

**South East Fermanagh Foundation and  
Innocent Victims United**

**(23 groups from across N.I, ROI and GB)**

**Submission to the Northern Ireland Affairs Committee  
Consultation on the NIO Legacy Proposals 2020**

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## **The NIAC inquiry into examining the Government's proposals to address the legacy of the Troubles in Northern Ireland.**

### **Abstract of the SEFF/IVU Response**

- We have been vocal in our criticism of the Stormont House Agreement (SHA) and the piecemeal approach to dealing with the legacy of terrorism in Northern Ireland during the Troubles.
- The Government's new proposed approach will not meet the needs of victims, survivors and their families. However, the NIO appears to be listening to victims, as they have realised that the SHA is not fit for purpose.
- The SHA proposals need a complete overhaul or completely discarded as they are not fit for purpose. These ill-thought out proposals were never fit for purpose and never took into consideration the views of victims and survivors.
- This paper largely deals both with the issues pertaining to the SHA Draft Bill, and the new Government proposals, despite the brevity and lack of detail within those new proposals. It also integrates parts of the SEFF/IVU alternative proposals.
- SEFF and the other groups that make up the IVU have made clear their views of SHA in their consultation responses in 2018.
- It appears that the Government have realised that the term 'non-criminal police misconduct' was both discriminatory, unfair and in breach of the ECHR, and intend to remove it from any reformed SHA.
- If some form of the SHA is to be retained, the ICIR structure needs to be completely removed and part of its role can be retained within the HIU.
- The HIU (or whatever other title used) should be an integral but semi-autonomous part of the PSNI, with the necessary appropriate independent oversight.
- The PSNI Legacy Investigations Branch (LIB), since the demise of HET, have been working diligently with limited resources on legacy cases. If they are replaced by another body, then their work will be potentially undermined.
- Under the SEFF/IVU proposals, the Government can implement a new investigatory branch almost immediately. This will also allow a seamless transition that will remove issues on disclosure, etc., that will arise if the HIU sits outside the structure of the PSNI.
- We cannot ever agree to an amnesty in any form. We fully support the rejection of repeated vexatious investigations and the criteria around the review and reinvestigation process must be tightened to prevent this.
- We see the merits in the Oral History Archive, however its terms of reference need to be tightened in order to prevent the continuation of revisionism.

- The government and legislators must now understand that the victims and survivors must be included within the debate. It is entirely pointless to ask the question if the legislation can promote ‘reconciliation’ if those writing the legislation do not understand the meaning of the term. The continual use of other statements such as ‘victim centred’ are purely designed to appear placatory but mean nothing in reality.
- We reiterate that we welcome the fact that the Government were prepared to look again at the legislation; now is the time to get it right. The very first stage of that is an acknowledgement by all parties that the use of violence for the furtherance of a political cause was and is wrong in all contexts.
- Unless there is a review of corresponding legislation specific to Northern Ireland, (Victims and Survivors Order, 2006 for example) then that legislation can be used alongside any new legacy proposals to continue with the ‘lawfare’ attack on the British state.

## **Introduction**

The South East Fermanagh Foundation (SEFF) is but one of the victims' and survivors' groups that forms Innocent Victims United (IVU). The IVU 'family' consists of 23 partner groups representing in excess of 11,500 victims and survivors in Northern Ireland, the Republic of Ireland and Great Britain.

The historic Belfast Agreement of 1998 led to the cessation of large-scale terrorism and the leadership of both republican and loyalist terror organisations agreed to seek their aspirations through purely political means. However, one of the major failures of that Agreement was not to consider and provide for the needs of the innocent victims of 'The Troubles.' Various short-term strategies were considered, including the Report of the Consultative Group on the Past in Northern Ireland (Eames Bradley)<sup>1</sup> published 16<sup>th</sup> December 2009. The proposals contained within that report were totally rejected but were to lead to the Stormont House Agreement (SHA)<sup>2</sup>, published 23rd December 2014, containing many of the failed elements of Eames Bradley.

The SHA was purportedly the out-workings of eleven weeks of meetings between the major Northern Ireland political parties and representatives of the British and RoI governments, and a supposed eventual common agreement reached. The SHA paper released in 2014 was very brief (14 pages) giving little detail on the proposed structures; the new proposed legacy investigatory body, the Historical Investigations Unit, (HIU) was briefly explained in two pages thereby giving little detail on its composition and role.

It was not until the release of the Draft Northern Ireland (Stormont House Agreement) Bill in May 2018 that it became clear what the exact proposals were. The semantics of the terminology contained therein indicated the planned Bill did not represent the needs of innocent victims. The release of the Draft Bill was closely followed by the Northern Ireland Office (NIO) launching a public consultation on proposals to address the legacy of the Troubles on 11th May 2018. SEFF led a number of consultation events across Northern Ireland, the Republic of Ireland and Great Britain. These events were attended by over 1,000 people, with many voicing their concern and opposition to what was proposed.

IVU has consistently stated its opposition to the legacy proposals included within the SHA, and that opposition was apparent in the responses by the associated membership and organisations to the NIO consultation. The NIO eventually released a document in July 2019

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<sup>1</sup> Report of the Consultative Group on the Past in Northern Ireland  
<https://publications.parliament.uk/pa/cm200910/cmselect/cmniaf/171/171.pdf>

<sup>2</sup> Stormont House Agreement  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/390672/Stormont\\_House\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf)

entitled “Addressing The Legacy of Northern Ireland's Past: Analysis of the Consultation Responses.”<sup>3</sup> It was clear that there was widespread opposition to the SHA proposals within the 17,000 responses received by the NIO, and that was indicated in the NIO’s own analysis.<sup>4</sup> It was not as stated by Relatives for Justice that, “*The vast majority of these submissions were from the bereaved and injured and called for the implementation of the Historical Investigations Unit as envisaged in the Stormont House Agreement. The NIO and UK government ignored this consultation – they ignored the voices of victims from across the community.*”<sup>5</sup> We are actually pleased to see that the NIO did not ignore the responses by the injured and bereaved, and took on board their views thereby realising that the SHA is not acceptable to the majority of victims and survivors in its current format. There is no desire within IVU for the implementation of Stormont House, it does not meet the needs of victims and survivors.

