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# **Inspection of the Police Service of Northern Ireland Historical Enquiries Team**

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# EXECUTIVE SUMMARY

## INTRODUCTION

Her Majesty's Inspectorate of Constabulary (HMIC) is an independent inspectorate which has a legal responsibility under Section 41, Police (Northern Ireland) Act 1998, to inspect the Police Service of Northern Ireland (PSNI), and to report on its efficiency and effectiveness.

In 2012, the Minister of Justice for Northern Ireland commissioned HMIC to inspect the role and function of the PSNI Historical Enquiries Team (HET), in accordance with terms of reference produced jointly by the Chief Constable of the PSNI and the Northern Ireland Policing Board (NIPB), which can be found at annex A to this report.

These terms of reference, set out a number of issues to be investigated through our inspection and these can be summarised as:

1. does the HET's approach conform to current policing standards and practices;
2. does the HET adopt a consistent approach to all cases; and
3. is the HET's approach to cases with state involvement compliant with European Convention on Human Rights and Fundamental Freedoms (ECHR)?

The HET was established, and has had to operate, in an extraordinarily challenging environment where past and present conflict divides communities across Northern Ireland. This context led to the HET being designed to become more than a way of re-examining deaths attributable to 'the troubles'; it was also designed to bring a "measure of resolution"<sup>1</sup> to the families of those whose deaths were attributable to 'the troubles'. This was a hugely ambitious and indeed unique project for a police force to undertake, a task made even more challenging by the absence of wider governmental and societal arrangements for dealing with the past, for example those that were

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<sup>1</sup> *HET Operational Guide* paragraph 2.1.

recommended in the “*Report of the Consultative Group on the Past in 2009*”.<sup>2</sup>

During our inspection we were told that the HET has had a positive impact on the lives of many families who have engaged with the process. But our inspection also found evidence of significant shortcomings in the way the HET operates. Many of these failures were previously identified in 2009 by Dr (now Professor) Lundy in her paper “*Can the Past be policed: Lessons from the Historical Enquiries Team Northern Ireland*.”<sup>3</sup>

## **BACKGROUND**

Between 1968 and 1998, more than 3,260<sup>4</sup> people lost their lives in Northern Ireland due to conflict during the period commonly referred to as ‘the troubles’.

This inspection focussed, though not exclusively, on cases involving the British Army between 1970 and 1973. At this time there was an agreement between the British Army and Royal Ulster Constabulary (RUC) that the Royal Military Police (RMP) would deal with any soldiers, who were witnesses or suspects; and that the RUC would deal with all civilian witnesses and suspects, who were involved in deaths during that period. In September 1973, this approach was considered unsatisfactory and the responsibility for investigating all deaths reverted back to RUC from that time.

Between 2000 and 2003, the European Court of Human Rights (ECtHR) applied the criteria for Article 2 ECHR to a number of complaints concerning deaths in Northern Ireland during ‘the troubles’ in which there had been state

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<sup>2</sup> Report of the Consultative Group on the Past, 2009.

<sup>3</sup> *Can the Past be Policed?: Lessons from the Historical Enquiries Team Northern Ireland*, Dr P Lundy, Journal of Law and Social Challenges, Volume 11, 2009,109.

<sup>4</sup> HMIC recognises that in Northern Ireland there are differing estimates of the number of people who have died as a result of ‘the troubles’. We have used the figures supplied by the HET on 2 April 2013.

involvement. These cases came to be known as the *McKerr* cases.<sup>5</sup> In each case, it concluded that the Article 2 rights of the deceased had been violated by a failure of the state to put in place an adequate and effective investigation to protect the right to life. Responsibility for the implementation of ECtHR judgments lies with the Committee of Ministers of the Council of Europe in Strasbourg (CM).<sup>6</sup>

Following the ECtHR's findings of a breach of Article 2 in the *McKerr* cases, the UK Government presented the CM with a 'package of measures' designed to address the Court's findings, and to prevent such failings from happening again.

One of these measures was the HET which had the following objectives:

1. *to 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. *to 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;<sup>7</sup> and*
3. *to do so in a way that commands the confidence of the wider community.<sup>8</sup>*

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<sup>5</sup> *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.

<sup>6</sup> The Committee of Ministers is the Council of Europe's decision-making body. It comprises the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg. It is both a governmental body, where national approaches to problems facing European society can be discussed on an equal footing, and a collective forum, where Europe-wide responses to such challenges are formulated. In collaboration with the Parliamentary Assembly, it is the guardian of the Council's fundamental values, and monitors member states' compliance with their undertakings.

