Majesty's Inspectorate of Constabulary (HMIC) published an inspection report on the PSNI Historical Enquiries Team (HET). The inspection specifically considered HET's review processes and procedures in Royal Military Police investigation cases involving the fatal shooting of over 150 civilians by the British army between 1970 and September 1973. The report was highly critical of the operational and investigative policies which HET operated under, particularly in relation to issues of accountability, openness and transparency.

In response to the HMIC report the Board established a Working Group to consider the PSNI response to the HMIC recommendations. The observations and conclusions of the Working Group, following deliberation and consultation over an 8 month period, are captured in this report and submitted to the Board for consideration.

The attached report comprises 3 parts. Part 1 is divided into three key sections. Section 1.2 briefly establishes the background to the establishment of the HET. Section 1.3 includes consideration of the efficacy of the HET by the Committee of Ministers of the Council of Europe in Strasbourg (CM). Section 1.4 considers the Board's scrutiny of the HET during the period 2008 – 2013. This section includes the Board's consideration of Professor Lundy's research reports, *Can the Past be Policed* (October 2008), a follow-up review (June 2010), and an *Assessment of HET Review Processes and Procedures in Royal Military Police Investigation Cases* (March 2012).

Part 2 is divided into two sections. Section 2.1 provides a brief overview of the findings of the HMIC Inspection of HET, while Section 2.2 provides a summary outline of the work carried out by the Working Group in its oversight of the implementation of the HMIC recommendations by PSNI.

Part 3 proposes five recommendations based on consultation and consideration of information supplied to the Working Group.

- Recommendation 1 proposes four principles which HET or any successor organisation should operate under in the future, including conducting cold case reviews in compliance with ACPO guidance; complying with Article 2 of the European Convention on Human Rights on the procedural obligation to investigate deaths; liaising effectively with the families of victims; and, providing information to the general public.
- The second recommendation seeks to ensure work continues towards full implementation of the HMIC recommendations and that the Board continues to oversee progress in collaboration with the HMIC through a follow-up review. A progress update report was received from Chief Constable on 27 March 2014 and was considered at a dedicated Board meeting on 14 April 2014.
- Recommendation 3 addresses the specific issue raised with the Working Group by victims and NGOs regarding the release of completed Review Summary Reports (RSRs) as they stood prior to publication of the HMIC report on 3 July 2013. Members agreed after the 6 February 2014 Board meeting to write to the Chief Constable to ask him to release these reports immediately.
- Recommendation 4 is consistent with the groups third term of reference *to 'agree the oversight mechanism for the review of HET and the on-going operation of HET'*. The Group sought a range of views from key stakeholders involved in existing independent oversight panels and has discerned considerable knowledge about how the oversight mechanism for a future HET should be formed, taking into consideration the merits and flaws identified by stakeholders participating in other established panels.
- The final recommendation suggests that the Board requires the Chief Constable to submit an evidence-based report to the Board on the failings highlighted in Professor Lundy's reports, as well as the perceived failure to provide the Board with a response to the concerns raised on this issue since 2008.

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**PART 1: BACKGROUND**

**1.1 Introduction**

On 3 July 2013, Her Majesty's Inspectorate of Constabulary (HMIC) published an inspection report on the PSNI Historical Enquiries Team (HET) in respect of 82 Royal Military Police cases between 1970 and 1973. This report was highly critical of the operational and investigative policies which HET operated under, particularly in relation to issues of accountability, openness and transparency. Further details about the HMIC report, and the Policing Board's response to it, are provided in Part 2 below. In this Part information is provided to explain why the HMIC report was commissioned in the first place.

**1.2 The origins and objectives of the HET**

HET had originally been established in September 2005 to examine 3,268 deaths arising from 2,555 separate incidents attributable to the security situation in Northern Ireland between 1968 and the Belfast Agreement in 1998. The decision to create this review unit emanated from a series of cases considered between 2000 and 2003 by the European Court of Human Rights (ECtHR) in regards to a number of complaints concerning deaths in Northern Ireland in which there was alleged to be state involvement.<sup>1</sup> The complainants in these cases, referred to collectively as the *McKerr* cases, contended that there had not been any adequate investigation into the circumstances of their relatives' deaths as required by Article 2 of the European Convention on Human Rights (ECHR). The ECtHR concluded in these cases that for an investigation into an alleged unlawful killing by state agents to be compliant, those individuals conducting the investigation must be independent from those implicated in the incident. The investigation must also be capable of leading to a determination of whether the force used in such cases was justified in the circumstances. It must also be capable of identifying a perpetrator and holding them to account. This includes a consistent approach to taking witness

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<sup>1</sup> These cases are collectively known as the *McKerr* cases. *McKerr v United Kingdom (UK)* (2002) 34 EHRR 20, *Jordan v UK* (2003) 37 EHRR 2, *Kelly and Others v UK* (2000) 30 EHRR CD223, *Shanaghan v UK* (2000) 30 EHRR CD370, *McShane v UK* (2002) 35 EHRR 23, and *Finucane v UK* (2003) 37 EHRR 29).

statements, collecting and storing forensic evidence, and carrying out an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Additionally there is a requirement of promptness and reasonable expedition of all investigations. Finally there must be a sufficient element of public scrutiny of the investigation and its results in order to ensure accountability and public confidence. In particular the next-of-kin of the victim must be involved in order to safeguard their legitimate interests. In the *McKerr* cases the ECtHR found that the United Kingdom had violated Article 2 as a consequence of various failings in the investigative procedures concerning the deaths of the applicant's relatives.

Following this decision, the UK Government presented a package of measures designed to address these findings to the Committee of Ministers of the Council of Europe in Strasbourg (CM), the body responsible for the implementation of ECtHR judgments. The CM examined the UK's progress at fifteen meetings between 2002 and 2009. Their deliberations were based on memorandums prepared by the Secretariat to the CM which recorded updated information provided by the UK Government in relation to the package of measures. One element included in the measures was the establishment of the HET in September 2005 as a specialist unit of the Serious Crime Review Team (SCRT) of the PSNI to examine 3,260 deaths arising from 2,555 separate incidents attributable to the security situation in Northern Ireland between 1968 and the Good Friday Agreement in 1998. The objectives of HET were to,

- 1) assist in bringing a measure of resolution to those families of victims whose deaths are attributable to 'The Troubles' between 1968 and the signing of The Belfast Agreement in April 1998;
- 2) re-examine all deaths attributable to 'The Troubles' and ensure that all investigative and evidential opportunities are subject to thorough and exhaustive examination in a manner that satisfies the Police Service of Northern Ireland's obligation of an effective investigation as outlined in Article 2, Code of Ethics for PSNI;
- 3) do so in a way that commands the confidence of the wider community.

### **1.3 The Assessment of HET by the Secretariat to the CM**

The Secretariat published a memorandum on 19 November 2008 which outlined their final assessment of HET based on submissions from the UK government, PSNI, the Irish

government and several NGOs (see attached **Annex A** for the *Secretariat's assessment* of HET). It reiterated their view that HET does not carry out Article 2 compliant investigations in historical cases as it only sought to identify if further evidentiary opportunities exist. Despite this, the Secretariat considered HET to be a useful model for bringing a 'measure of resolution' to families and next-of-kin in such cases. Therefore it could play an important role as one element in a package of measures designed to satisfy the State's obligations to conduct effective investigations in alleged violations of Article 2 of the ECHR. The memorandum noted that the structural arrangements and organisation of the HET, including the employment of retired police officers from Scotland, Wales and England, serving police officers seconded from police forces across the United Kingdom and a number of retired Royal Ulster Constabulary (RUC) officers, meant that it met its obligations for independence.<sup>2</sup> It also noted that HET received ring-fenced funding to complete its activities; introduced a well-structured organisational scheme that allowed for different teams to concentrate on different aspects of a case depending on its complexity and the engagement with the family concerned; and, met with the families, informing them of their findings and providing them with a copy of the Review Summary Report (RSR). The Secretariat voiced concerns however that the HET process was taking longer than originally anticipated and proposed that the CM strongly encourage the HET to complete its work as quickly as possible. Nonetheless the Secretariat recommended that the Committee close its examination of HET given that they believed it had the structures and means to finalise its work. On 19 March 2009, the CM adopted a resolution<sup>3</sup> which indicated that in light of the information that had been provided, it decided to close its examination of the issue of the investigation of historical cases.

#### **1.4 Timeline of Board/Committee scrutiny of the HET.**

The Policing Board has followed the work of the HET closely, initially facilitating background briefings concerning a 2008 report by the Northern Ireland Affairs Committee which recommended alternative ways for HET to prioritise their caseload in order to manage funding more effectively. Thereafter, independent research conducted by Professor Patricia Lundy of the University of Ulster provided a focus for much of the Board's scrutiny of the HET.

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<sup>2</sup> Former RUC officers were required to declare any past interest in a case and would have no involvement in any case in which they have been previously involved.

<sup>3</sup> (CM/ResDH(2009)44)

### *Can the Past be Policed?*

In October 2008 the Board's Human Rights & Professional Standards Committee (HR&PS) considered a report by Professor Patricia Lundy on the operational and investigative practices of HET. *Can the Past be Policed?* identified institutional flaws in the organisational and operational procedures in the HET process. It also raised serious concerns about governance and leadership, accountability, procedures, storage of evidence and an inconsistency of approach between cases with state involvement and cases without.

On 12 November 2008 Members of the HR&PS Committee met with the Chief Constable Sir Hugh Orde and senior colleagues to discuss Professor Lundy's report. It was agreed at that meeting that the Chief Constable would provide the Committee with a written response to the report. Despite further meetings and numerous requests from the Committee a substantive response was not received.

In March 2009 the HR&PS Committee was provided with a 'current situation paper'. The paper expressed the view that the majority of issues raised in Professor Lundy's report had either been addressed, or had moved on significantly since its initial publication. The report noted that other factors, such as the employment of former RUC/PSNI staff, '*would still be contentious*' and had not yet been fully addressed. The paper stated that the leadership of HET had met with Professor Lundy again and was exploring how to assess the current position against that described in the *Can the Past be Policed?* report by means of a follow-up review.

### *Follow up Review of the Historical Enquiries Team*

In her follow-up review Professor Lundy noted that initially PSNI and HET leadership welcomed the opportunity to respond to the concerns raised in her research. However, Professor Lundy informed the Committee that subsequently she had experienced a lack of cooperation from HET senior management, especially in regards to the level of access to HET staff, which she believed was '*not conducive to a meaningful assessment*'. She believed this raised serious questions about accountability and transparency. Therefore Professor Lundy stated that she would no longer devote any time to a follow up review,

suggesting that HET management should submit a detailed response based on the findings of her initial report to the HR&PS Committee.

Thereafter the HR&PS Committee met with the leadership of HET and continued to press for a substantive response to both Professor Lundy's *Can the Past be Policed?* report and her follow-up review. On 15 September 2010 the Committee issued a letter to the Chief Constable Matt Baggott seeking his response to a number of urgent matters of concern, once again reiterating their desire for a comprehensive PSNI response to Professor Lundy's original report and her follow up review. No response was received from PSNI to the Committee's request.

Engagement through correspondence continued and, further to issues raised by the Committee, ACC Harris responded by letter dated 7 October 2011. Under the heading 'Dr Lundy's report' ACC Harris stated;

*'HET is now in its 7<sup>th</sup> year of operations and has evolved a methodology that will allow it to complete its task within a relatively short period of time. The HET does not intend commissioning any further research and will focus on finishing its task...'*

At a meeting with the HR&PS Committee on 13 October 2011 the Committee was informed that there had been a relationship breakdown between the HET and Professor Lundy and that a follow-up report would no longer be compiled. Furthermore Members were unaware of any specific steps undertaken to address the issues highlighted in Professor Lundy's reports.

On 24 February 2012 the HR&PS Committee again wrote to the Chief Constable to advise that the Committee was anxious that a formal response on progress made with respect to Professor Lundy's original report had not yet been provided. The letter requested that a response to the issues raised by Professor Lundy be submitted to the Committee at the earliest opportunity.

Assessment of HET Review Processes and Procedures in Royal Military Police Investigation Cases.