When we became aware of the NIO’s analysis document, and giving regard to what we were hearing from the IVU membership, and also from other organisations, we felt it was absolutely incumbent upon us to consider alternative proposals that would satisfy the needs of most victims and survivors. (I have attached a copy of our proposals to this email). A senior member of Amnesty International stated, probably without intended irony, “*All perpetrators of human rights abuses committed during the conflict, regardless of their identity, must be held accountable before the law.*”<sup>6</sup> Since 1998, those human rights abuses have largely been ignored save for a number of challenges against the state. It is unfortunate that Amnesty have previously ignored our overtures and have never supported the views of IVU and have a piece-meal approach to the legacy of the past. Amnesty must understand that Stormont House will not achieve the demands within their statement, and will simply cause further problems.

We have been working on the development of alternative proposals for some considerable time, giving full regard and cognizance to the views of not just our constituency but the opinions of all. The importance of our proposals was paramount when the UK Government, through the median of the NIO, announced its proposals for the future of legacy investigations in NI, on 18th March 2020.<sup>7</sup>

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<sup>3</sup> Analysis of the consultation responses

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/836991/Addressing\\_the\\_Legacy\\_of\\_the\\_Past\\_-\\_Analysis\\_of\\_the\\_consultation\\_responses\\_2\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836991/Addressing_the_Legacy_of_the_Past_-_Analysis_of_the_consultation_responses_2_.pdf)

<sup>4</sup> Ibid

<sup>5</sup> Relatives for Justice, <https://www.relativesforjustice.com/rfj-responds-to-ni-affairs-committee-announcement-on-dealing-with-the-past/>

<sup>6</sup> <https://www.amnesty.org.uk/press-releases/northern-ireland-legacy-proposals-further-betrayal-victims>

<sup>7</sup> UK Government sets out way forward on the legacy of the past in Northern Ireland

<https://www.gov.uk/government/news/uk-government-sets-out-way-forward-on-the-legacy-of-the-past-in-northern-ireland>

The Northern Ireland Affairs Committee (NIAC) have asked for the submission of written evidence on the UK Government's proposals to confront the legacy issues in Northern Ireland.<sup>8</sup> In the NIAC's terms of reference, they have outlined seven points that they wish addressed; each of those strands are discussed in this document.

### **1. Whether the Government's proposed approach will meet the needs of victims, survivors and their families.**

The consistent underlying issue with all the proposals that have been presented since the Belfast Agreement of 1998 is that they have continually failed to engage with the victims and survivors. The latest contribution by the NIO is another example of this. It is impossible for the Government's proposals to meet the needs of victims and survivors if the Government doesn't know what they want. The quickly rushed through Victims' and Survivors (NI) Order 2006, is a prime example when our government decided to unnaturally redefine what a 'victim' is in order to placate one section of the community thereby enabling a convicted terrorist to be classed as a victim.<sup>9</sup> That definition has been a cornerstone of the difficulties we have faced since 2006, and that definition was rejected by European law when the EU in 2012 defined a victim as: -

- a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence.
- family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death;<sup>10</sup>

The British government have been continually criticised for alleged human rights abuses by the European Court of Human Rights (ECtHR). Yet that court and the EU have been silent on how our government have derogated from the natural definition of a victim, a definition in Northern Ireland that is both unique and abhorrent.

The definition of a victim is not the only issue but is just another part of how victims have been both marginalised and politicised to satisfy the needs of some. We recognise that there are a lot of traumatised people in our society who need support in a number of ways, and that includes dealing with the legacy of the Troubles. Point 16 of the EU Directive on the support for victims, states that, "*Victims of terrorism have suffered attacks that are intended ultimately to harm society. They may therefore need special attention, support and protection due to the particular nature of the crime that has been committed against them.*"<sup>11</sup>

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<sup>8</sup> UK Government sets out way forward on the legacy of the past in Northern Ireland, <https://www.gov.uk/government/news/uk-government-sets-out-way-forward-on-the-legacy-of-the-past-in-northern-ireland>

<sup>9</sup> The Victims and Survivors (Northern Ireland) Order 2006, <https://www.legislation.gov.uk/nisi/2006/2953/article/7>

<sup>10</sup> DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, 25th October 2012, Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1421925131614&uri=CELEX:32012L0029>

<sup>11</sup> Ibid

We do not attempt to divide or unilaterally support one section of the community. We believe that all innocent victims<sup>12</sup> of terrorism deserve both government and community support. The Government now intend to further step away from its responsibilities by attempting to close down unsolved cases of murder, which will once again completely let down the victims and survivors, and potentially leave the Government vulnerable to challenge by breaching both the Human Rights Act and the European Convention on Human Rights (ECHR).

The human rights legislation contained within the ECHR has developed over many years, and the UK must consider the legislation that is there to protect victims. There has been no clear decision as of yet whether the UK have decided to remain a signatory to the ECHR. Article 11 of the European Parliament Directive on Victims,<sup>13</sup> *“Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.”*

The brief NIO document suggests that after a review, unsolved murders will be closed. *“Once cases have been considered there will be a legal bar on any future investigation occurring.”*<sup>14</sup> The rule of law in Northern Ireland has already been circumvented to appease the terror organisations; this proposal will simply add to the considerable hurt felt by the bereaved. An unresolved murder investigation can never be closed; notwithstanding that statement, credible new evidence is required in order to conduct a new review, and we never supported recurring investigations based on scurrilous allegations or flimsy hearsay evidence. However, it is not inconceivable that new evidence may come to the fore at any time in the future that may warrant a prosecution; a case in mention is the murder of RUC police officer Michael Ferguson in 1993. Christopher O’Kane confessed to his involvement in the murder and other offences and received a ten-year sentence in 2015.<sup>15</sup> Potentially this proposed legislation would close down something of this nature.

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<sup>12</sup> We define ‘innocent victims’ as those who became victims through no fault of their own.

<sup>13</sup> DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, 25th October 2012, Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1421925131614&uri=CELEX:32012L0029>

<sup>14</sup> UK Government sets out way forward on the legacy of the past in Northern Ireland, <https://www.gov.uk/government/news/uk-government-sets-out-way-forward-on-the-legacy-of-the-past-in-northern-ireland>

<sup>15</sup> BBC News, Christopher O’Kane jailed over IRA police confession, <https://www.bbc.co.uk/news/uk-northern-ireland-foyle-west-35149692>

## **2. What steps the Government can take to ensure that the proposed new legacy body is independent, balanced and open, and complies with the Belfast/Good Friday Agreement and ECHR commitments?**

It must be recognised that little thought was given to the victims and survivors in 1998, and the Belfast Agreement contains three short paragraphs within the section, Rights, Safeguards and Equality of Opportunity that looks at victims' issues. The sub-section Reconciliation and Victims of Violence states, "*It is recognised that victims have a right to remember as well as to contribute to a changed society.*"<sup>16</sup> There has never been any legislation in the last twenty-two years that has given due cognizance to the rights and needs of the victims and survivors.