<sup>7</sup> The *Code of Ethics for PSNI* was first published in 2003 and was revised and reissued in 2008. Its contents are drawn from a number of sources, including the ECHR. Article 2 of the Code relates to the conduct of police investigations and should not be confused with Article 2 ECHR.

<sup>8</sup> *HET Operational Guide* paragraph 2.1.

The Secretariat to the CM acknowledged that the HET would not be carrying out Article 2 compliant investigations in historical cases. Rather, it was envisaged that the HET could be a useful model for bringing a “*measure of resolution*” to those affected by ‘the troubles’, and that institutions, such as the HET, “*could play an important role*” in satisfying the state’s continuing obligation to conduct effective Article 2 investigations, when taken together with other measures.<sup>9</sup>

### **The Historical Enquiries Team’s current structure**

The HET is accountable to the Chief Constable of the PSNI who reports on the effectiveness, efficiency and impartiality of the PSNI to the NIPB. The HET has a senior command team that is led by its Director. The Director and his senior team set the strategic direction. The senior team members individually lead the review teams and manage cases allocated to them. The Chief Constable has delegated responsibility for HET’s resourcing and finance to the Assistant Chief Constable (ACC) - Crime Operations, who also has overall responsibility for any case that the HET refers to the PSNI for investigation.

The HET has nine operational review teams supported by an intelligence unit and a support structure to manage family contact, file management and administration. Finance and human resources support are supplied by the PSNI with staff delegated to work at the HET.

The case review section which examines the deaths that occurred during ‘the troubles’ has 88 posts. All these posts are staffed by former police officers who have experience in criminal investigations.

The case review section is sub-divided into three units (red, purple and white), each led by a lead senior investigating officer (LSIO) who is responsible for ensuring that cases are dealt with appropriately. These three units are further divided into nine operational review teams (four red, four purple and one white). The red and white teams are referred to as ‘independent’ because they are staffed by individuals who have not

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<sup>9</sup> CM/Inf/DH(2008)2 revised, 19 November 2008, paragraph 49.

previously worked for the RUC or the PSNI, whereas the remaining four purple teams are known as 'local' because they include individuals who have.

### **How the Historical Enquiries Team works**

The HET adopted a systematic approach to dealing with cases. The initial collection phase took three years and cases are generally dealt with in a chronological order.

After it has been assessed, a case is allocated at a Review and Allocation Panel meeting to a team for review. A letter is sent to the identified next-of-kin of the deceased advising them of the HET review.

If a family wishes to engage (as is the position in approximately 70% of cases), the lead senior investigating officer (LSIO) or another member of the team meets the family members to explain the process. Families are asked whether there are any particular questions that they would like the HET report to address.

In cases where the family of the deceased does not engage with the process, the case is referred to the Non-engagement Assessment Team (NEAT) for review. A less detailed SIO report is generated in cases when there is no such engagement, apart from cases reviewed by the red teams.<sup>10</sup>

## **METHODOLOGY**

The inspection team included staff with experience of: major crime and homicide investigations; the review of historical cases; the management of intelligence; and previous knowledge of inspections in Northern Ireland.

In total, we interviewed over 180 people from a range of organisations, including the HET, criminal justice agencies, non-governmental organisations (NGOs) and law firms. We also interviewed 13 families of victims – some in

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<sup>10</sup> The red teams produce an Review Summary Report (RSR) for each case that is reviewed whether the family concerned engage in the process or not.

Belfast and others in Derry-Londonderry. A full list can be found in annexes E and F.

We examined the material relating to 31 cases that the HET had reviewed.

The evidence collection phase was conducted between November 2012 and May 2013.

## **FINDINGS**

In the main body of this report we have divided our considerations into two areas:

1. general considerations which relate to the structures, systems and processes employed by the HET; and
2. specific considerations which relate to the HET's approach to deaths with state involvement.<sup>11</sup>

### **General Considerations**

#### **Clarity of the Historical Enquiries Team's role and purpose**

Given the unique operating context within which the HET was established we would have expected clear terms of reference to be in place to enable it to operate effectively and in accordance with relevant policy, good practice and ECHR.

We found that the lack of comprehensive terms of reference for the HET coupled with an absence of coherent and prescriptive policies created confusion amongst the public, NGOs, criminal justice partners and the HET staff about what they can expect from a HET review.