On 8 March 2012 Professor Lundy presented another research paper entitled *Assessment of HET Review Processes and Procedures in Royal Military Police (RMP) Investigation Cases* to the Human Rights and Professional Standards Committee. This research specifically considered HET's review processes and procedures in Royal Military Police investigation cases involving the fatal shooting of over 150 civilians by the British army between 1970 and September 1973. Professor Lundy's research stated that, by November 2011, HET had completed 36 RMP case reports. Her paper detailed her findings based on an analysis of twenty-four HET reports, relating to seventeen individual RMP cases. Professor Lundy reported that there were apparent anomalies and inconsistencies in the HET investigation process where the military was involved, compared to historic cases where non-State or paramilitary suspects were involved. She questioned whether such anomalies and inconsistencies impacted upon the ability, and/or perception, of the HET to undertake impartial, effective reviews in cases involving State agencies. Professor Lundy also found that some HET interviews in RMP cases appeared to lack robustness and inconsistencies were frequently not adequately challenged.

The Committee forwarded Professor Lundy's report to the Chief Constable on 12 March 2012 to seek his views on her findings. The Chief Constable responded to this letter in correspondence dated 14 March 2012, noting that Professor Lundy's report;

*'has neither status nor legal bearing in shaping the responsibilities or conduct of HET which are much broader than reflected in this paper'.*

Questions were subsequently put to the Chief Constable by Members at the 5 April 2012 Board meeting in respect of Professor Lundy's RMP report and it was agreed by the Board that a review of investigative practices within the HET by Her Majesty's Inspectorate of Constabulary (HMIC) provided an appropriate way forward.

## **PART 2: THE HMIC REVIEW OF HET**

### **2.1 HMIC Review of HET**

Between 4 May 2012 and 31 October 2012 the Chief Constable and the Board corresponded regarding the Terms of Reference for the HMIC review, with the final agreed terms confirmed by way of correspondence from HMIC to the Chief Constable dated 25 October 2012 (see **Annex B** for these Terms of Reference).

The HMIC Review of RMP cases (1970 – 1973) undertaken by HET<sup>4</sup> was conducted between November 2012 and May 2013, with Inspectors interviewing over 180 people and examining material relating to 31 cases, previously reviewed by HET. While reporting that it had been told that the HET had had a positive impact on the lives of many families who had engaged with the process, HMIC determined that there were a wide range of areas in which HET did not conform to current policing standards and practices. This included a lack of explicit systems and processes in relation to the storage and cataloguing of relevant material, as well as an absence of a standard format of recording policy decisions. This inconsistent approach was exacerbated by the different working practices and approaches exercised by HET staff appointed from outside of Northern Ireland. Inspectors noted that no process existed to address these differences. HMIC further indicated its concern at the lack of a clearly defined complaints process and a reticence to make final reports available for public consumption.

As regards adopting a consistent approach to all cases, HMIC noted that as a matter of policy, HET treated deaths in which there was state involvement differently from those cases where state actors were not implicated. The Review stated that in cases where there was state involvement, they appeared to be treated less rigorously. The *HET Operational Guide*<sup>5</sup> appeared to accept that soldiers, whether acting wrongly or not, were at all times acting in the course of their duty and that the ‘malice’ required for a murder charge could not therefore be expressly or impliedly applied to their conduct; this in turn was sometimes used as a reason for not re-interviewing the soldiers in question under caution. HMIC also noted discrepancies between military cases and non-military cases in the nature and extent of the pre-interview disclosure provided to the interviewee and in

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<sup>4</sup> HET compiled 82 RMP cases in the period 1970 – 1973.

<sup>5</sup> The *HET Operational Guide* was prepared in 2012 in anticipation of the HMIC Inspection. See Part 3, Recommendation 5, pp. 17-18 for further discussion of this document.

the process by which it was verified whether an interviewee was unfit for interview. It was the HMIC's view that all of these practices undermined HET's capability to fully determine if the state's use of force was justified in some investigations. HMIC Inspectors also considered whether HET's approach to cases involving the State was compliant with the European Convention on Human Rights (ECHR). The report noted their strong concerns in relation to compliance with Article 2 and the independence, effectiveness and promptness of investigations. In particular Inspectors believed that the deployment of former RUC and PSNI officers in state involvement cases could give rise to the view that the entire process lacks independence. (The full set of the HMIC's recommendations are attached as **Annex C**).

## **2.2 Board response to HMIC Review and the work of the HET Working Group.**

Members of the Board received the report and agreed at a meeting on 4 July 2013 that a dedicated working group should be established to consider a number of recommendations relevant to the Board and to oversee implementation of the remainder which were focused on the PSNI. The Board also issued a press release which stated it had no confidence in the leadership of the HET and asked the Chief Constable to review the management arrangements with immediate effect. The Board further stated that all reviews of military cases should be suspended and that no other reviews should be finalised until the recommendations highlighted by HMIC had been implemented.

At the first meeting on 11 July 2013, Members established the Terms of Reference for the on-going work of the Working Group. It was agreed that the Terms of Reference should remain a 'living document', so that, if required, they could be amended to take account of future findings. The Terms of Reference agreed to by Members state that the Working Group should:

- Review PSNI failures to respond promptly to issues raised in relation to the work of HET;
- Lead on addressing the challenges identified in the HMIC report;
- Agree the oversight mechanism for the review of HET and the on-going operation of HET;
- Seek to ensure that the management, leadership and governance arrangements of HET and PSNI leadership are addressed as a matter of urgency;

- Publish a plan and programme for consultation; and,
- Seek to ensure the implementation of the HMIC recommendations.

The HET Working Group met on 18 occasions between July 2013 and April 2014 and engaged directly with a range of stakeholders, through direct meetings with their representatives or consideration of written submission which relayed experiences of dealing with HET and opinions on the reforms required (see **Annex D** for a list of these stakeholders). The Working Group also held bi-monthly meetings with the Chief Constable, the most recent of which was on 14 April 2014 and regularly corresponded with PSNI in order to establish the work being undertaken to implement the HMIC recommendations.

In addition, the Chair of the HET Working Group was invited to meet with Acting Detective Chief Superintendent Tina Barnett and Detective Superintendent Jason Murphy, the new Director and Deputy Director respectively of HET, at a 'critical process day' which provided an update of the progress made within the HET since the publication of the HMIC's report. The critical process day included a seminar at HET Headquarters, attended by 'critical friends' from Great Britain which provided an opportunity for officials from other agencies to critically assess and challenge the work undertaken by the interim leadership of the HET.

During the Working Group meeting of 17 October 2013 Members first considered a paper on the procedural obligation to investigate under Article 2 of the European Convention on Human Rights. This paper was adopted by the Working Group and subsequently shared with the Chief Constable. An updated and revised version is attached at **Annex E**.

The Chair of the HET Working Group reported on the activities of the Working Group at each of the Board's monthly meetings between September 2013 and February 2014.

As of April 2014 the HET had completed reviews in 1,752 cases, involving 2,214 deaths. A further 810 cases linked to 1,054 deaths are yet to be completed.

The Working Group is obliged to respect the confidentiality of the consultation process it conducted and has relied on its own judgement when forming opinions on the basis of

the engagement it undertook. Part 3 of this report sets out the concluding observations of the HET Working Group based on its engagement with stakeholders and the PSNI over a seven month period and presents a number of recommendations which the Working Group feels reflect its experience of scrutinising this area of work.

## **PART 3: CONCLUDING OBSERVATIONS AND RECOMMENDATIONS OF THE HET WORKING GROUP**

### **Introduction**

The Working Group has considered the background to the establishment of the HET and the role undertaken by the Policing Board in scrutinising the work of the organisation as set out in Parts 1 and 2 of this report.

A key priority for the Working Group was to undertake a programme of consultation with stakeholders. This engagement has significantly contributed to the evidence base for the formulation of concluding observations and recommendations. Where these discussions brought the Working Group outside its terms of reference this report reflects the views expressed.

In setting out the following recommendations the Working Group has had regard to its terms of reference; engagement undertaken with stakeholders; confidential notes of its 14 meetings; and correspondence over the seven month period.

### **Recommendation 1**

**The Board has agreed that the HET going forward, under whatever guise, should operate under the following principles:**

- **it should conduct cold case reviews in compliance with the ACPO guidance;**
- **it should comply with Article 2 of the European Convention on Human Rights (a paper on the procedural obligation under Article 2 ECHR to investigate deaths is attached as Annex E);**
- **it should liaise effectively with the families of victims; and,**
- **it should provide information to the general public.**

The overwhelming view of those with whom the Working Group engaged was critical of the HET and conveyed a lack of confidence in its ability to continue. Further, the majority of those with whom the Working Group engaged felt that the HET as an organisation was irretrievable and that a completely new approach was required to satisfy the requirements of those families most directly affected. The Group received views on

alternative mechanisms to the HET and the potential for cold case review investigations, truth recovery processes and a combination of both.

It is however beyond the remit of the Working Group to make a determination on the future role of the HET. This remains an operational decision for the Chief Constable. The Board is required to hold the Chief Constable to account for his decisions and monitor how these impact upon the efficiency and effectiveness of an impartial, human rights compliant Police Service that secures the confidence of the whole community in Northern Ireland.

The Working Group is particularly mindful of community sensitivities with regard to the future operation of the HET and that the successful implementation of HMIC's recommendations are imperative in securing confidence in its ability to carry out human rights compliant reviews into historic deaths. The following recommendations are made in that context.

## **Recommendation 2**

**The Working Group recommends that:**

- (a) The PSNI's on-going progress in terms of management and governance arrangements for HET following the implementation of the HMIC recommendations should continue to be monitored on a quarterly basis by the Board;**
- (b) The Board should agree with HMIC that a follow-up review be conducted as soon as possible to evaluate progress made against the July 2013 recommendations.**

It is clear that important work has been undertaken by the PSNI. An interim Director and Deputy Director were appointed on 30 September 2013 and internal reviews have been completed. A new permanent Director has since been appointed by the Chief Constable. Some Members of the Board have disputed whether this appointment is compatible with the Article 2 requirements for institutional, hierarchical and practical independence. The Chief Constable has advised Members that he is reassured that the legal advice he has received supports his view that a range of safeguards currently being implemented within

HET would ensure its practical independence. Some Members of the Board, having received the Chief Constable's explanation of the protocols and safeguards which are in place to ensure that HET personnel declare an interest and withdraw from any participation in case reviews of which they have previous personal or operational experience, have expressed themselves satisfied that this maintains practical independence. These Members believe that there should be no inference that would impugn the reputation of the RUC or PSNI.

The Working Group received two reports from PSNI on 12 December 2013 and 27 March 2014 setting out what progress had been made with the implementation of each of the 20 recommendations contained in the HMIC report. While much appears to have been achieved, it is clear that in some respects more remains to be done.

As regards Recommendation 3, the PSNI have not yet suggested to the Board what mechanism could be put in place through which the HET can be more open and accountable to the public in Northern Ireland. As regards Recommendation 5, the proposed new manual of policies and procedures has not yet been finalised and agreed by the PSNI. As regards Recommendation 14, it seems that the PSNI have not yet sought the agreement of the DPP for Northern Ireland to the HET's revised policy approach to state involvement cases. More generally, the PSNI have not yet shared with the Board important documents generated by the implementation process such as the draft manual of guidance for staff, or a full assessment undertaken in response to Recommendation 9 concerning the funding and time required to complete the work of the HET.

From the outset, the Working Group has expressed some concern about the PSNI's level of commitment to the HMIC Review and has observed an apparent reluctance to engage fully with some of the recommendations.

The Working Group has also experienced some frustration in its efforts to evaluate the progress made by the PSNI in implementing the HMIC recommendations and believes a future review by the HMIC is necessary. The Board has written to the Minister of Justice to request a follow-up review be carried out to evaluate PSNI progress with HMIC recommendations. The Chief Constable has advised the Board that he is supportive of this proposal.

The Working Group believes that it has concluded its deliberations and that ongoing responsibility for further scrutiny of reforms to, and future activities of, the HET should be assumed by the Board through the Performance Committee.

### **Recommendation 3**

**The Working Group recommends the immediate release of the 34 RSRs completed in respect of non-military cases and any completed follow-up reports. This recommendation was brought to the Board at its meeting on 7 February 2014, when the remainder of this report was still in draft. The Board unanimously accepted the recommendation and communicated the same to the Chief Constable.**

At the beginning of its consideration of the HMIC Review of HET and in consultation with some families affected by the Review, the Board agreed that the HET should continue the process of conducting reviews in non-military cases but, as a precautionary measure, should not finalise or release reports in those cases.