It is encouraging that the Government have realised that the planned structures in the Stormont House Agreement have been rejected by the majority of people who responded to their consultation in 2018. The NIO eventually released a document in July 2019 entitled "Addressing The Legacy of Northern Ireland's Past: Analysis of the Consultation Responses."<sup>17</sup> It was clear that there was widespread opposition to the Stormont House Agreement proposals within the 17,000 responses received by the NIO, and that was indicated in the NIO's own analysis.<sup>18</sup>

Unfortunately, the Government, rather than conducting a new review, have reacted by producing suggested proposals that will satisfy few. Any new legislation must look at the issues in a holistic way, not striving to placate those who 'shout loudest.' The SHA has been designed in a way that will target those who served in NI as members of the Security Forces, whilst ignoring the terror organisations who killed 90% of those who died during the Troubles. A new term, 'non-criminal police misconduct', appears throughout the Draft Northern Ireland (Stormont House Agreement) Bill; a term that has not been defined in the same way 'collusion' has never been defined. The fear from many is that 'non-criminal police misconduct' will be weaponised in the same way collusion has in the past (and present).

If this was the only issue with the proposed Historical Investigations Unit, then it potentially could have been surmounted by suggested changes. However, there are other problems. A further major defect of the current proposals for the HIU is that it combines the role of investigation and adjudication (please see attached alternative proposals document by SEFF/IVU). This is yet another proposal that will circumvent UK law and will further breach

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<sup>16</sup> Belfast Agreement,

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/136652/agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf)

<sup>17</sup> Analysis of the consultation responses

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/836991/Addressing\\_the\\_Legacy\\_of\\_the\\_Past\\_-\\_Analysis\\_of\\_the\\_consultation\\_responses\\_2\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836991/Addressing_the_Legacy_of_the_Past_-_Analysis_of_the_consultation_responses_2_.pdf)

<sup>18</sup> Ibid

human rights legislation. Article 6 of the ECHR protects your right to a fair trial or hearing if you are charged with a criminal offence or a public authority is making a decision that has an impact upon your civil rights or obligations.<sup>19</sup> There is extensive case law available, and the fact is that that an investigatory non-judicial body who investigates and also judges an individual without redress, and then condemns them in a public document, will end up in the European courts.

The presumption of innocence is being removed, Paragraph 2 of Article 6, ECHR, embodies the principle of that presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the suspect or accused has committed the offence charged, the burden of proof is on the prosecution, and any doubt should benefit the accused.<sup>20</sup> Each case is going to be judged at the outset, and the potential for prosecution or identifying the person(s) involved. In almost all cases where a member of the Security Forces took life, then that individual(s) can be identified.

The singular role of the LIB and any other investigatory body, including the proposed HIU, can only be that of investigation. They are not and cannot become the adjudicator. No matter how genuine and well founded the ‘belief’ that LIB may have as to the identity of any perpetrator, it would be an impermissible usurpation of the role of the Courts for police officers, whether as part of the new HIU, or any other part of the PSNI, to publish or express their views on ‘guilt’.

We have suggested the formation of an Oversight Panel and during the case review process, the panel must establish if there is credible new evidence relating to the death. If that evidence alone, or when considered in conjunction with other existing evidence, raises the reasonable suspicion that the new evidence is capable of leading to the identification of a person criminally involved in the death, and the prosecution of a person for a criminal offence relating to the death, then the case may be subject to a re-investigation. (please see attached SEFF/IVU proposals)

Our document outlines how our proposed new legacy body meets the needs of all and is independent, balanced and open to scrutiny. We have explained how current proposals are not ECHR compliant and will be challenged whether that is in the Stormont House Draft Bill or in the new NIO document.

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<sup>19</sup> Guide on Article 6 of the European Convention on Human Rights, 2019, Right to a Fair Trial, [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_criminal\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf)

<sup>20</sup> Ibid

### **3. The differences between the Government’s new proposals, draft Stormont House Agreement Bill (and in addition, the SEFF/IVU proposals).**

The Stormont House Agreement is made up of 4 institutions:

- Historical Investigation Unit (HIU)
- Independent Commission of Information Retrieval (ICIR)
- Oral History Archive (OHA)
- Implementation and Reconciliation Group (IRG)

#### **March 2020 Government Proposals**

The new Government proposals only refer to one institution that will incorporate the HIU and ICIR into one body. This new independent body will be focused on providing information to families and ‘swift’ examinations of all unresolved deaths from the Troubles. They are indicating that there will be, “... *a shift in focus to information retrieval as the core service for individuals and families.*” The government advocates that there will only be a, “... *full police investigations in cases with a ‘realistic prospect’ of prosecution due to ‘new compelling’ evidence.*”<sup>21</sup> We cannot disagree with the premise within these statements, as it is both wrong and improper to force families into traumatic and stressful situations without any hope of a positive result for them. Unfortunately, there are many cases that contain little or no hope of either identifying or prosecuting the perpetrators. Like all cold case reviews, each one is judged on its own merits.

#### **SEFF/IVU**

Our proposal also suggests one institution. It will be similar to the current PSNI Legacy branch - LIB – however with increased resources and a greater level of scrutiny to deal with the volume of legacy cases. We believe that it is unhelpful, unnecessary and exorbitantly costly to create a new parallel police service with all the associated problems and time delay. The PSNI are deemed to be an acceptable police service by all the community in Northern Ireland, thereby a well thought out structure and recruitment for a legacy investigative branch can surmount any possible challenges. It was held that in the case of the murder of Jean Smyth, the PSNI have to, “... *promptly take steps to secure the practical independence of the investigators so that they have the capacity to carry out an Article 2-compliant, effective investigation into the killing.*”<sup>22</sup> Consideration therefore must be given to the challenges when the formation and recruitment takes place in order to demonstrate that practical independence.