This has, in our view, impacted on: the understanding of whether the HET is a review or investigative body; how the HET would achieve its stated

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<sup>11</sup> The term 'state involvement' refers to cases in which a person was killed by a member of the British Army, the RUC or any other agent of the state. The phrase 'without any state involvement' is applied to those deaths that occurred at the hands of others. However, for the purposes of this inspection the term state involvement relates to deaths involving the British Army.

intention of *“bringing a measure of resolution”* to families; and finally, how and when the HET should be expected to interact with other criminal justice agencies.

**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.**

### **Accountability**

The HET is a body in which there is considerable public interest and, as such, we expected to find evidence of it being open and transparent with the public about what it has done and how it has done it. Indeed, one of its explicit objectives is to work in a way that “commands the confidence of the wider community”. However, our inspection did not find any evidence of a communication strategy aimed at letting the public know what the HET is doing. There was no public reporting mechanism, such as a published annual report, and as a result no public scrutiny. The only accountability structure is the reporting line from the Director of the HET to the Chief Constable.

This paucity of public accountability was further exacerbated by the absence of a complaints procedure which is easily accessible to those who might wish to complain. We believe that such a procedure is crucial if the public is to have full confidence in 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.**

### **Systems, policies and structures**

Our inspection identified some areas within the HET that were operating well and conforming to current policing standards, for example, the way disclosure is managed. However, we have concerns about the lack of explicit systems and practices underpinning the HET operation. We found that the HET operated in 'silos' with different policies being implemented in each team.

The HET does have an *Operational Guide*. This document is subtitled: *A document that provides an overview of the work of the HET*. Whilst, this document explains the component parts of the HET, it does not provide clear and unequivocal guidance on policies and processes. This is particularly important when considering issues such as the records of interview and the storage of material.

When a case is brought forward for review, all the material is transferred from the PSNI to the HET. The HET uses a system whereby a folder<sup>12</sup> is used to collate all material, including records of policy decisions, collected throughout the examination of the case. We looked at a number of these folders and found that there was no consistency in what they contained, or in how material was stored in them and indexed.

The lack of consistency within the HET was illustrated by the absence of a standard format for recording policy decisions. SIOs adopted their own approach to the recording of the progress of their enquiries and the decisions taken. As a result many such decisions are not recorded at all. We believe this to be poor practice.

**Recommendation 5. The HET should establish clear and accessible policies and procedures that deal with all aspects of the review**

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<sup>12</sup> These are document wallets that the HET commonly refer to as 'blue folders'.

**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.**

### **Staff induction**

Independent staff account for approximately 50 percent of the HET workforce. Whilst this helps promote independence, they also bring with them different working practices which were evident in our inspection. This inconsistency of approach undermines the confidence that individuals have in the HET's ability to treat each case consistently. We believe that such inconsistency of approach could have been mitigated by an effective induction process for staff joining the HET.

Whilst recruits were provided with induction packs, there was evidence that they were rarely used. We consider that this is a significant problem and one which needs to be addressed urgently. The presence of an effective induction process for new staff is critical to the success of the HET if it is to reach and maintain the necessary high standards in its work.

**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.**

### **Performance management**

At the time of our inspection, the HET endeavoured to complete 40 cases per month. This is a substantial undertaking and there is an inherent risk to the quality of work carried out in each case. This figure has recently been re-assessed by the HET who now state that this should be reduced to 30 cases

per month. We remain of the view that this is an ambitious objective and that even this reduced target may not be achieved without sacrificing quality.

A good quality review requires time. It would seem sensible for there to be an independent assessment of what it is possible to achieve within the cost and timescales currently agreed.

**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.**

### **Quality assurance**

We could not find any evidence of any quality assurance or review processes. As a publicly funded body, operating in an area of significant public interest, we consider it is necessary for the HET to be subject to appropriate levels of independent oversight and inspection.

**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.**

### **Review of Intelligence Product**

The management of intelligence is a fundamental element of the HET process, and we examined the HET's intelligence system closely. We found that it was robust and auditable, with both paper and computer-based records of what had been accessed and by whom. The processes were underpinned by a Memorandum of Understanding (MoU) between the HET and the PSNI intelligence branch (C3).

The HET's ability to demonstrate independence in the intelligence process is undermined by the involvement of the former RUC and PSNI officers working for the HET in managing the information from the C3 intelligence branch. The HET believes that it is important to have officers both with the local knowledge necessary to make sure the intelligence is relevant to the individual cases and with an understanding of the PSNI systems. This

undermines the HETs ability to demonstrate an independent approach to the handling of intelligence.

We do not question the capability or integrity of the individuals who manage the HET intelligence process and can also see the benefits of having officers with local knowledge doing this work. However, the HET needs to do everything it can to make sure its independence is safeguarded.