Subsequently some stakeholders expressed the view to the Working Group that it was their preference that all completed reports (Review Summary Reports and follow-up reports) should be issued to families in non-military cases and they sought the Working Group's view as to how this may be achieved.

The Working Group has discussed the release of the reports with the Chief Constable and Assistant Chief Constable Crime Operations, and the Chair of the Working Group also discussed the matter when he met with the Director of HET and senior investigators within HET.

The view has been expressed to the Working Group, by the Chief Constable and Assistant Chief Constable Crime Operations, that the 34 Review Summary Reports which have been completed since July 2013 cannot be released in their current form and need to be edited so as to more strictly reflect the role and remit of HET going forward. The Working Group has been made aware that such an approach is unlikely to be welcomed by families.

The Working Group does not agree that there is any justification for altering the format or content of the RSRs where this is not specifically required by the HMIC Review.

#### **Recommendation 4**

- (a) The Working Group recommends that the Board should advise the Minister for Justice that an oversight panel needs to be put in place, using the principles of the Ministerial Appointment process, and complying with the general specification set out below. The Board should also agree with the Minister a budget for the work of the oversight panel;**
- (b) In the event of an oversight Panel being established in the absence of, or pending, legislation, the Working Group recommends that the oversight panel should report to the Board. The Working Group further recommends that the Board should put in place protocols with the PSNI to govern the appropriate arrangements for supplying the oversight panel with unfettered access to documents and witnesses and to outline the status of recommendations made by the oversight panel.**

An oversight panel should be established to build community confidence and address recommendation 10<sup>6</sup> and partly address recommendation 3<sup>7</sup> of the HMIC review of HET.

Further to the consultation undertaken by the Working Group in relation to an oversight panel, the following observations are presented in relation to the principles that should govern the oversight panel and the generic characteristics of the membership of an oversight panel for the Historical Enquiries Team, or any successor organisation:

- The Panel should be small enough to have practical and operational flexibility in undertaking the specific work required; trust and integrity amongst Panel members must be a core value; the Panel should have due regard not only for the specific interests of the families of victims but also for the more general interest of the public

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<sup>6</sup> Recommendation 10

An independent oversight panel should be established to oversee and scrutinise in the public interest all aspects of the work of the HET. This body should have unfettered access to the information it would need to carry out this responsibility.

<sup>7</sup> Recommendation 3

The Chief Constable and the NIPB should agree a mechanism through which the HET can be made more open and accountable to the public in Northern Ireland.

at large in ensuring the accountability of the PSNI; and the independence of the Panel is critical.

- The Panel should have the very specific skills required to examine information which is largely evidence or intelligence material and should be able to engage in analysis and audit of the relevance and strength of evidence. Based on its engagement the Working Group has identified the following generic skills sets that would be required within the oversight panel:
  - Expertise on family issues with an understanding of the role of HET and an ability to secure the confidence of families;
  - Legal and policing expertise;
  - Understanding of intelligence and the intelligence gatekeeper role and of the need for independence of the gatekeeper role.

The Working Group was persuaded by submissions received that there should be statutory underpinning for the Panel. The view was expressed to the Working Group that a Panel overseeing the work of the HET, or any successor organisation, should have the power to compel the disclosure of documents, the interviewing of witnesses and the enforcement of recommendations. However, such legislative underpinning could take a minimum period of 18 months to introduce and the opportunity to build confidence in the historical review process in the interim may be diminished.

It was suggested that if the Oversight Panel was answerable to the Board then the Board could rely on its own statutory powers in relation to compelling information, if necessary, which may strengthen any protocols put in place.

The Board has initiated discussions with the Minister of Justice with regard to the creation of an oversight panel.

## **Recommendation 5**

**The Working Group recommends that the Board should require the Chief Constable to submit an evidence-based report<sup>8</sup> to the Board addressing the following issues:**

- (a) The Board's concerns regarding the perceived failure of the PSNI to provide the Board, as the authority charged with holding the PSNI to account for its actions, with substantive responses to the concerns raised by the Board further to Professor Lundy's research findings since 2008;**
- (b) The apparent failings in leadership, management and governance revealed by the research of Professor Lundy and the report by HMIC and the need for an explanation as to how those failings arose and were allowed to continue.**

The Working Group considered the attempts by the Board to address the issues of concern raised in Professor Lundy's first report of November 2008. Over a period of 3½ years the Board and the Human Rights and Professional Standards Committee in particular, expressed concern and a certain degree of frustration at what was perceived to be a failure by the PSNI to engage with very significant concerns regarding the leadership, management and governance arrangements within the HET highlighted within that report and arising from engagement with the Board in relation to that report.

Professor Lundy completed a follow-up review in June 2010; the Board felt that its attempts to secure substantive engagement on this review were also unsuccessful. Professor Lundy subsequently wrote to the Board to advise of her frustrations and ultimately the failure of the leadership of HET to engage in addressing serious issues of concern.

Professor Lundy prepared a second and separate report in March 2012 on the specific issue of the HET's handling of 82 RMP cases between 1970 and 1973. Again this report was not accepted by the PSNI and the Working Group noted a degree of hostility towards Professor Lundy personally.

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<sup>8</sup> The report should disclose all communications and minutes of meetings where these matters were discussed.

Professor Lundy's second report was dismissed as having 'neither status nor legal bearing...' No substantive response was given to the issues raised and the Board felt compelled to suggest that HMIC be invited to conduct a review. While the HMIC's review was confined to the specific issues raised in Professor Lundy's second report on Royal Military Police cases between 1970 and 1973, it served to completely vindicate the integrity of Professor Lundy's research and simultaneously focus attention on the apparent failure of the PSNI to address issues of concern raised by the Board, on the basis of Professor Lundy's research since 2008. The Working Group noted that HMI Steve Otter expressed his surprise and concern at the quality of responses from the PSNI to issues raised by the Board over this period.

Members of the Working Group were further concerned that, given PSNI's failure to provide a substantive response to Professor Lundy's two reports and follow-up review, internal HET documents available at that time also highlighted a number of management and leadership issues. An internal performance review from 2009, which Members gained sight of only in January 2014, made 36 recommendations about structures and processes, some of which would appear to address some of the concerns highlighted by Professor Lundy. Having sought clarification from both PSNI and HMIC, the Working Group was surprised to learn that HMIC were not provided with a copy of this document during their inspection. Furthermore there is no evidence to suggest that the recommendations contained in the internal performance review were ever implemented. It is therefore disappointing that it appears that another significant opportunity to address performance issues was apparently missed, particularly in the context of Professor Lundy's Review.

In January 2014 PSNI also provided the Working Group with a copy of a *HET Operational Guide*, prepared in 2012 in anticipation of the HMIC Inspection.<sup>9</sup> The Working Group has noted the HMIC critique of this document. As part of a scoping exercise undertaken by a PSNI Detective Chief Superintendent of current policy, practice and standards applied by HET, the Working Group was informed that the *HET Operational Guide* submitted to HMIC was a summary of a more comprehensive document. Members were informed that, in anticipation of the HMIC inspection, a

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<sup>9</sup> It is assumed that the report submitted to the Working Group entitled 'Manual of Guidance' is the same summary document shared with HMIC. *Inspection of the Police Service of Northern Ireland Historical Enquiries Team*, July 2013, p. 74, <http://www.hmic.gov.uk/media/inspection-of-the-police-service-of-northern-ireland-historical-enquiries-team-20130703.pdf>.

comprehensive 'Manual of Guidance' was prepared which captured the entirety of the work undertaken by HET including the process of conducting case reviews. However this Manual was not adopted or implemented as HET policy. Members were further informed that an 'amended, shorter version' of the Manual was produced for HMIC as part of their inspection. This is the document referred to as the *HET Operational Guide* in the HMIC report. Neither the 'Manual of Guidance', nor the *HET Operational Guide* were accepted as HET policy or implemented as standard operating procedure.

Furthermore, there is also some confusion about the document provided to the HMIC. The *HET Operational Guide* was apparently a 'shorter, amended version', yet the 'Manual of Guidance' on which we are informed it has been based upon, appears to be a shorter and less comprehensive document.

In any case, the Working Group has expressed concern that the *HET Operational Guide* did not, according to the HMIC inspection, provide clear and unequivocal guidance on policies and processes which should have been adopted as part of any internal HET review. Furthermore, the Working Group expressed concern that neither version was adopted as Standard Operating Procedure, nor indeed, as HMIC noted, had the HET followed any Standard Operating Procedure since 2005.

## **Postscript to concluding observations and recommendations of the HET Working Group**

The HET Working Group completed its deliberations at its final meeting on 28 April 2014 without consensus. Thereafter, progression of HET issues was delegated to the Board's Performance Committee and Members have continued to consult closely with the Chief Constable on a number of issues relating to historical investigations.

With regard to the publication of the Working Group's Position Paper, there was no consensus in the Performance Committee or the Board on this issue. Members agreed that it was imperative that the Justice Minister commission HMIC to undertake a follow-up review of the HET in order to reassure the Board and the public that PSNI had fully implemented all the recommendations contained in the original inspection. The Board wrote to the Minister on 28 April 2014 to ask him to commission HMIC to carry out a follow-up inspection of HET as soon as practically possible and the Minister agreed to do so in a letter dated 1 July 2014. The inspection began in September 2014.

The Committee have also considered the implementation of Recommendation 10 of HMIC's inspection report on HET which recommended that an oversight panel should be established to oversee and scrutinise all aspects of the work undertaken by the HET. The Chair of the Board wrote to the Justice Minister on 28 April 2014 to inform him that Members agreed that any oversight panel should be independent of the Board and that it was ultimately his responsibility to appoint such a panel. The Minister replied on 19 May 2014 to express his opinion that the appointment of an oversight panel was a matter for the Board. The Chair wrote again to the Minister on 27 May 2014 to inform him that Members would discuss this issue on 5 June 2014 and agree a way forward. Based on Recommendation 4 of the HET Working Group's Position Paper which outlined the principles that should govern the oversight panel and the generic characteristics of its membership, Members have been presented with a number of options with regard to the powers, composition and independence of an oversight panel in order to build community confidence in the HET. However, resourcing of any such panel remains a major concern for the Board given the increasing pressures on the Board's budget. Members expressed a range of views on the potential establishment of an oversight panel and again there was no consensus on the creation of such a panel.

The Chief Constable met with the Performance Committee on 18 September 2014 and informed Members that PSNI had implemented all the HMIC recommendations within their operational remit. He outlined that due to severe budgetary pressures, PSNI was considering drawing together its legacy operations under a single command, provisionally referred to as the 'Legacy Branch'. This Branch would be fully integrated into the Crime Operations Department, accountable to the Chief Constable through the Assistant Chief Constable. The Chief Constable outlined his belief that it would prove impossible to reengineer public confidence in the HET and that a new approach was necessary. He emphasised that the work of the Legacy Branch would be underpinned by the full implementation of HMIC's recommendations and that he believed the independence of the Legacy Branch should be scrutinised by an oversight panel appointed by the Board. Members of the Performance Committee have expressed diverging views on the establishment of a Legacy Branch, particularly as to whether such arrangements would comply with the Article 2 ECHR requirements for institutional, hierarchical and practical independence.

## **Ministers' Deputies Information documents**

CM/Inf/DH(2008)2revised, 19 November 2008

### **Cases concerning the action of security forces in Northern Ireland**

Progress achieved in implementing the Court's judgments since Interim Resolution CM/ResDH(2007)73 and outstanding issues

Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights (DG-HL)

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#### **6 cases concerning the action of security forces in Northern Ireland**

Jordan v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001

Kelly and others v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001

McKerr v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001

Shanaghan v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001

McShane v the United Kingdom, judgment of 28 May 2002, final on 28 August 2002

Finucane v the United Kingdom, judgment of 1 July 2003, final on 1 October 2003

#### **Secretariat's assessment:**

47. The Secretariat recalls that the HET does not carry out Article 2 compliant investigations in historical cases.<sup>10</sup> The HET will not only view existing evidence but will also examine the potential of gathering new evidence either from lines of enquiry, missed opportunities or from turning information/intelligence into evidence. If sufficient evidence is found and can realistically be pursued, the HET will forward files to the Public Prosecution Service.