**For a more comprehensive review of the SEFF/IVU proposals, please see attached document.**

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<sup>21</sup> UK Government sets out way forward on the legacy of the past in Northern Ireland, <https://www.gov.uk/government/news/uk-government-sets-out-way-forward-on-the-legacy-of-the-past-in-northern-ireland>

<sup>22</sup> Irish News, <http://www.irishnews.com/news/northernirelandnews/2019/03/19/news/psni-does-not-have-required-independence-to-carry-out-legacy-killing-investigation-court-rules-1576844/>

## **Investigation and Information Recovery**

### **SHA**

The HIU is proposed to be an independent investigative unit under the control of the HIU Director, with the aim to have the work completed in five years.<sup>23</sup> Police powers to investigate criminal activity and Non-criminal misconduct in relation to deaths.

### **ICIR**

Independent international institution that will enable families to seek and privately receive information; established in an agreement between the UK and ROI Governments. It had planned to create five Commissioners; a jointly appointed Chair, one from the UK, one from the ROI, and the First and Deputy First Minister NI.

### **March 2020 - Government Proposals**

There are no details of the structure of the proposed independent body, but the aim would be to:

- End the cycle of reinvestigations, thereby: -
- Ensuring Northern Ireland veterans receive equal treatment to their counterparts who served overseas.

### **SEFF**

The LIB style unit would be under the charge of a Deputy Chief Constable (DCC); possibly from outside NI but would be answerable and under the rank structure of the PSNI and accountable to the policing board. There would be an Oversight Panel (OSP) chaired by an independent Judge/Retired Judge who would look at the decisions of the DCC and review investigations. Stormont House refers to information recovery solely and should be concerned also with truth recovery.

## **Re-Investigation**

### **The planned HIU Caseload**

- As it stands, the HIU would investigate all deaths caused by the Security Forces (Police or Military). Many of these cases have received multiple reviews and investigations, with the same conclusion each time; a number of those have been investigated in excess of a period of twenty years and may fall into the ‘vexatious’ category.

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<sup>23</sup> Draft Northern Ireland (Stormont House Agreement) Bill,  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/706283/Draft\\_Northern\\_Ireland\\_Stormont\\_House\\_Agreement\\_Bill.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706283/Draft_Northern_Ireland_Stormont_House_Agreement_Bill.pdf)

- All the cases that have not been reviewed by the HET or LIB, but also HET cases that require further investigation (information to identify perpetrator) or in the ‘non-criminal police misconduct’ category.
- Those currently sitting with Police Ombudsman (HID department).
- Referred by DPP where likely to find new evidence lead to identification or prosecution

The case sequencing would generally be conducted in a chronological order unless there are exceptional circumstances. There will be no investigation where the Chief Constable certifies that an investigation is substantially complete, unless the Director considers any of the caveats.

### **March 2020 - Government Proposals**

- To conduct swift, final examinations of all the unresolved deaths.
- Only those cases where there is new compelling evidence and a realistic prospect of a prosecution will be investigated.
- Once cases have been considered there will be a legal bar on any future investigation occurring.
- There would be no non-criminal misconduct investigations within the new Government proposals.

### **SEFF**

If there was credible new evidence as identified by the DCC, then he would direct an investigation. This new evidence should give rise to a reasonable possibility that the it would lead to the identification of the perpetrator and to a criminal prosecution. The decision to re-investigate would also be reviewed by the OSP. There is no time limit on credible new evidence being uncovered.

No investigation would take place if it is not deemed in the public interest. That needs to be defined but circumstances include where the alleged perpetrator is deceased, or is too mentally impaired to be interviewed or to stand trial.

All files where an investigation took place would be submitted to the PPS for oversight and/or decision. Non-criminal misconduct is not within the remit of the investigatory team. If there is credible evidence that a criminal offence by serving or retired police officers or the military, then they would be investigated in the same way as any other case.

### **Family Reports**

#### **HIU**

Completed for all investigations - (does not clarify if no investigation is directed).

## **March 2020 - Government Proposals**

No details contained within the proposals

### **SEFF Proposals**

The DCC's staff would be required to prepare a report regarding the case, this would not identify perpetrators unless there has been a criminal conviction.

### **Truth Recovery**

#### **SHA**

- It will information recovery rather than truth recovery
- Only where the family makes an application.
- Must be a close family member making the request, however more distant relative can apply if close family members do not object and considered appropriate.
- Information not assessed to same standard as for a criminal or civil trial, though steps would be taken to evaluate reliability and credibility of information.
- Information only provided to ICIR on a voluntary basis, that information would not be admissible in court proceedings, but does not provide immunity from prosecution if obtained by other means.
- The ICIR would not provide information to investigations/police or intelligence services.
- The information would be passed to the family by way of written report. No information would be passed that endangered any person or prejudiced national security.

## **March 2020 - Government Proposals**

No other details provided, but it appears by inclination that they do not support the role of the ICIR.

### **SEFF/IVU**

Not specifically covered in our proposals, although it is our belief that the ICIR as proposed by SHA has no credible role. The ICIR is largely reliant on those who have been involved in terrorism to provide information which is unlikely and probably unreliable. Another body conducting similar work potentially in tandem with the HIU makes no operational sense.

## Narratives/Archives

### SHA

- Central place to voluntarily share experiences and narratives in relation to the Troubles.
- Anyone affected by the Troubles in any way can share their memories.
- Would sit within PRONI, under senior civil servant (deputy keeper of records) who would appoint a steering group.

### **March 2020 - Government Proposals**

A central resource for people from all backgrounds and from throughout the UK and Ireland will also be created to share experiences and narratives related to the Troubles.

### SEFF

No alternative was suggested, but we are wary of governance in this body and the checks and balances that must be in place to ensure the veracity of the information that is gathered. The Oral History Archive must be a totally separate entity, structured in an academic format, with internal checks on the authenticity of the data collected to prevent revisionism.

## Oversight of Legacy

### SHA

One of the key roles of the Implementation and Reconciliation Group (IRG) is to promote reconciliation. The IRG appears to be totally autonomous, hence the statement, "*The IRG may do anything that it thinks necessary or expedient in connection with the exercise of its functions.*"<sup>14</sup>

### **March 2020 - Government Proposals**

No other details provided.

### SEFF

Concerns remain as to how the IRG might report and exercise its functions.