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

### **Satisfaction surveys**

In an attempt to evaluate satisfaction levels the HET procured an independent consulting company to undertake a series of surveys. To date each survey has identified high levels of satisfaction. In the most recent survey, in August 2011, 64 percent were satisfied with the performance of the HET with only a small cohort of families (3 percent) expressing dissatisfaction.

However, we have some concerns about how the families are selected. We have found that not all the families who receive a final RSR are selected to participate in the satisfaction survey. In addition, the selection process also excludes those who did not wish to engage with the HET; those who disengaged along the way; and those who are still awaiting a report.

A more balanced picture might be produced by including all who have been contacted by the HET. This would help to evaluate the different stages of the process, and could highlight any issues which, hitherto, have been missed.

**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.**

### **Review summary reports**

We found a number of inconsistencies in how cases are dealt with when families engage with the HET and when they do not. Firstly, we have raised

a general concern about the difference between the reports generated by the HET.

Secondly, we found that the families who choose to be represented by a solicitor or NGO – who, generally, are far more intrusive and probe the findings of the HET reports – are treated differently than those who are unrepresented.

Thirdly, families or their representatives have received a number of different versions of a RSR which can lead to them to think that changes are being made for the wrong reasons – rather than simply to deal with an error or omission. We found a lack of control over the way drafts and versions were handled and shared with both families and, in one state involvement case, the MOD against the wishes of the family. It is vital that the HET has a system that tracks all drafts or versions of its RSRs so that changes can be properly documented and audited.

Finally, we found that the HET is completing cases and delivering RSRs to families without engaging with them fully or answering the specific questions which the families wanted addressing in the report. This is against the undertaking, outlined in the draft *Standard Operating Procedures (SOP)* from 2005 and reiterated in the most recent *Operational Guide*, that the HET was said to have made when they first engaged with families.

**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.**

### **Specific considerations**

#### **State involvement cases**

The most contentious accusations of inconsistency arise in state involvement cases where our inspection gives rise to concerns that deaths are examined less rigorously than in cases where there is no state involvement. We have considered this issue both in terms of the policy that the HET adopts, when considering the legal position in such cases, and in terms of the practice that the HET adopts when undertaking its reviews.

## Legal position

We found that the HET, as a matter of policy, treats deaths where there was state involvement differently from those cases where there is no state involvement. The latest *Operational Guide* provided by the HET states that it is not appropriate to compare state involvement cases (referred in the *Operational Guide* as “military cases”) and those without any state involvement. It states that:

*“HET maintains it is not appropriate to compare the review processes in military cases with reviews of murders committed by terrorists. Soldiers were deployed on the streets of Northern Ireland in an official and lawful capacity, bound by the laws of the UK and military Standard Operating Procedures of that time”.*<sup>13</sup>

It appears as though the HET’s guidance in regard to cases with state involvement was adopted without any reference to what was, by then, established case law. It concerns us greatly that such an important organisation in Northern Ireland should adopt an approach to such a key area of its work based upon a view of the law that, even if it were ever correct, was manifestly and provably not correct by the time such policy came to be drafted.

This substantial legal error was perpetuated by the fact that the HET did not seem to seek the views of others regarding the accuracy of its *Operational Guide*. At the very least, we would have expected the HET to seek the views of the Director of Public Prosecution (DPP) for Northern Ireland and Her Majesty’s Attorney General for Northern Ireland, given that they were then responsible for prosecution policy.

We consider the HET’s approach to be entirely wrong in that:

1. it is clear that the HET has adopted a different approach between cases that have state involvement and those that do not; and

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<sup>13</sup> *HET Operational Guide*, paragraph 6.19

2. the approach that the HET has adopted in state involvement cases is susceptible of challenge, as it appears to be based on a misunderstanding of the law.

**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.**

The HET's policy with regard to state involvement cases influences the practical steps that it takes in its reviews. We summarise below the particular aspects of its approach that concern us.

### **Interviews under caution**

An interview under caution is part of an investigative process (as opposed to a review), as its purpose is to put the allegation to the suspect and elicit his or her side of the story.

The HET's *Operational Guide* is clear that any of its teams could conduct an interview under caution.<sup>14</sup> However, we were told by HET staff that, in practice, only the red teams – which deal with cases of state involvement – carry out this procedure.

We are aware, that in a number of cases that the HET use what has been referred to as the '*pragmatic approach*'. This appears to involve the notion that where suspects would have been interviewed under caution in the normal course of events, a member of the HET could decide to dispense with the caution in order to interview a suspect so that they could obtain as much information as possible about the death for the benefit of the family. This is explained in this extract from the *Operational Guide*.