48. The Secretariat observes that the HET is confronted with the difficult task of examining thousands of incidents that have taken place over three decades. As

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<sup>10</sup> CM/Inf/DH(2006)4 revised 2, paragraph 65: 'In particular, the establishment of the Historical Enquiries Team, especially designed for re-examining deaths attributable to the security situation in Northern Ireland during "the Troubles" and containing a unit solely staffed with officers from outside the PSNI, seems encouraging. It is clear however, that it will not provide a full effective investigation in conformity with Article 2 in "historical cases" but only identify if further 'evidentiary opportunities' exist. The latest information is however helpful. The HET work in identifying evidential opportunities appears to be thorough and involves modern techniques. It would appear to be a valuable complement to the police investigations in the cases under its remit. The HET work thus appears to the Secretariat a positive development in remedying the defects in the police investigations identified by the Court in this kind of cases. Once possible, reports on concrete results achieved would be appreciated. The information provided regarding the interplay between the HET and the Police Ombudsman is also appreciated. Information about review mechanisms available to families in relation to the work of the HET would be useful'.

acknowledged by the United Kingdom authorities, the HET process appears to be taking more time than it was originally anticipated.

49. Despite these set backs, the Secretariat is of the opinion that the HET can be considered as a useful model for bringing a “measure of resolution” to those affected in long-lasting conflicts. Such institutions could be viewed as playing an important role in satisfying the State’s continuing obligation to conduct effective investigations in violations of Article 2 of the Convention.

50. Bearing in mind the context in which the HET is operating, the Secretariat considers that it would be unrealistic for the HET, which was established only in late 2005, to have fully completed its task by now given the sheer volume and complexity of the cases it had to deal with. As a consequence, the HET has still not concluded reviewing 65 % of the cases before it (only 471 out of 1,344 cases have been concluded).

51. The Secretariat therefore proposes to look into whether or not the HET has the necessary organisational structure and the means to be able to finalise its work in the near future:

52. Firstly, the HET is staffed by retired police officers from Scotland, Wales and England; serving police officers seconded from police forces across the United Kingdom and a number of retired Royal Ulster Constabulary (RUC) officers. The latter group are required to declare any past interest in a case and will not work on a case in which they have been previously involved. The Secretariat takes note of the structural arrangements/organisation of the HET and acknowledges that the organisation is independent.<sup>11</sup>

53. Secondly, the HET has received a funding for over 6 years to be able to continue with its activities until it finishes the cases before it. The HET funding cannot be used for other policing work and is allocated to each of the organisations involved in the HET project.

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<sup>11</sup> The ECtHR previously found that ‘the PSNI was institutionally distinct from its predecessor even if, necessarily, it inherited officers and resources’. *Brecknell v the United Kingdom* Application nos. 32457/04, 34575/04, 34622/04, 34640/04, 34651/04, November 2007.

54. Thirdly, the HET seems to have adopted a well-structured organisational scheme. This allows its different teams to concentrate on different aspects of a case depending on its complexity and the engagement of the family concerned.

55. Lastly, it is noted that the HET meets with the families, informs them of their findings and provides a copy of the Summary Report. The Secretariat welcomes that, after receiving the Summary Report, the families can seek further clarifications of any outstanding issues.

56. In the light of the foregoing and bearing in mind the Committee of Ministers' emphasis on the need for rapid progress in the investigation into all past cases (see, Interim Resolution CM/ResDH(2007)73), the Secretariat proposes that the Committee of Ministers might consider strongly encouraging the HET to finalise its work rapidly and that it might decide to close its examination of this measure as the HET has the structure and means capable of allowing it to finalise its work.

57. As to the concrete results obtained by the Police Ombudsman in the investigation of historical cases, the Secretariat welcomes the good working relations established between the HET and the OPONI and notes with satisfaction that these institutions have now agreed to adopt a Memorandum of Understanding to that effect. The Secretariat further notes that the HET has transferred a total of 63 cases to the OPONI for its examination. The Police Ombudsman may decide to publish the results of the investigations into these cases if he considers this appropriate. The Secretariat considers therefore that no further issues appear to rise in this respect.

**TERMS OF REFERENCE FOR THE HER MAJESTY'S INSPECTORATE OF CONSTABULARY (HMIC) REVIEW OF PSNI HISTORICAL ENQUIRIES TEAM (HET).**

- 1) The Chief Constable and the Policing Board has invited HMIC to review the procedures and approach of the HET relating to the interviewing of former military personnel.

**Clarification following consultation with Board:**

To examine the adequacy of the policy and procedures in place to ensure that the HET investigation of RMP cases is compliant with the ECHR and current policing standards.

- 2) The review should focus on those deaths occurring between 1970 and September 1973 in which military personnel form a key part of the investigation. These deaths were investigated jointly by the RUC and the RMP under an agreement arranged between the Chief Constable of the RUC and the General Officer Commanding whereby the RMP had responsibility for interviewing soldiers involved in the incident and forwarding details to the RUC investigators.

**Clarification following consultation with Board:**

To determine whether the conduct of all aspects of the HET investigation of RMP cases meet current policing standards and the requirement to provide an independent, effective, prompt and sufficiently transparent investigation of these cases under Article 2 ECHR.

- 3) The Chief Constable seeks reassurance that in accordance with Article 2 ECHR the HET procedures for the interviewing of former military personnel are in keeping with the requirement to provide an independent, effective, prompt and sufficiently transparent investigation.

**Clarification following consultation with Board:**

To confirm whether the HET is investigating cases involving the Military Police as effectively as it investigates all other cases, including those where there is no 'state'

involvement at all, with a view to ensuring there is no breach of Article 3 and Article 14 of the convention. The review should include interviews with families and their representatives.

- 4) The Chief Constable seeks a review which takes into account recognised best practice in dealing with the interviewing of former military personnel.

**Clarification following consultation with Board:**

To determine whether HET investigation processes in RMP cases, as outlined in the research conducted by Professor Lundy, meet the requirement benchmarks and standards. The review will take cognisance of the standards that applied at the time and obligations in respect of article 6.

- 5) The Chief Constable would value any recommendations which HMIC feels would benefit HET investigations in which former military personnel form a key part of the enquiry.

**Clarification following consultation with Board:**

To establish if there is consistency and equality of treatment in all of the above investigations and policies, procedures and processes in comparison with other historic cases within PSNI, bearing in mind the obligation on the PSNI to ensure balance in respect of their approach to such matters.

## HMIC RECOMMENDATIONS

The HMIC report made twenty recommendations for implementation:

**Recommendation 1:** The HET's role and purpose need to be clarified and specific terms of reference should be published. These must be explicit about what the public and interested parties can expect from the HET.

**Recommendation 2:** The HET should publish an annual report to the public setting out what it has done to achieve its objectives, how it has responded to constructive feedback, and an acknowledgement about those things that might not have been achieved.

**Recommendation 3:** The Chief Constable and the NIPB should agree a mechanism through which the HET can be made more open and accountable to the public in Northern Ireland.

**Recommendation 4:** The HET should establish a single complaints process that is easily accessible to those who might wish to complain about any aspect of the work of the HET.

**Recommendation 5:** The HET should establish clear and accessible policies and procedures that deal with all aspects of the review process. In particular, this should deal with the storage of material and the maintenance of policy files.

**Recommendation 6:** The HET should ensure that all material created to date has been properly and consistently catalogued and stored. In particular, the HET should ensure that case folders contain all relevant material.

**Recommendation 7:** The HET should introduce policy files to record – to an explicitly set standard – decisions on cases and their rationale.

**Recommendation 8:** The HET should introduce a rigorous induction programme to ensure that all staff understand the policies and practices that they should employ in their work.

**Recommendation 9:** The Chief Constable should commission an assessment of the outstanding cases alongside the funding and time required to complete the work of the HET.

**Recommendation 10:** An independent oversight panel should be established to oversee and scrutinise in the public interest all aspects of the work the HET. This body should have unfettered access to the information it would need to carry out this responsibility.

**Recommendation 11:** The HET should implement an independent audit process to verify that the HET staff have the benefit of all appropriate intelligence material held by the PSNI.

**Recommendation 12:** The HET should extend the use of satisfaction surveys to a wider group than just those that receive a final RSR. In addition, the survey methodology should be open to public scrutiny.

**Recommendation 13:** The HET should introduce a system that tracks all drafts or versions of its RSRs so that changes can be properly documented and audited.

**Recommendation 14:** The HET should: immediately withdraw paragraph 6.19 of its *Operational Guide*; draft a revised policy approach to state involvement cases; seek the DPP for Northern Ireland agreement to it; and then publish it to HET members and other interested parties.

**Recommendation 15:** The Chief Constable should enforce his decision that any case which requires investigation should be referred to the PSNI C2. The Chief Constable should also introduce systems to provide himself with an assurance that this policy is applied in all cases.

**Recommendation 16:** The HET should dispense with the '*pragmatic approach*' and stop conducting any interviews under caution.

**Recommendation 17:** The HET and the PSNI should review the MoU between them to clarify the point at which cases should be referred to PSNI C2 for investigation and to address any anomalies and inconsistency between the handling of state and non-state cases.

**Recommendation 18:** The Chief Constable should introduce systems and processes whereby he may be satisfied that the HET operates in a consistent way in respect of all the cases that it reviews.

**Recommendation 19:** The HET should hold monthly meetings with the PPS to discuss cases and contentious legal issues.

**Recommendation 20:** The Chief Constable should make sure that the HET introduces a policy about the deployment of staff to state involvement cases. This should include the vetting of staff regarding previous involvement in cases, in order to safeguard the independence of investigations.

<b>ENGAGEMENT WITH NGO AND VICTIMS GROUPS</b>	
<b>NGO/Victims Group</b>	<b>Type of Engagement</b>
Padraig Ó Muirigh Solicitors	Attended meeting on 22 August 2013.
Committee for the Administration of Justice	Attended meeting on 12 September & 23 October 2013. Also made a written submission to the Working Group.
Pat Finucane Centre	Attended meeting on 12 September & 23 October 2013. Also made a written submission to the Working Group.
Relatives for Justice	Attended meeting on 12 September & 23 October 2013. Also made a written submission to the Working Group.
Justice for the Forgotten	Attended meeting on 12 September & 23 October 2013.
WAVE Trauma Centre	Attended meeting on 12 September & 23 October 2013. Also made a written submission to the Working Group.
Amnesty International NI	Attended meeting on 12 September & 23 October 2013.
Rights Watch UK	Attended meeting on 12 September 2013. Also made a written submission to the Working Group.
Commission for Victims and Survivors (CVSNI)	Attended meeting on 23 October 2013.
The families of the McGurk's Bar bombing	Attended meeting on 23 October 2013.
Kevin R Winters LLP	Attended meeting on 23 October 2013.
Northern Ireland Retired Police Officers Association	Attended meeting on 23 October 2013.
RUC George Cross Foundation	Attended meeting on 23 October 2013.
RUC Widows Association	Attended meeting on 23 October 2013.
Loughgall Truth & Justice Campaign	Made a written submission to the Working Group.

**THE PROCEDURAL OBLIGATION TO INVESTIGATE: ARTICLE 2 ECHR**  
**NOTE TO MEMBERS OF THE HET WORKING GROUP**

**Introduction**

1. This note sets out in summary form (i) the relevant legal framework and principles as *per* Article 2 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which apply to investigations into deaths in which there may have been some involvement by State forces<sup>1</sup> and (ii) the findings of Her Majesty's Inspectorate of Constabulary (HMIC) following its inspection of the Historical Enquiries Team (HET). In doing so, consideration has been given to the jurisprudence of the European Court of Human Rights (ECtHR) and of the United Kingdom courts.

**Background**

2. The HET was established in September 2005 to examine 3,260 deaths arising from 2,555 incidents attributable to the security situation in Northern Ireland between 1968 and April 1998. The establishment of the HET was, in large part, a response by the United Kingdom Government to the judgments of the ECtHR in a number of complaints involving deaths in which there was alleged to be State involvement.<sup>2</sup> The complainants alleged that the State had failed to discharge its obligations to investigate the deaths as required by Article 2 ECHR.<sup>3</sup> In those cases (known as the McKerr cases) the ECtHR found that the State was in breach of Article 2 as a result of its failure to investigate the deaths according to the principles enshrined in Article 2. The UK Government, in an effort to address the findings of the ECtHR, presented a "package of measures" to the Committee of Ministers.<sup>4</sup> An important element in the package of measures presented by the UK Government was the HET.
3. The HET operated as a specialist unit of the Serious Crime Review Team (SCRT) of the PSNI. The stated objectives of the HET when it was established were: to bring a measure of resolution to those families of victims whose deaths were attributable to 'the Troubles' between 1968 and the signing of the Belfast Agreement on Good Friday 1998; to re-examine all deaths attributable to 'the Troubles' and ensure that all investigative and evidential opportunities were subject to through and exhaustive

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<sup>1</sup> This note does not cover every issue but refers to those raised by the HMIC inspection into the HET. It considers deaths in which there is alleged State involvement whether that involvement was alleged by the British Army and/or the police service.