#### **4. Whether and How the Government's Proposals will Promote Reconciliation in Northern Ireland**

Reconciliation is an oft used term that has a laudable desired outcome but little understanding as to how to get there.<sup>24</sup> In the Northern Ireland context, its principal aim is to restore a relationship within the community that has been divided by the trauma of the Troubles. Two sets of terror organisations set out to create anarchy, and the State was caught in the middle attempting to restore order. Government documents and plans can never alone achieve any level of reconciliation. The first major step towards reconciliation has to come from the major players during the Troubles. Repentance and apologies from the terror organisations will go a long way to changing the power balance and relationships within the community.<sup>25</sup>

Victims have stated many times that there is an unfair pressure on them to forgive, but most find that impossible to do so without an acknowledgement of the violence and terror used in the community in the furtherance of a political cause. It is difficult to quantify the hurt caused by certain high-profile figures who incessantly laud the part played by those who took life in the furtherance of their cause. Both the British and Irish governments have a major part to play in both challenging this type of 'hate speech' and also making a demand from those organisations that there must be an unreserved apology before the next steps can be taken. The two governments can assist in this by acknowledging that their own involvement was not without reproach.

The Government appear to have recognised that the SHA proposals could never have achieved any level of reconciliation, having acknowledged they were divisive in nature and an undue focus on the role of the Security Forces. It is, however, difficult to understand how the new proposals can achieve any level of reconciliation due to lack of detail or purpose. Perhaps part of the strategy was to encourage debate that might help inform their future plans.

All members of the Security Forces appear to be retrospectively criminalised; locally, nationally and internationally. There is nothing within HIU or indeed the government proposals to redress this balance, apart from the welcome protection from non-criminal investigations that appears to have a vindictive basis.

The high-profile legacy inquests will continue to get high media attention consistently questioning the actions of ex-members of the Security Forces. Their findings are unlikely to ever be accepted unless they fit the narrative that is driving many of them. Meanwhile the many thousands of bereaved who never had an adequate inquest are expected to 'move on' and forget their past without acknowledgement. Inquests in relation to the murder of innocent

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<sup>24</sup> In the very short document, 'UK Government sets out way forward on the legacy of the past in Northern Ireland', reconciliation is mentioned five times without context, <https://www.gov.uk/government/news/uk-government-sets-out-way-forward-on-the-legacy-of-the-past-in-northern-ireland>

<sup>25</sup> Barkan E. & Karn A., 2006, *Taking Wrongs Seriously: Apologies and Reconciliation*, Stanford, CA., Stanford University Press, pp4-8.

victims were usually very short proceedings in which little information was divulged, sometimes taking place mere weeks after the murder. They would never receive the benefit of an expensive and detailed investigation of the available facts that the current round of inquests avail of, focusing mainly on the actions of the State. It is that while the State continues to refuse to defend itself and its Security Forces, the weapon of 'lawfare' will continue to be used and that is one of the biggest barriers to reconciliation.

The new government proposals have not referenced the SHA and how they will compare with the draft bill of 2018. The Oral History Archive (OHA) was potentially a structure that could create some level of reconciliation by allowing people to narrate their stories thereby providing acknowledgement. Even this structure lacked precise detail how it would work. Without proper control, there is the potential of mass submissions of one-sided narratives to reflect an unbalanced account of what took place. The new proposals have no detail in respect of the recording of the history of the Troubles or how the process would be overall managed, and by whom.

Overall, none of the intended solutions from Eames Bradley forward give mention to how we can learn from the past. By failing to do so leaves the danger of history repeating itself, a cycle within Irish history that needs broken. We all have our views on what took place, those views must be harnessed and used within reconciliation. It is time that the victims and survivors are centre to these structures and not merely referred to in academic documents, or used by organisations to further an ideological cause.

## **5. The potential merits of consolidating the bodies envisaged in the Stormont House Agreement (SHA) into a single organisation.**

The previous submission by SEFF/IVU proposed that the HIU should be retained within the PSNI as an enhanced Legacy Investigation Branch (LIB). The outworking, safeguards and transparency in such a process have already been described in our previous submission, and in the attached document.

The views of SEFF/IVU in relation to the ICIR and the IRG have also been expressed previously and to an extent within this submission. The appointment of ‘independent academics’ who are acceptable to each of the divided communities, political parties and indeed the core focus of this process - the victims – will be very difficult. To appoint external academics with a sufficient and non-tainted knowledge of the Northern Ireland ‘Troubles’ will prove equally problematic.

If this consolidation process as described by the NIO in their new proposals was to continue regardless of the clear concerns of many, such a scenario could not involve the other three bodies (ICIR, OHA and IRG) as they would not ‘fit’ into a policing role, and therefore this would preclude such complete consolidation. The SHA and the NIO statement of intent expresses the requirement for independence in respect of each body. If they are consolidated it is difficult to envisage how such independence would be possible.

There is the ever-increasing awareness of an agenda is to re-write the history of the murderous campaign of the conflict by all paramilitaries (primarily the PIRA) and portray them as the ‘defenders of their people’ from the agents of the British State Forces. The fact that the SHA is intent upon providing protection from defamation or other civil actions for contributors will naturally facilitate this distortion of the truth.

## **6. The equity of the Government's proposed approach to the re-investigation of cases.**

Generally, with the proposed Legacy Commissioner or Director, this is similar to the SEFF/IVU submission with the exception of the HIU becoming subsumed within the PSNI/LIB. Our view would be that the Deputy Chief Constable (DCC) appointed from an external police service would take the lead in relation to the review and investigation of murders.

The DCC's staff would ultimately prepare a family report which would be presented to the Legacy Commissioner for review and eventual release to the family.

It would be the SEFF/IVU contention that all cases should be the subject of a review and, *'only cases in which there is a realistic prospect of a prosecution as a result of new compelling evidence will proceed.'* This we believe should assist in the prohibition of habitual re-investigations which in themselves create Human Rights infringements on the subjects of these investigations.

There should be consideration for the introduction of similar prohibitions in relation to 'vexatious' civil actions and the allocation of legal aid for cases other than those with compelling new evidence.

The one aspect that SEFF/IVU would strongly oppose is the closing of a case which has been reviewed/re-investigated and no prosecution has followed. This we assert is contrary to Art. 2 ECHR and this view has been affirmed in the recent judgement of the 'Good Neighbour Bomb' case on the 4th May 2020<sup>1</sup> in which through case law as cited this Court held that,

*'... in view of new materials coming to light after a long break when nothing had been occurring, obligations under Article 2 revived and so applied in some form to investigative activity thereafter.'*<sup>26</sup>

It is clear therefore that in any case in which new compelling evidence emerges there is a duty on the State to ensure a further investigation. This has also been mentioned previously in this document.