<sup>2</sup> *McKerr v United Kingdom* (2002) 34 EHRR 20; *Jordan v United Kingdom* (2003) 37 EHRR 2; *Kelly & others v United Kingdom* (2000) 30 EHRR 223; *Shanagan v United Kingdom* (2000) 30 EHRR 370; *McShane v United Kingdom* (2002) 35 EHRR 23; *Finucane v United Kingdom* (2003) 37 EHRR 29.

<sup>3</sup> The requirements of Article 2 ECHR are set out below.

<sup>4</sup> The Committee of Ministers of the Council of Europe is responsible for the implementation of ECtHR judgments.

examination; and to do so in a manner that commanded the confidence of the wider community.

4. The Committee of Ministers held 15 meetings between 2002 and 2009 to assess progress on the implementation of the ECtHR's findings in the McKerr cases. In its final assessment<sup>5</sup> it emphasised that the HET did not, in its view, carry out Article 2-compliant investigations as it only sought to identify whether further evidentiary opportunities existed but it did consider the HET to be a useful model for bringing a measure of resolution to families and could therefore play an important part in the package of measures designed to satisfy the State's Article 2 obligations.<sup>6</sup> The HET was described as a "valuable complement to the police investigations in the cases under its remit."<sup>7</sup> In particular, the Committee of Ministers considered that the structure and organisation of the HET, as it then was, ensured the necessary degree of independence. The HET comprised retired police officers from police services in Great Britain, serving police officers seconded from police services across Great Britain and a number of retired former Royal Ulster Constabulary (RUC) officers. In respect of the latter, they were required to declare any past interest in a case and recuse themselves from any case in which he or she may have been involved. On that basis, the Committee of Ministers was satisfied that the HET was independent.<sup>8</sup> The Committee of Ministers also recorded the importance of the role of the Office of the Police Ombudsman, which was responsible for investigating alleged criminality by police officers and its relationship with the HET. The Committee of Ministers adopted a resolution to close its examination of the issue.<sup>9</sup>
  
5. However, in 2008, concerns were raised as a result of the research and subsequent report of Professor Patricia Lundy.<sup>10</sup> That research was followed-up by Professor Lundy and identified a number of concerns with the HET.<sup>11</sup> As a direct result of Professor Lundy's research the HMIC was commissioned to undertake an inspection of RMP cases between 1970 and 1973. The HMIC issued an inspection report, dated 3 July 2013. During the course of that inspection the HMIC considered 82 Royal Military Police (RMP) cases the deaths having occurred between 1970 and 1973. The HMIC identified a number of failings within the HET and noted strong concerns that the HET was not compliant with Article 2 ECHR. In particular, the HMIC believed that the involvement of former RUC and PSNI officers in State involvement cases could give rise to a reasonable perception that the HET lacked the requisite independence. The HMIC report is considered in greater detail below. The Northern Ireland Policing Board subsequently established a dedicated working

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<sup>5</sup> Dated 19 November 2008.

<sup>6</sup> CM/Inf/DH(2008)2revised, 19 November 2008.

<sup>7</sup> *Ibid.* at paragraph 47, footnote 14.

<sup>8</sup> *Ibid.* at paragraph 52.

<sup>9</sup> On 19 March 2009, CM/ResDH(2009)44.

<sup>10</sup> *Can the past be policed?* Professor Lundy, University of Ulster 2008.

<sup>11</sup> *Assessment of HET Review Processes and Procedures in Royal Military Police (RMP) Investigation Cases*, Professor Lundy, University of Ulster, 2012.

group made up of political and independent members to oversee the implementation of the HMIC's recommendations.

## Legal Framework

6. The positive obligation on the State (known as the procedural obligation) pursuant to Article 2 ECHR means that an inquiry must follow a suspicious death. That inquiry must be designed to lead to criminal proceedings, where appropriate. The ECtHR has applied a fact specific test to individual cases: Article 2 requires a full inquiry into a death where that death occurred in a situation which raises issues of public concern whether or not there was direct or indirect state involvement.<sup>12</sup> There has been some attempt in the UK courts to distinguish, in the context of the standards of investigation to be applied, between cases in which there is alleged direct or indirect state involvement in the death and those cases which involve for example a failure of care in hospital which results in death. The ECtHR has not, however, distinguished cases in the same way. Despite the debate at a judicial level both the ECtHR and the UK Supreme Court are clear that if state forces *may* bear some responsibility for a death, directly or indirectly, there must be a full Article 2 compliant investigation.
7. The ECtHR has interpreted the procedural obligation as imposing on States an obligation to “initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the substantive obligations (i.e. to take life or to fail to protect life) has been or may have been violated and it appears that agents of the state are or may be in some way implicated.”<sup>13</sup> The purpose of such an investigation is to ensure that the “full facts are brought to life; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.”<sup>14</sup>
8. There is no single prescribed model of investigation. The ECtHR (and the UK Supreme Court) recognises that some flexibility is required as to form and procedure to be adopted.<sup>15</sup> However, the cornerstone of the requirement for the investigation is that it must comply with certain minimum requirements.

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<sup>12</sup> For example, in *Menson and others v. UK* (2003) 37 EHRR CD 220 the ECtHR held that article 2 applied to the killing of a black man during a racist attack in the absence of any direct State responsibility for the death. That was followed, in 2007, in *Angelova and Iliev v. Bulgaria* (2008) 47 EHRR 7. See also *Šilih v. Slovenia* (2009) 49 EHRR 37, a decision of the Grand Chamber, in April 2009.

<sup>13</sup> *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182.

<sup>14</sup> *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653.

<sup>15</sup> See for example *Al-Skeini and others v the United Kingdom* (2011) EHRR 18.

Those minimum requirements are:<sup>16</sup>

- (i) The authorities must act of their own motion and not wait for the matter to be referred;
- (ii) The investigation must be independent;
- (iii) The investigation must be effective;
- (iv) The investigation must be reasonably prompt;
- (v) There must be sufficient public scrutiny of the investigation;
- (vi) The next of kin of the deceased must be involved in the investigation to the appropriate extent.

### **Investigation to be of the State's own motion**

9. Article 2 requires the State (by its authorities) to conduct an investigation of its own motion once the matter has come to its attention. The State may not wait until a case has been referred or a formal complaint has been made.<sup>17</sup> Any civil or other remedy that may be available to the next of kin must therefore be left out of account when assessing the extent of the State's obligations. A civil action may provide a judicial fact finding forum and the opportunity to get a finding of unlawfulness but it does not involve the punishment of the alleged perpetrator.<sup>18</sup> In other words, a fact-finding mechanism which is incapable of holding the perpetrator to account will not in itself satisfy Article 2. It is also clear that the obligation cannot be 'waived' by the next of kin, or indeed anyone else. Once the matter has come to the attention of the State it must comply with its obligations. Where a number of allegations have been made of State involvement in deaths where there may be systemic issues arising from the allegations there is a further obligation to investigate those systemic issues.<sup>19</sup>

### **Independence**

10. The ECtHR has held that "it is generally regarded as necessary that the persons responsible for and carrying out the investigations to be independent from those implicated in the events. This means not only a lack of institutional connection but also a practical independence."<sup>20</sup> Therefore, independence must be demonstrated as a matter of institutional, hierarchical *and* practical independence. If the investigation appears to be institutionally and hierarchically independent but is not, in fact, independent there is likely be a violation of Article 2. The purposes of the investigation were described by Lord Bingham "... to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who

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<sup>16</sup> As per for example *Edwards v UK* [2002] 35 EHRR 19; *Jordan v UK* [2003] EHRR 2.

<sup>17</sup> *Jordan v The United Kingdom* (2003) 37 EHRR 2.

<sup>18</sup> *Jordan ibid*; *Edwards v the United Kingdom* (2002) 35 EHRR 19.

<sup>19</sup> In *Ali Zaka Mousa v the Secretary of State for Defence* [2011] EWCA Civ 133 the Court of Appeal proceeded on the basis that if the IHAT must be capable of investigating independently the systemic issues that arose.

<sup>20</sup> *Jordan v United Kingdom* (2003) 37 EHRR 2.

have lost their loved ones may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.”<sup>21</sup> Importantly, the requirements of independence apply whether the inquiry subject to scrutiny is investigative only or has additional functions such as deciding on prosecution or making recommendations.<sup>22</sup> In other words, because another independent body is ultimately responsible for deciding on whether to prosecute in an individual case does not absolve the investigation of its obligation to demonstrate the requisite independence.

11. Independence, in the context of PSNI investigations into alleged RUC misconduct, was considered specifically by the ECtHR in 2007. One case (the Brecknell case) considered the investigation into the attack on Donnelly’s bar in Armagh, in which the initial investigation had been undertaken by the RUC but taken over by the PSNI in 2004. The ECtHR held, on the question of independence, that “the PSNI was institutionally distinct from its predecessor even if, necessarily, it inherited officers and resources. It observes that the applicant has not expressed any doubts about the independence of the teams which took over from 2004 (the SCRT Serious Crime Review Team) and the HET (Historical Enquiries Team). However this does not in the circumstances detract from the fact that for a considerable period the case lay under the responsibility and control of the RUC. In this respect, therefore, there has been a failure to comply with the requirements of Article 2.”<sup>23</sup> Furthermore, it was noted that the PSNI did not itself *investigate* the RUC. That responsibility falls upon the Office of the Police Ombudsman (OPONI), which is independent. However, it must be noted that in a large number of historical cases the reference to OPONI for investigation came from, or as a direct result of, HET inquiries. In other words, HET was the first and only point of entry into the investigative process for a number of cases.

12. On the facts as presented in the *Brecknell* case, the ECtHR was content that the PSNI (through the SCRT and HET) was capable of demonstrating the necessary independence from the RUC for the purposes of an Article 2 compliant investigation. Importantly, however, that finding was made in the absence of any doubts expressed about the independence of the investigative teams that took over from the RUC. That means that while the PSNI is not *incapable* of investigating the RUC, because it is institutionally independent, the other elements of independence must also be demonstrated in the circumstances of an individual case: hierarchical and practical independence. Had the next of kin expressed doubts about the independence of the teams that carried out the investigation in 2004 the ECtHR would have had to go on to consider those elements expressly.

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<sup>21</sup> *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653.

<sup>22</sup> *Ali Zaki Mousa and others v The Secretary of State (No.2)* [2013] EWHC 1412 Admin, Divisional Court

<sup>23</sup> *Brecknell v the United Kingdom* Application nos. 32457/04, 34575/04, 34622/04, 34640/04, 34651/04, November 2007. Importantly, the ECtHR was considering the arrangements as they existed before changes were revealed by the HMIC report, set out below.

13. Recently, in connected English cases, the extent of the requirement for independence in State involvement cases was reconsidered. While the factual matrix of the investigative body under consideration in those cases is not identical to that of the HET there are striking similarities and some very relevant findings. Furthermore, the High Court in Belfast has considered specifically the issue of independence in the context of former RUC officers' involvement in the disclosure process on an inquest. Those cases are set out below. Given the extensive recent analysis it is important to set that analysis out in some detail.
14. The Iraq Historic Allegations Team (the IHAT) was set up by the Secretary of State to investigate and prosecute alleged ill-treatment of detainees by members of the British armed forces in Iraq. The IHAT was held by the English Court of Appeal not to be sufficiently independent to satisfy the requirements of Article 2.<sup>24</sup> The problem with the IHAT was that it included persons who were members of groups which may have been called to account and therefore could not demonstrate practical independence. The Court stated "it seems to us that the central concern in this case is not related to the formal chain of command or to the niceties of the hierarchical or institutional military arrangements. It is to do with the reality of the situation on the ground in Iraq and the extent to which that may impact on the practical independence of the IHAT in view of the involvement of the Provost Branch"<sup>25</sup> Importantly, that finding was despite the fact that there was no evidence that any individual member of the Provost Branch was involved in any reprehensible conduct in Iraq and "no reason to believe that IHAT will investigate the allegations any less thoroughly".<sup>26</sup> Furthermore, the Court of Appeal stressed that it was not for any person challenging the independence of the IHAT to prove that some element or person in IHAT actually lacked impartiality. As the court made clear "One of the essential functions of independence is to ensure public confidence and, in this context, perception is important."<sup>27</sup> The Court of Appeal referred with approval to the opinion of Lord Steyn, albeit in a different context, that "public perception of the possibility of unconscious bias is the key."<sup>28</sup>
15. It can be noted that the IHAT had a *civilian* head who reported to the Provost Marshall (Army), the head of the Royal Military Police (RMP).<sup>29</sup> All elements of the IHAT reported directly to the civilian head: the Provost Marshall was responsible for the effective and efficient running of the IHAT and the achievement of its objectives.

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<sup>24</sup> *Ali Zaki Mousa and others v the Secretary of State for Defence* [2011] EWCA Civ 133; *Ali Zaki Mousa and others v The Secretary of State (No.2)* [2013] EWHC 1412 Admin, Divisional Court The *Mousa* case considered Articles 2 and 3 ECHR and proceeded on the basis that the same principles apply to both.

<sup>25</sup> Referring to Provost Branch (Army), at paragraph 34.

<sup>26</sup> This was accepted by the Divisional Court and not disapproved of by the Court of Appeal.

<sup>27</sup> *Ali Zaki Mousa & others v The Secretary of State* [2011] EWCA Civ 1334, at paragraph 35.

<sup>28</sup> In *Lawal v Northern Spirit Ltd* [2003] ICR 856 which was subsequently confirmed and adopted by Lord Justice Laws in *R (JL) v Secretary of State for Justice* [2009] EWHC 2416 (Admin)

<sup>29</sup> At paragraph 36.

He also received all reports for agreement with the civilian head. Underneath the civilian head were a number of Provost Branch members together with a number of civilian investigators participating in the investigation of the allegations. The fact that there was a civilian head of IHAT did not assuage concerns. The Court of Appeal found “the problem is that the Provost Branch members of IHAT are participating in investigating allegations which, if true, occurred at a time when Provost Branch members were plainly involved in matters surrounding the detention and internment of suspected persons in Iraq. They had important responsibilities as advisers, trainers, processors and “surety for detention operations”. If the allegations or significant parts of them are true, obvious questions would arise about their discharge of those responsibilities.”<sup>30</sup> The court went on “Provost Branch members are investigating allegations which necessarily include the possibility of culpable acts or omissions on the part of Provost Branch members.”<sup>31</sup>

16. The Secretary of State argued that because the chain of command was such that the Royal Military Police were under the command not of the Provost Marshall but of the Officer Commanding, who was not of Provost Branch, the independence was assured but that argument was rejected. The Court of Appeal also considered whether practical independence could be underwritten by IHAT’s recusal arrangements but held that recusal arrangements were not a satisfactory answer to the concerns about independence.<sup>32</sup> The Court of Appeal stated “we do not consider this to be a marginal case. On the contrary, we are of the view that the practical independence of IHAT is, at least as a matter of reasonable perception, substantially compromised.”<sup>33</sup>

17. The Secretary of State had also set up a separate panel, the Iraq Historic Allegations Panel (IHAP) to consider the results of IHAT’s investigations and identify any wider issues to be brought to the attention of the Ministry of Defence or of Ministers personally. The IHAP relied upon the IHAT to provide the raw material for consideration by the IHAP. Given the lack of independence of the IHAT, the Court of Appeal held that that necessarily compromised the IHAP’s independence as “we have considered whether the existence of IHAP dilutes or mitigates our concerns about IHAT. It does not... If, as we have found, IHAT suffers from a lack of practical independence and the raw material destined for consideration by IHAP is the product of IHAT, IHAP’s independence is itself compromised.”<sup>34</sup> That highlights the importance of individual participants being able to demonstrate practical and hierarchical independence. It also makes it clear that an individual or group of

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<sup>30</sup> The Royal Military Police (RMP) is the Army’s specialists in Investigations and Policing and is responsible for policing the military community. The Military Provost Staff are the Army’s specialists in Custody and Detention, providing advice inspection and surety.

<sup>31</sup> *Ali Zaki Mousa & others v The Secretary of State* [2011] EWCA Civ 1334, at paragraph 37.

<sup>32</sup> At paragraph 37.

<sup>33</sup> *Ali Zaki Mousa & others v The Secretary of State* [2011] EWCA Civ 1334, at paragraph 38.

<sup>34</sup> At paragraph 39.

individuals, if involved only at an early stage in the review of a case or in the collection and dissemination of information for a subsequent investigation, may taint the entire process.<sup>35</sup>

18. Subsequently, the Secretary of State reformed and reconstituted the IHAT in an attempt to meet the criticism of the Court of Appeal. The new IHAT had removed all RMP personnel, who were replaced by Royal Navy Police (RNP). The Provost Marshal (Army) was replaced by the Provost Marshal (Navy). Civilian employees were recruited externally, comprising primarily retired police officers.<sup>36</sup> There was also a lawyer and a small number of civil servants. The IHAT was headed by a retired Detective Chief Superintendent of police. The IHAT now considers and reports upon systemic issues arising. The IHAP was disbanded. The IHAT now reports on wider systemic issues to the Provost Marshal (Navy) which reports are also provided in an un-redacted format to the Directorate of Judicial Engagement Policy. The restructured IHAT was challenged by a number of victims of alleged mistreatment and by relatives of those alleged to have been murdered by State forces.<sup>37</sup> Amongst other things, they alleged that the IHAT was still not sufficiently independent for the purposes of Articles 2 and 3 ECHR. As a result of the restructuring of the IHAT the Divisional Court held that it was now capable of carrying out its investigative and prosecutorial functions independently but that reconsideration was necessary of the way in which the duty to assess the systemic issues and to take account of lessons learned is discharged in a way that provides greater transparency and public accountability.

19. In respect of the independence of the RNP the court, having examined carefully the role played by the RNP in Iraq, concluded that it had no involvement in army investigations and that it was not involved in the formulation of detention and interrogation policy or other relevant training. The court stressed that the RNP must be able to, and did, make decisions on whether to pursue investigations and whether to prosecute “entirely independently of the Secretary of State for Defence, any civil servant and, even more importantly, of anyone in the hierarchy of the armed forces.”<sup>38</sup> An issue arose as to the potential for one person (RNP) who was responsible for decisions on prosecutions to be influenced in any of those decisions. Having examined the issue carefully, the court was satisfied that he had “complete institutional independence... and was not subject to any interference on an individual basis with that independence by the hierarchy of the armed forces.” In other words, the court considered whether in reality another force may seek to influence but concluded that it could not. The court held ultimately that the RNP was a separate

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<sup>35</sup> This is particularly relevant to the comments below about the HET Intelligence Unit.

<sup>36</sup> Of the full complement of 110 persons, 94 were intended to be recruited externally. The balance was to be made up of 5 RNP, 1 lawyer and 10 civil servants.

<sup>37</sup> *Ali Zaki Mousa and others v The Secretary of State (No.2)* [2013] EWHC 1412 Admin, Divisional Court.

<sup>38</sup> *Ali Zaki Mousa (No 2) ibid* at paragraph 74.

service police force to the RMP with independent command and independent working and that it was independent of both the events *and* the personnel being investigated – both being essential elements of independence. Despite the finding of institutional independence, the court still considered it appropriate to examine whether there was any senior RNP officer involved in, for example, policy formulation on detention and interrogation or training. The court analysed whether, despite institutional independence, any individuals were as a matter of fact potentially involved in events in Iraq.

20. The court was not satisfied however that the Directorate of Judicial Engagement Policy could be described as independent despite its conscientious work because it reported to the Secretary of State and was an integral part of the defence and military hierarchy. Therefore, the arrangements in place for the discharge of the function in relation to the wider issues and the lessons learned from systemic issues were inadequate and required further consideration. In conclusion, the court held that the IHAT and the arrangements associated with it were not sufficient to discharge the Article 2 obligation. In particular, the court was critical of: the degree of accessibility to the public; the accessibility to the families of the deceased and the examination of systemic abuse and training.
21. The High Court in Belfast considered a number of issues arising from the inquest into the death of Mr Patrick Pearse Jordan.<sup>39</sup> For present purposes, the relevant challenge was to the involvement of former RUC Special Branch Officers and a former RUC Intelligence Officer (in the Legacy Support Unit) in the process of complying with the Chief Constable's obligations to disclose material to the Coroner. It was alleged that their involvement in the disclosure process compromised the independence of that process and meant that the inquest was not compliant with Article 2. The officers about whom the challenge was made were described as support staff under the direction of PSNI Legal Services Branch. They were not involved in any investigative capacity but were solely involved in collating and preparing materials for appropriate public interest immunity (PII) certification and onward disclosure to the next of kin.
22. To determine that issue, Mr Justice Stephens examined the function performed by those officers. The evidence provided by PSNI was that: the officers were subject to close internal and external scrutiny; where former RUC officers are employed to examine archived material they do so under the supervision of PSNI Legal Services Branch; where there was a PII process the materials are examined by independent counsel, the Chief Constable, the Secretary of State or Minister of State prior to any PII certification; the processes are under the supervision of the Coroner who

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<sup>39</sup> *Jordan's Applications* [2014] NIQB 11, Judgment of Stephens J. delivered on 31 January 2014.

ultimately has access to all disclosure materials including un-redacted materials.<sup>40</sup> PSNI also relied upon the additional fact that those officers had no delegated responsibility for the disclosure process which remained with the Chief Constable. Furthermore, the Coroner and the Coroner's counsel had un-redacted access to all Stalker/Sampson material and to all documents involved in the Stevens Inquiry. The Coroner and his counsel could instruct that any document was relevant and should be disclosed. In other words, there was independent oversight of the disclosure process. Stephens J described the legal safeguards in place as sufficient to ensure that the independence of the PII and Article 2 redactions was not compromised. However, importantly, it was because the officers were not involved in the investigatory process but had limited duties that the independence of the investigation itself was not compromised.<sup>41</sup> Had the officers been involved in the investigatory process it is likely, by implication, that Stephens J. would have reached a different view.

23. In summary, in the instant situation, the mere fact that the HET is ultimately responsible to the Chief Constable of the PSNI and involves some PSNI officers does not in itself render it in violation of Article 2. Crucially, if there is any suggestion that those officers are neither hierarchically nor practically independent that has the potential to taint the investigative process and likely result in a finding that it is *not* Article 2 compliant. By way of example, a PSNI officer who is a former RUC officer who was or may have been concerned in any way either personally or through his or her contact with other RUC officers who may be implicated in the subject of the investigation, should not be involved in the investigation at any stage. That may include any officer who was responsible for policy, training or supervision of those officers. Even if a PSNI officer was not formerly a member of the RUC, if he or she is not practically or hierarchically independent from those who may be implicated in the investigation or not free to exercise his or her duties free from improper interference, the process is likely to fall foul of Article 2. A self-recusal process is unlikely in itself to be sufficient to ensure the independence of the process.<sup>42</sup> Much will depend on the exact nature of the recusal process, its rigour and oversight.

## Effectiveness

24. The requirement that an investigation is effective means that the procedure in question must be *able* to reach a determination of State responsibility. It must be, for example, capable of reaching a determination of whether the force used was or was not justified and to the identification and punishment of those responsible. "Any deficiency in the investigation which undermines its ability to establish the cause of

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<sup>40</sup> *Ibid*, at paragraph 323.

<sup>41</sup> *Ibid*, at paragraphs 333 to 340.

<sup>42</sup> *As per Ali Zaki Mousa (No. 2)*.

death or the person responsible will risk falling foul of this standard.”<sup>43</sup> The requirement of effectiveness includes a requirement that the authorities take reasonable steps to secure relevant evidence such as eye-witness and forensic evidence. Otherwise, the investigation is unlikely to be capable of identifying and punishing those responsible. Therefore, failure to follow an obvious line of enquiry (and the failure to keep an open mind about lines of enquiry) may result in a violation of Article 2.<sup>44</sup> If an investigator pre-determines the outcome of an investigation without first undertaking the preliminary investigative steps and, for that reason, does not follow a procedure which is capable of resulting in a prosecution, the investigation is likely to be incapable of identifying the perpetrator *and* holding him responsible. It would therefore fall foul of Article 2. For example, *if* an investigation of a suspect is commenced by interviewing without caution and therefore in circumstances in which the answers cannot be used against the suspect in a subsequent prosecution,<sup>45</sup> that investigation will likely fall foul of Article 2 unless it is abundantly clear, on an objective analysis, that there is no realistic prospect of a prosecution.