Since the 1998 Belfast Agreement which had major input from both the British and Irish governments, it has been perceptible feature that the Irish government has consistently absolved itself of having a major role throughout the Troubles. For the legacy of the Troubles to have any chance of being resolved requires that government to acknowledge that they were a significant protagonist in the same way the British government were. They must not continue with an abstract 'hands off' approach, and move forward with legacy structures of their own that can mirror those being created by the British government.

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<sup>26</sup> Summary of judgment - Rosaleen Dalton  
<https://judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20judgment%20-%20In%20re%20Rosaleen%20Dalton.pdf>

## **7. What legislative steps the Government can take to address what have been described as vexatious claims against veterans.**

A definition of ‘vexatious claims’ is required as the term is quite ambiguous and unclear. Specifically, are the Government proposing to apply the ‘vexatious claims’ concept across both the criminal and civil law spectrum?

The primary legislation that is central to this issue is the Justice (Northern Ireland) Act 2002. In particular, Sections 31 and 35.

- Section 31(1) of the Justice (Northern Ireland) Act 2002, ‘Conduct of Prosecutions’ states, ‘The Director must take over the conduct of all criminal proceedings which are instituted in Northern Ireland on behalf of any police force (whether by a member of that force or any other person)’. Any proposed legislation will have to reflect this statutory requirement and may entail amendment of the 2002 Act.<sup>27</sup>

The current application of Section 35, ‘Information for Director’, has largely led to the current ‘vexatious claims’ debate.

- Section 35(3) Where the circumstances of any death which has been, or is being, investigated by a coroner appear to the coroner to disclose that an offence may have been committed against the law of Northern Ireland or the law of any other country or territory, the coroner must as soon as practicable send to the Director a written report of the circumstances.<sup>28</sup>
- Section 35(4) The Chief Constable of the Police Service of Northern Ireland must give to the Director information about offences alleged to have been committed against the law of Northern Ireland which are of any description specified by the Director.<sup>29</sup>
- Section 35(5) The Chief Constable of the Police Service of Northern Ireland must, at the request of the Director, ascertain and give to the Director -
  - Information about any matter appearing to the Director to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland, and

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<sup>27</sup> Section 31 (1) of the Justice (Northern Ireland) Act 2002  
<http://www.legislation.gov.uk/ukpga/2002/26/section/31>

<sup>28</sup> Section 35 (3) of the Justice (Northern Ireland) Act 2002  
<http://www.legislation.gov.uk/ukpga/2002/26/section/35>

<sup>29</sup> Section 35 (4) of the Justice (Northern Ireland) Act 2002,  
<http://www.legislation.gov.uk/ukpga/2002/26/section/35>

- Information appearing to the Director to be necessary for the exercise of his functions.<sup>30</sup>

The PSNI position articulated by Sir George Hamilton is that S35 places a de facto requirement on the PSNI to investigate if a referral is made from the Director. ‘Operation Kenova’ being an example of the same. The upcoming legacy inquest process will undoubtedly lead to a sharp increase in referral under the Section 35 requirement for the Coroner to refer to the Director where there are indications an offence has been committed.

The Code of Practice for prosecutors established by the 2002 Act states at 1.4, “*A decision whether or not to prosecute or to divert an offender from prosecution through an alternative to prosecution is a serious decision that affects suspects, victims, witnesses and the wider public and must be taken with the utmost care. It is a quasi-judicial function.*”<sup>31</sup>

At 1.5 it states, “*It is the duty of prosecutors to ensure that the right person is prosecuted for the right offence. Prosecutors must ensure that all decisions are independent, fair, impartial and taken with integrity. It is their duty to ensure that the law is correctly applied, that all relevant admissible evidence is presented to the court and that a fair trial takes place, which will include ensuring that their duties to safeguard the rights of the defendant are complied with.*”<sup>32</sup>

The new proposals appear to subvert this ethos and there will no doubt be a swathe of judicial reviews around this. For example, in relation to alleged ill treatment by the British military during the war in Iraq, there have been over 1,400 judicial reviews in UK courts.

The ‘new compelling evidence’ caveat will prove problematic. Intelligence is not evidence and cannot be used in court. However, intelligence can be used to develop evidence by traditional investigative methods. In addition, intelligence of appropriate grading can be used as justification for the arrest and interview of a suspect. The failure to grasp this was one of the factors which led to demise of the HET. When there are tens of millions of pieces of intelligence held by the PSNI on legacy investigations, the actioning of this intelligence will be contentious, no matter who the investigative body are.

## **Conclusion**

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<sup>30</sup> Section 35 (5) of the Justice (Northern Ireland) Act 2002, <http://www.legislation.gov.uk/ukpga/2002/26/section/35>

<sup>31</sup> Codes of Practice for Prosecutors,

<https://www.ppsni.gov.uk/sites/ppsni/files/publications/PPS%20Code%20for%20Prosecutors.pdf>

<sup>32</sup> Ibid

We are now 22 years after the Belfast Agreement and unbelievably we are in a situation where there is still a crisis within resolving the legacy of the NI Troubles. We can build something better, and build that together. SEFF/IVU have suggested practical legacy proposals that have the potential to produce solutions that can work for all.

It has been unfortunate that IVU who represent such a large constituent of victims and survivors are being ignored when we simply want to see a better way for all. Professor Kieran McEvoy and his SHA 'Model Bill Team' have been vocal in their support for the legislation that they helped to design and have roundly dismissed the alternative proposals suggested by IVU and unfortunately have also misquoted our suggestions when they recently released a document analysing the alternative proposals to the SHA.<sup>33</sup> By his own admission, in an interview with the journalist Brian Rowan, Professor McEvoy and his team have never engaged with the IVU.<sup>34</sup>

Victims and survivors must be listened to and become central to how we can prevent the trauma and misery of thirty years of terrorism from happening again.

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<sup>33</sup> PROSECUTIONS, IMPRISONMENT AND THE STORMONT HOUSE AGREEMENT A Critical Analysis Of Proposals On Dealing With The Past In Northern Ireland, <https://s3-eu-west-1.amazonaws.com/caj.org.uk/2020/04/09093700/Prosecutions-Imprisonment-the-SHA-LOW-RES.pdf>

<sup>34</sup> <https://eamonnmallie.com/2020/04/legacy-fallout-why-did-the-nio-go-on-a-solo-run-by-brian-rowan/>

### **Proposed alternative to Historical Investigations Unit (HIU).**

We propose, for the reasons stated below, that alternative provisions are required for the structure and operation of an Historical Investigations Unit ('HIU') which is proposed in the draft 2018 Bill.