25. While there must be a system which is designed to ensure that persons against whom there is sufficient evidence are prosecuted, Article 2 probably does not extend to require that a prosecution *must* follow.<sup>46</sup> For example, the Public Prosecution Service can decide that despite the evidential test being satisfied a prosecution would not be in the public interest. However, if there is sufficient evidence to mount a prosecution any decision not to prosecute must be supported by reasons which meet the reasonable expectations of interested parties that a prosecution would follow or a reasonable explanation for not prosecuting.<sup>47</sup>

26. Where the death occurred as a result of the use of lethal force by police, the investigation must be able to scrutinise the legal framework within which the operation was conducted including the planning and control of the operation. There must be an adequate and effective framework (of law, policy and practice) to safeguard against arbitrariness. Police policy will be considered. In particular, whether it contained clear and robust guidelines on the use of force and the planning and control of the operation which must have as an objective the minimising of the risk of loss of life.<sup>48</sup> The ECtHR will not construe the positive obligation to protect life or to investigate a death so as to impose an impossible or disproportionate burden on the State but will have regard to policy and resource considerations, among other

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<sup>43</sup> *Jordan ibid.*

<sup>44</sup> See e.g. *Kolevi v Bulgaria* Application no 1108/02; *Jordan v The United Kingdom* (2003) Application no. 28883/95.

<sup>45</sup> In such a case, the information obtained from the interview could not be used against the interviewee at trial.

<sup>46</sup> This is also the position in England and Wales.

<sup>47</sup> *R v DPP ex parte Manning & Melbourne* [2001] QB 330 DC; *R (Denis) v DPP* [2006] EWHC 3211; *R (Armani de Silva) v DPPEWCA* 3204.

<sup>48</sup> *Nachova ibid.*

things.<sup>49</sup> Not, however, so as to absolve the State from conducting an Article 2 investigation. Rather, the means of conducting the investigation may differ.

27. It can also be noted in passing that the ECtHR held, in 2004, that strict obligations arise in investigating hate crimes involving violence.<sup>50</sup> That is relevant to any investigation of sectarian violence. The ECtHR held that “where there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society’s condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence... The domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another, irrespective of the victim’s racial or ethnic origin.”

28. Excessive investigative delay has itself been held to be incompatible with the requirement for an effective investigation under Article 2.<sup>51</sup>

### **Promptness**

29. The investigation must be prompt. The requirement of promptness and reasonable expedition is an important element of the Article 2 obligation. It is also considered to be essential to maintaining public confidence in the State’s “adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”<sup>52</sup> In July 2013, the ECtHR considered the investigation into the killing of Mr McCaughey and Mr Grew by the British security forces in Northern Ireland in 1990. That decision was concerned only with delay.<sup>53</sup> The ECtHR restated the importance of investigations being instigated promptly and being proceeded with reasonable expedition. The ECtHR criticised the inquest process and said that delay in carrying out inquests, in cases of killings by security forces in Northern Ireland, was an endemic problem and emphasised the urgency of reforms to “involve the state taking, as a matter of some priority, all necessary and appropriate measures to ensure...that the procedural requirements of Article 2 are complied with expeditiously.” The ECtHR held that the excessive investigative delay of itself meant the investigation was ineffective for the purposes of Article 2.

### **Public scrutiny**

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<sup>49</sup> See e.g. *Osman v United Kingdom* [1998] ECHR 101.

<sup>50</sup> *Nachova & others v Bulgaria* Nos. 43577/98 and 43579/98 (confirmed by Grand Chamber).

<sup>51</sup> *McCaughey v United Kingdom* Application n. 43098/09, 16 July 2013.

<sup>52</sup> *Jordan v United Kingdom* (2003) 37 EHRR 2

<sup>53</sup> There being domestic remedies still to be exhausted. The matter may therefore return to the ECtHR on the substantive allegations of breach.

30. The investigation must be transparent in the sense that it must permit public scrutiny of the investigation and its results, “to secure accountability in practice as well as in theory.” The requirement of public scrutiny is additional to and separate from the requirement to involve the relatives of the deceased in the procedure to the extent necessary to safeguard his or her legitimate interests.<sup>54</sup> That means that both the process and the result must be subject to effective scrutiny. As set out above, public confidence in investigations is a fundamental aspect of Article 2.
31. The ECtHR (Grand Chamber) emphasised that in addition to the obligation to have an effective official investigation, the investigation must be public and must be accessible to the victim’s family. That includes an independent examination, accessible to the victim’s family and to the public, of the broader issues of State responsibility, for the death, including the instructions, training and supervision given...<sup>55</sup> Furthermore, the investigation must encompass broader issues such as planning. Although the essential purpose of an Article 2 investigation is to ensure accountability of State agents or institutions for deaths occurring under their responsibility the investigation should be “broad enough to permit the investigating authorities to take into consideration not only the actions of State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life.”<sup>56</sup> The investigation must also include lessons learned following the identification of wider systemic issues.<sup>57</sup>
32. The Divisional Court in England considered the arrangements necessary to ensure sufficient public scrutiny in the IHAT case.<sup>58</sup> In that case, the Secretary of State, following the judgment of the Court of Appeal,<sup>59</sup> agreed to: establish a website to keep the public informed of its work in a manner which did not compromise investigations or prosecutions and publish information about progress of the IHAT’s work; keep the complainants informed of progress and decisions made on each case; and publish annually information about systemic issues identified and steps taken to address them. The court drew attention to the absence of any mechanism within the IHAT to consider with appropriate detail the instructions, training etc. of actions taken in Iraq, which the court felt would entail obtaining evidence from soldiers and those responsible for devising and organising the training together with effective checking of its reliability. The absence of that capability was deemed to be particularly significant where there is “an accumulation of identical or analogous

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<sup>54</sup> *Jordan ibid.*

<sup>55</sup> *Al-Skeini and others v the United Kingdom* (2011) EHRR 18

<sup>56</sup> *Ibid* at paragraph 163.

<sup>57</sup> *Ali Zaki Mousa (No. 2)* .*ibid.* The court made clear that those principles while stated in a case concerning death in custody they applied equally to other deaths under Article 2.

<sup>58</sup> *Ali Zaki Mousa (No. 2)* .*ibid.*

<sup>59</sup> In *Ali Zaki Mousa and others v the Secretary of State for Defence* [2011] EWCA Civ 133,

breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but a pattern or system.” The court was not formulating a new test but referring to an early decision of the ECtHR.<sup>60</sup> The court was not content that the examination of the wider or systemic issues was sufficiently public or subject to independent scrutiny but noted the steps to be taken by the Secretary of State (set out above).

### **Involvement of the next of kin**

33. Article 2 requires that the next of kin must be involved in the procedure to “the extent necessary to safeguard his or her legitimate interests.”<sup>61</sup> Whether that requires disclosure of witness statements and other materials is fact-specific. For example, in an Article 2 compliant inquest the next of kin is entitled to discovery of all relevant material unless a decision is made by the Coroner on grounds of public interest immunity to restrict discovery. In an investigation by the Independent Police Complaints Commission however it has been held that discovery of witness statements is not required.<sup>62</sup>

### **THE RELATIONSHIP BETWEEN INVESTIGATIVE DUTIES AND CRIMINAL PROSECUTION**

34. It is necessary to consider whether a prosecution can be brought before a decision can be made on *how* and *when* the State must comply with its Article 2 obligations but not, importantly, on whether the State must comply – it is the appropriate means by which it may comply which may be affected by the reality of potential prosecution. It has been accepted that a properly conducted independent criminal process could be the most effective way of discharging the State’s investigative duty.<sup>63</sup> If prosecution is a realistic possibility, then account must be taken of the risk of the fairness of a subsequent criminal trial being prejudiced by disclosures during an Article 2-compliant investigation.<sup>64</sup> In many cases that will mean delaying the public part of the investigation until it has been determined properly whether prosecution is a realistic possibility. In other words, an Article 2-compliant inquiry might have to await the outcome of a prosecution or a decision not to prosecute.

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<sup>60</sup> *Ireland v United Kingdom* (1979-1980) 2 EHRR 25, at paragraph 159.

<sup>61</sup> *Jordan ibid.*

<sup>62</sup> *Green v United Kingdom* Admissibility Decision, 27 July 2005. It does not require the next of kin to have access to police files or copies of all documents during an ongoing inquiry but that may depend upon the extent to which the next of kin have been kept informed by liaison with the police: *Brecknell v the United Kingdom* Application no. 32457/04, November 2007.

<sup>63</sup> *McKerr v United Kingdom* (2002) 24 EHRR 20, at paragraph 134. Importantly, this presupposes that the criminal investigation is independent see comments re IHAT in *Ali Zaki Mousa*.

<sup>64</sup> For example, the prospect of prosecution may mean that relevant witnesses will refuse to give evidence because of the privilege against self-incrimination.

35. The Divisional Court in England (in the IHAT case) considered that very situation and analysed it according to category of case. It divided the cases into three categories: (i) cases in which there had been no IHAT investigation and therefore no realistic prospect of further prosecution; (ii) cases in which there had been a previous prosecution and IHAT is now investigating or about to investigate with a view to deciding whether to prosecute; and (iii) cases where there was no previous prosecution and IHAT is investigating or about to investigate whether to prosecute.<sup>65</sup>
36. In respect of category (i) cases, the court held that there could be no impediment to further investigations as part of an Article 2-compliant inquiry. An example of such a case was that of a soldier who shot an escaping suspect. A charge of murder was dismissed by his commanding officer and therefore not susceptible to Court Martial. The case was then referred to the Crown Prosecution Service. After review by the Metropolitan Police Service the CPS proceeded on a charge of murder. Thereafter, however, the CPS decided there was no realistic prospect of conviction and offered no evidence. In another example, seven soldiers were investigated following the death in custody of a detainee. Following an investigation and Court Martial the soldiers were acquitted and it was decided that no further investigation would be pursued as a basis for any prosecution. In both cases, the Divisional Court held that there had been no Article 2-compliant inquiry and that the Article 2 duties had not been complied with and should proceed.<sup>66</sup>
37. In respect of category (ii) cases, the court held that there could be an impediment to conducting an Article 2-compliant inquiry because the IHAT was continuing to investigate and may decide to prosecute. An example of such a case was that of a detainee alleged to have been drowned by four British army soldiers. Following a Court Martial at which all four soldiers were acquitted the IHAT continued to review the case. The court was concerned at the delay in reaching a decision on whether to prosecute and ordered the Secretary of State to report within six weeks on progress made in investigating the death and when a decision was to be reached as to whether to prosecute. If no prosecution was to follow then an Article 2-compliant investigation would have to be conducted as the court stressed “the delay in making decisions in respect of prosecutions concerning those responsible... is a source of increasing concern, because the Article 2 investigative duty requires speedy action.”<sup>67</sup>
38. In respect of category (iii) cases, the court held that where it is very unlikely that there will be a prosecution and there has been no previous criminal process and

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<sup>65</sup> *Ibid. Ali Zaki Mousa (No. 2).*

<sup>66</sup> Because there had been no inquiry of the type identified as necessary i.e. public and accessible to the family which examined the broader systemic issues and the instructions, training etc. given to the soldiers as set out above.

<sup>67</sup> *Ali Zaki Mousa (No. 2) .ibid. at paragraph 165.*

therefore no impediment to an Article 2-compliant inquiry such an inquiry should proceed. However, the court gave the Secretary of State, as with category (ii) cases, 6 weeks to report on progress made and when a decision would be made as to prosecution. One example of such a case was that of a detained person who was found shot dead after being transported by British army soldiers. The case was not investigated by RMP but was under review by the IHAT.