We propose that the entity for legacy be an amended and enhanced form of the existing Legacy Investigations Branch, (LIB) remaining within the PSNI but with the appointment of an additional Deputy Chief Constable (DCC) to be head of the Branch. In order to demonstrate transparency this DCC appointment should be an officer from outside Northern Ireland. (In effect the newly configured LIB would be an enhancement of the existing process and held within PSNI but with the additional element of transparency of the appointment of the DCC from outside Northern Ireland)

S/he would have sole responsibility for legacy cases and the recruited detectives, all of whom would be required to have previous criminal investigative experience as police officers.

We explain that a major defect of the current proposals for the HIU (as proposed in the draft 2018 Bill) is that it combines the role of investigation (reporting to the PPS) and adjudication (preparing what are called in the draft 2018 Bill 'comprehensive family reports').

It is contrary to constitutional principle in the United Kingdom, as a democratic society under the rule of law, that those in such a Legacy body on whom the draft 2018 Bill proposes to confer police powers should also have powers of adjudication in cases where the PPS determines that a prosecution is not to be taken.

The proper and sole role of the LIB is that of investigation. They are not and cannot become the adjudicator. No matter how genuine and well founded the 'belief' of LIB as to the identity of any perpetrator, it would be an impermissible usurpation of the role of the Courts for police officers in LIB (or any other part of PSNI) to publish or express their views on 'guilt'.

While the DCC and the enhanced LIB would be governed by PSNI regulations, the PSNI Code of Ethics and oversight by the Policing Board it would also strengthen the objectives of the new LIB if an additional oversight body was created. This should be a panel led by an independent Judge/retired Judge, consisting of members from outside Northern Ireland. This panel would oversee all aspects of the LIB's work.

The duties of the Oversight Panel (OSP) would include-

1. Reviewing the DCC decisions as to whether a case meets the criteria for re-investigation or not;  
*i.e. is there credible new evidence relating to the death and such evidence alone, or when considered in conjunction with other existing evidence, raises the reasonable suspicion that the new evidence is capable of leading to-*
  - a. *the identification of a person criminally involved in the death; and*
  - b. *the prosecution of a person for a criminal offence relating to the death.*

*(The identification of a person involved in a death should only be pursued where the perpetrator is no longer amenable to the Court but evidence acceptable to the Court can be produced to prove guilt beyond reasonable doubt. Due process requires that a person remains innocent until proven*

*guilty so any attempt to simply "identify a person involved in a death" for the purposes say of a family report would be unacceptable and potentially in breach of Article 6 Human Rights Act especially if the involvement did not amount to a substantive criminal act.)*

2. *Evidence relating to a death is "new evidence" if—*
  - a. *the individuals carrying out the investigatory processes for the investigatory authority in relation to the death—*
    - i. *did not know of the evidence, or*
    - ii. *did not know of the relationship between the evidence and the death;*

*or*
  - b. *the LIB reinvestigating the death*
    - i. *did not previously know of the evidence, or*
    - ii. *did not previously know of the relationship between the evidence and the death.*
3. *No re investigation should be launched on the basis of an allegation that a belief exists that a non-criminal or legally undefined act or omission has occurred such as the much maligned term of "collusion" or the "protection of an informant" unless there exists credible evidence to support the investigation of a substantive criminal offence by an identifiable perpetrator relative to the same.*

4. *Public Interest:*

*All cases to be reinvestigated need to establish that the public interest will be served by undertaking a fresh re investigation. If the perpetrator is deceased or of a physical or mental state that he/she could not safely be cautioned, interviewed or face a trial, then the public interest test would not be met.*

The proposal would be that the DCC would be required to prepare a report regarding the cases assessed and identify if 1a) and 1b) above have or have not been deemed suitable for investigation.

Whether a case is deemed appropriate for re-investigation or not by the DCC a report will be submitted to the OSP outlining the findings of the new LIB's decision as to a re-investigation or not. In all cases in which an investigation has been undertaken a file will be placed before the Director of Public Prosecutions (DPP). This will act as a further check and balance on the process.

In the event that a family/interested party are aggrieved by a decision of the LIB they can appeal the decision to the OSP.

#### Provision of a Family Report

When all investigations have concluded, if a case results in a Court prosecution and subsequent conviction a Family Report will not be provided as the court processes should provide full detail for the family.

If a report is submitted to the DPP but there is no prosecution directed or no conviction is obtained, then a Family Report will be provided by the OSP, utilising the factual material obtained from the initial investigation and that of the LIB re-investigation.

The content of a Family Report must not identify any individuals, living or deceased, or allow any means of identification of any individuals who have been subject of investigation but who are not to be prosecuted.

Furthermore, the new LIB should have no power to make findings of ‘non-criminal police misconduct’. The proposals for ‘non-criminal police misconduct’ as contained in the draft 2018 Bill run contrary to the principle of constitutional justice (further referenced in Appendix A) and indeed they breach the very ‘General Principles’ contained in clause 1 of the draft 2018 Bill:

*(e) the principle that human rights obligations should be complied with.*

The existing LIB has 1130 investigations on its books and by far is the lead investigation authority. The PSNI should be allowed to come of age and the Policing Board should be the strongest advocate for this position.

It is worth emphasising that current best practice across UK policing concerning serious case reviews is conducted on the premise that, “*A serious crime review is not a reinvestigation*”. This is extremely important when allocating investigative resources and managing the expectations of the families of victims. It must be stressed that the new HIU will carry out a review of each case and if an investigative opportunity is identified then a full investigation will follow.

Consideration should be given to the creation of a similar Unit with responsibility for the review of murders which occurred in England, Scotland and Wales; this may well be created within the existing remit of the Independent Office of Police Conduct. The proposed OSP would also oversee this body.

The final proposal to ensure this process adheres to the expectations of all victims throughout the United Kingdom and Ireland would be for the Government of the Republic of Ireland to introduce a similar unit within An Garda Síochána also with the creation of an OSP.

A number of Principles of Elementary Justice are included at Appendix A underpin this proposal and it will be noted that the draft 2018 Bill significantly and materially fails to meet these criteria.

Everything to do with legacy is difficult and we feel that many wrong turnings have been taken and we would like to make what we feel is a constructive suggestion.