### ***If there is no prosecution***

39. In cases where there will not be a prosecution following a criminal investigation, consideration has to be given as to how the Article 2 duty will be complied with. One means of complying with the duty would be to have an Article 2-compliant inquest because the duties of the coroner were extended to include the duty to determine how, by what means and in what circumstances the death occurred.<sup>68</sup> In the category (i) and (ii) cases referred to above, even though there was an investigation in the IHAT case it was not Article 2-compliant and that duty stands to be discharged now. In that case, an inquest was not a possibility so the court went on to consider how the duty could be discharged. The court reiterated that the form of inquiry will depend on the circumstances of each case, that there should be some flexibility for the individual State to decide how to give effect to its obligations.<sup>69</sup> The Divisional Court went on to consider whether the IHAT was discharging those duties. Despite the court's finding that the Secretary of State and his officials had "assiduously and conscientiously attempted to discharge the obligations... in the unprecedented circumstances of the invasion and occupation of Iraq over a period of six years... [but] reached the conclusion in relation to cases where deaths have occurred that the establishment of IHAT and the arrangements associated with it are not sufficient to discharge the duty imposed on the State."<sup>70</sup>

40. The reasons for so finding can be summarised as follows. Firstly, given the priority to prosecute those who are criminally responsible the IHAT was not best structured to prosecute promptly and efficiently.<sup>71</sup> The court referred to one case where there was no evidence that anything had or was being actively pursued. Secondly, the IHAT was not structured so as to take decisions promptly and effectively as to whether there *may* be a realistic prospect of prosecution.<sup>72</sup> In those cases, the IHAT lacked "the necessary focus and drive which this unprecedented situation requires."<sup>73</sup> The court commented that there appeared to be no immediate prospects of any further

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<sup>68</sup> *As per R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *Ali Zaki Mousa (No. 2)* .*ibid.* at paragraph 168.

<sup>69</sup> Recognising of course that Article 2 has certain basic requirements which must be met.

<sup>70</sup> *Ali Zaki Mousa (No. 2)* .*ibid.* at paragraph 179. Note, the reformed IHAT was at that stage found to be sufficiently independent.

<sup>71</sup> Category (i) cases referred to above as those where there was no investigation into criminal responsibility for the death and therefore no current prospect of prosecution.

<sup>72</sup> Category (ii) and (iii) cases where there has been a previous prosecution and IHAT is now investigating with a view to whether to prosecute and cases where there has been no previous prosecution and IHAT is now investigating whether there should be a prosecution.

<sup>73</sup> *Ali Zaki Mousa (No. 2)* .*ibid.* at paragraph 182.

prosecutions, even though the deaths occurred more than nine years ago. “The decision to continue investigations without the necessary expertise, focus and direction of the Director of Service Prosecutions as to whether prosecution was a realistic prospect, was a serious failure.”<sup>74</sup> Thirdly, “because of its focus on investigation for the purposes of prosecution, the IHAT inquiry, like a police inquiry, has not been an inquiry accessible to the public of the broader issues of State responsibility for the death, including the instruction, training and supervision given to soldiers undertaking such tasks.”<sup>75</sup> Because there were cases where there would be no prosecution, it was necessary now to conduct an inquiry that was accessible to the public – IHAT was neither structured nor staffed to do that. Fourthly, IHAT did not provide an inquiry which was sufficiently accessible to the victim’s family because in some cases contact had not been made with them. The court stressed again the importance of public and relatives accessibility to ensure the Article 2 procedural rights of relatives. Fifthly and lastly, there was no evidence that the IHAT inquiry had considered or would consider with the appropriate level of detail the instructions, training and supervision and therefore to discharge the obligation to independently investigate the wider and systemic issues.<sup>76</sup>

41. In the court’s view, once decisions had been made about prosecutions, “suitably adapted, a form of prosecutorial inquiry derived from the model used by coroners would have many advantages over an overarching public inquiry... the task being broken down into different inquiries conducted by differently appointed persons for different deaths... The decision [in a case where there may be a realistic prospect of prosecution] on whether to investigate, how to progress the investigation and whether a prosecution should be brought being made with the direct involvement of the Director of Service Prosecutions.”<sup>77</sup> The court anticipated, once the decision had been taken as to the prospect of prosecution, that there would be an inquisitorial approach to each inquiry. While deciding against the necessity for a single overarching public inquiry the court did stress the importance of other factors to counterbalance the absence of such an inquiry. It accepted that there would be “no independent person who could give the inquiries overarching direction or who could provide a comprehensive overview of the recommendations that should be made... As an additional guard against the risks of delay and a lack of direction and to deal with unresolved issues... the court would envisage appointing a designated judge. The judge would be provided with regular information as to progress of each inquisitorial inquiry.”<sup>78</sup> Furthermore, the court considered that a Parliamentary Committee could scrutinise the wider or systemic issues. The court concluded that

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<sup>74</sup> *Ali Zaki Mousa (No. 2)* .*ibid.* at paragraph 184.

<sup>75</sup> *Ali Zaki Mousa (No. 2)* .*ibid.* at paragraph 188.

<sup>76</sup> *Ali Zaki Mousa (No. 2)* .*ibid.* at paragraphs 192 to 194.

<sup>77</sup> *Ibid* at paragraph 215. Note, in these cases a full inquest was not possible because the deaths occurred outside of the jurisdiction.

<sup>78</sup> *Ibid* at paragraphs 222 to 223.

as soon as decisions had been made as to whether to prosecute in each case, it would consider ordering Article 2-compliant inquiries along the coronial model.

## THE HMIC REPORT

42. Her Majesty's Inspectorate of Constabulary (HMIC) completed its inspection of the HET in July 2013.<sup>79</sup> In particular, it considered whether the HET's approach to Royal Military Police (RMP) cases described as state involvement cases was compliant with Article 2 ECHR. The inspection focused on deaths between 1970 and 1973.<sup>80</sup> The inspection began by recognising that the HET was not by itself capable of complying with Article 2 but that it could, in the words of the Committee of Ministers, be capable of playing an important role in satisfying the state's continuing obligation to conduct Article 2 compliant investigations "when taken together with other measures".<sup>81</sup> It cannot be said therefore that the HMIC misunderstood the extent to which the HET was *part of* a process rather than the process itself.

43. The HMIC found that the HET's approach was not compliant with Article 2 and recognised that was "relevant to whether the HET was capable of playing a role in the satisfaction of Article 2 when taken together with other measures."<sup>82</sup> The reasons, where particularly relevant to this note, may be summarised as follows.

### ***Differential treatment***

44. The HET treated deaths where there was State involvement differently from other cases by 'keeping' those cases itself and conducting interviews under caution rather than transferring those cases to the PSNI for formal criminal investigation. In so doing, the HET was acting contrary to an express instruction of the Chief Constable – that all cases requiring investigation (as opposed to review) should be referred to the PSNI for formal investigation. At that stage, the PSNI were to conduct interviews under caution to protect the prospect of a prosecution. The effect of the HET deciding to interview under caution and not refer to the PSNI was two-fold: the interviewee received extensive pre-interview disclosure which was not given to non-State interviewees; and there was not a police criminal investigation.<sup>83</sup> Furthermore, the HMIC criticised the HET for permitting an RMP interviewee to excuse himself from an interview by claiming to be suffering from ill-health without adequate checks being undertaken of the veracity of that claim. It is that differential treatment which forms the basis of significant criticism by the HMIC. While the HMIC did not find any

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<sup>79</sup> *Inspection of the Police Service of Northern Ireland Historical Enquiries Team* Her Majesty's Inspectorate of Constabulary, 2013.

<sup>80</sup> The HMIC however recorded that was not its exclusive focus.

<sup>81</sup> CM/Inf/DH(2008)2 revised 19 November 2008.

<sup>82</sup> At page 22.

<sup>83</sup> The HMIC reported that no State case had been referred to the PSNI but many non-State cases had been referred for formal investigation.

breach of Article 14 ECHR<sup>84</sup> (the right not to be discriminated against), Article 14 does apply to any Article 2 investigation. That means that even if an investigation is otherwise compliant with Article 2 it must not discriminate against any person on the ground of, for example, political opinion, national or social origin or other status, unless the discrimination can be justified.<sup>85</sup>

### ***Independence***

45. The HMIC expressed two principal concerns about independence. It highlighted one specific case where independence was clearly compromised by a former RUC officer undertaking a State involvement case from which that officer was not practically independent. That demonstrated that the procedures in place to ensure independence were either not sufficient in themselves or not applied in practice. On that basis, it would seem unlikely that any reassurance can be given that the same thing did not happen in many other cases. However, it would not be correct to assume that a police officer (even if formerly a member of the RUC) could never investigate a case involving the British Army. Such an officer would be institutionally independent of the army but, importantly, he or she must also be independent in the practical and hierarchical sense. That requires extremely careful consideration in each case because historically many operations, which resulted in alleged violations of Article 2, involved both the police and the army.
46. The HMIC also criticises the HET because its Intelligence Unit, which acts as the gate-keeper of all intelligence fed through to all HET teams (including those that investigated State cases including cases of RUC alleged involvement) was staffed by officers the majority of whom are former RUC officers. That meant that there was no process for ensuring that all relevant intelligence was assessed by independent persons and thereafter passed to the HET. That is a key criticism that is similar to that of the Iraq Historical Allegations Team, referred to above. That criticism taken on its own is capable of undermining the independence of the package of measures and of tainting the investigative process from the very outset. Therefore, whether the “other measures” are sufficient to enable compliance with Article 2, which they may well be, they were compromised at the intelligence gathering stage.<sup>86</sup> To have any chance of achieving an Article 2 compliant package of measures therefore the PSNI should ensure that former RUC officers are not involved in the process of analysing, extracting, managing and forwarding intelligence to the HET. Rather, institutional, hierarchical and practical independence should be guaranteed and demonstrated by

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<sup>84</sup> Article 14 guarantees the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>85</sup> A public authority must be able to demonstrate that the discrimination is justified: that there is an objective and justifiable reason for treating persons differently and that the difference in treatment is proportionate to the reason i.e. no more than is necessary.

<sup>86</sup> *As per Mousa ibid.*

the appointment of persons who cannot have any connection with matters which are or may be investigated.

### ***Effectiveness***

47. The failure to follow procedures for the storage, cataloguing and assessment of material was haphazard, which was likely to have affected the quality and therefore the effectiveness of the investigations. In addition, the criticisms regarding differential treatment were found by HMIC to undermine the effectiveness of the investigations because, presumably, in at least those cases in which failures were identified the likelihood of the investigation being capable of identifying and thereafter holding the perpetrator to account had been compromised. That undermined the entire process as the first stage of it was considered to be ineffective.

### ***Promptness***

48. The HMIC proceeded on the basis that the HET could not progress cases with sufficient promptness because of the delay already incurred before the setting up of the HET. It therefore considered the issue as one of “best practice” rather than ECHR compliance. However, the obligation is to commence and thereafter proceed with investigations with reasonable expedition. Any continuing delay will therefore be a relevant factor in considering ECHR compliance.<sup>87</sup>

### ***Public scrutiny***

49. The HMIC was concerned by the degree of “transparency and accountability” of the HET and was of the view that, arguably, it may fall foul of the Article 2 requirement for public scrutiny of the investigations and their results. The HMIC recommended that an independent oversight panel should be established to oversee and scrutinise in the public interest all aspects of the work of the HET and that the Panel should have unfettered access to the information it would need to carry out that responsibility.<sup>88</sup> The Policing Board through a dedicated working group is currently considering the implementation of that recommendation. Importantly, scrutiny must be to the public ultimately therefore the work of the Panel must be sufficiently accessible to the public.

## **CONCLUSION**

50. In conclusion, the HMIC report recorded flaws in the HET which were sufficiently serious to mean that the HET was not compliant with Article 2 ECHR but perhaps more importantly that the flaws identified within the HET were capable of undermining the entire package of measures for the investigation of suspicious

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<sup>87</sup> See, for example, *Ali Zaki Mousa ibid and Jordan's Application ibid.*

<sup>88</sup> Recommendation 10.

deaths. The PSNI must discharge its legal obligations and may not defer or delay the discharge of those obligations. It is important to stress that any process that is established which is confined to *reviewing* unsolved deaths without more will not in itself comply with Article 2 ECHR. However, what is abundantly clear is that any process must not operate so as to *violate* Article 2 and undermine the package of measures. The Policing Board's role is relatively limited: it may not direct the PSNI on the model to be adopted or on the employment of staff within the HET. It can, however, form a view on the proposed arrangements and comment upon them but ultimately it is a matter for the PSNI and the State to resolve any Article 2 issues. It is simply not possible to assess at this stage the likely outcome of any court challenge to the reformed HET because the restructuring is an ongoing process and insufficient detail has been provided.

- (i) When further detail is available including the precise organisational structure, the recusal process, the resourcing issues have been resolved, the policies and procedures have been redrafted and shared with the Board, the arrangements for the independent oversight panel have been formulated and the range of safeguards clearly set out, the Policing Board may wish to consider whether Article 2 ECHR is likely to be complied with.

27 APRIL 2014