This is that a panel of eminent people: jurists and others with constitutional law and public policy making experience be appointed to review what might be feasible and to take due account of all the difficulties: this could be in the form of Royal Commission or judicial enquiry (with most, if not all, members from outside Northern Ireland).

## **Appendix A**

### **PRINCIPLES OF ELEMENTARY JUSTICE**

#### **PRINCIPLE I:**

The draft 2018 draft Bill contained a list of ‘principles’ but this must be expanded to include a principle directing that all legacy investigation and adjudication must take full account of the context at the time of the matter which is under investigation or subject to adjudication.

#### **PRINCIPLE II**

It is an essential principle of the administration of justice that the police submit their investigative reports of any crime only to the Public Prosecution Service. The police have no general or adjudicatory role.

Thus, where the new LIB is to provide the OSP with information to issue Family Reports, in circumstances where there is to be no prosecution, the LIB/OSP must not in any such Report identify individuals, or allow means of identification of any such individuals, whether living or deceased, who have been subject to investigation but who are not to be prosecuted.

#### **PRINCIPLE III**

Where an investigation is properly required for compliance with Article 2 of the European Convention on Human Rights (cases of alleged state involvement in any death) then there must be an independent adjudicatory element as well as independent investigation.

#### **PRINCIPLE IV**

Such adjudicatory process must provide all proper rights of representation and defence to those who may be subject to criticism before the adjudicator forms any critical view on the conduct of any such individuals.

#### **PRINCIPLE V**

Before an adjudicator publishes any report containing criticism of any individual the adjudicator must:

- provide to such individual a draft of the relevant section of the report;
- afford to such individual reasonable time to respond to such criticism;
- give careful consideration to any such response; and
- where appropriate amend the relevant section of the report to take due account of any points properly raised in such response

## **PRINCIPLE VI**

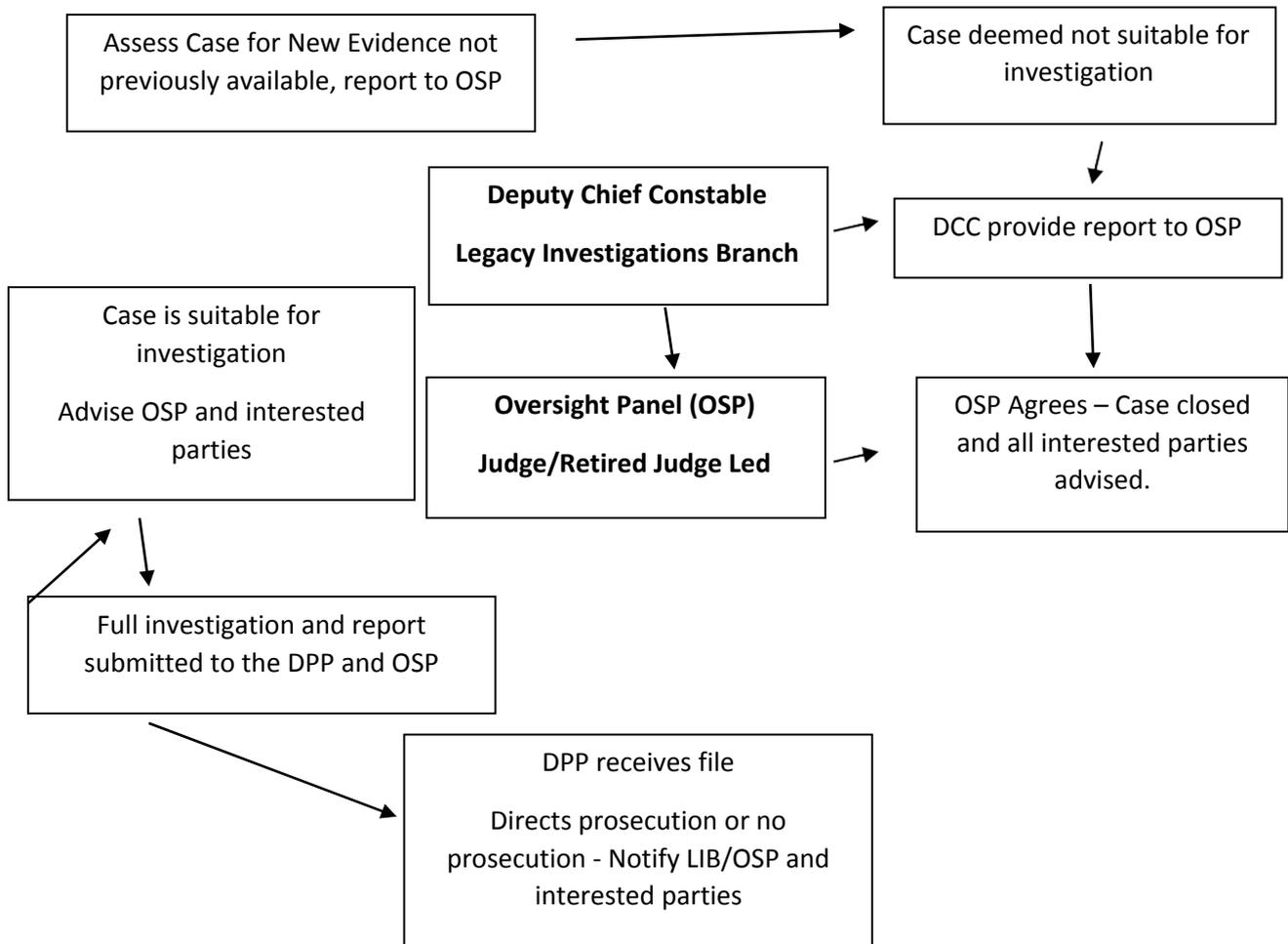
The legislation must exclude any proposal to expose retired police officers to investigation for 'non-criminal police misconduct'. The proposal is discriminatory and would involve the improper and retrospective imposition on former police officers of a critical, condemnatory finding or adjudication.

The proposal is impermissible as it imposes retrospectively on retired police officers something which was not part of their terms of service on appointment.

Removal of this discriminatory and unjust provision would not, however, remove the need for the principles of elementary justice set out in Principles IV and V.

## **PRINCIPLE VII**

The draft 2018 Bill includes many provisions for support and assistance to be afforded by the LIB to victims and their families. Equivalent support and assistance must be provided by LIB to retired police officers, veterans and others under investigation by LIB, whether or not a prosecution is to be taken.



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