*"This 'pragmatic approach' was adopted specifically to give the HET maximum opportunity to obtain as much information as possible for the benefit of [the family]. People who are interviewed under caution as 'suspects' are typically either extremely guarded*

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<sup>14</sup> HET *Operational Guide*, paragraphs 3.8 and 3.9

*in what they say, or exercise their right not to say anything at all.*<sup>15</sup>

We understand that the term '*pragmatic approach*' was used in 2010, at the time when the Chief Constable of the PSNI decided that the HET should refer all cases that require investigation to the PSNI – leaving the HET to focus solely on reviews. This decision resulted in a Memorandum of Understanding (MoU) between the HET and PSNI Crime Operations Department (C2) which set out the way such referrals should be made. We found that the HET followed the MoU in non-state involvement cases, referring all those that required investigation to the PSNI. However, we were concerned to find that the HET continued to conduct interviews under caution in state involvement cases in contravention of the Chief Constable's decision. Even more worrying, and notwithstanding the fact that the HET is not meant to conduct interviews under caution, we also found that it had adopted the '*pragmatic approach*' to dispense with the caution in some state involvement interviews.

The '*pragmatic approach*' has been a cause of concern to others. We are aware that, on 10 January 2011, there was a discussion between the HET and the Public Prosecution Service (PPS) about this issue. During the meeting, a senior lawyer: "*asked the HET representatives to review their strategic decision not to caution and involve the police in relation to interviewees who made admissions to serious crime*".<sup>16</sup>

Since the MoU with C2 came into effect in 2010, the HET has referred 39 legacy cases involving 119 victims to the PSNI for further investigation. Of these 39 cases, not one is a state involvement case.<sup>17</sup>

We do not see any reason for the HET to conduct interviews under caution and we have a number of serious concerns:

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<sup>15</sup> A HET Review Summary Report 2010. The report can be downloaded at <http://www.patfinucanecentre.org/cases/mcgreanery.html>

<sup>16</sup> PPS notes of meeting with HET 10 January 2011.

<sup>17</sup> List of the HET cases investigated by C2 from PSNI.

1. when the HET staff conduct interviews under caution, they are acting as investigators, which is contrary to the Chief Constable's decision in 2010 that any case which requires investigation should be referred to the PSNI;
2. because, in practice, only the red teams investigating state involvement cases conduct interviews under caution, there is a material difference in approach within the HET to cases with state involvement and cases without any state involvement. Cases involving paramilitary suspects, on the other hand, are referred to C2 for interview; and
3. the '*pragmatic approach*', in our judgment, could only be defensible if a decision had already been made that criminal proceedings could never be taken against the suspect. As a matter of law, there remains, in all cases, a remote chance that a prosecution could take place.<sup>18</sup>

### **Pre-interview disclosure**

Notwithstanding the fact that the HET should not have been conducting any interviews under caution since 2010, another highly contentious issue involving state involvement cases and legal interpretation arises from the amount of material that the HET provides to a former soldier or his legal representative in advance of any such interview. This is commonly referred to as pre-interview disclosure and generally applies to suspect interviews under caution. We found that the HET used different approaches based on whether the suspect was a state actor or not. The suspect in state involvement cases would get full disclosure of material whereas a paramilitary suspect would get very little. When asked to explain the difference in approaches, the HET stated that it operated on the assumption that, unlike non-state actors, soldiers involved in a shooting had co-operated with investigators at the time and had provided their identities and produced their weapons for inspection – two things which non-state actors did not do.

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<sup>18</sup> An admission by the person responsible that his or her actions were unlawful, for example, an individual walking into a police station to confess to a murder.

As said above, the difference in approach is based upon a misunderstanding of the law.

### **Verification of illness**

Further evidence that the HET is not consistent in its approach across state and non-state involvement cases was revealed when we found that the HET does not always seek verification where a potential interviewee in a state involvement case claims to be unfit for interview due to illness.

**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 what it has termed as the '*pragmatic approach*' and stop conducting interviews under caution.**

**Recommendation 17. The HET and 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 to satisfy himself 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.**

## **EUROPEAN CONVENTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS COMPLIANCE**

The Secretariat to the CM acknowledged that the HET would not be carrying out Article 2 compliant investigations in historical cases. Rather, it was

envisaged that the HET could be a useful model for bringing a “*measure of resolution*” to those affected by ‘the troubles’, and that institutions, such as the HET, “*could play an important role*” in satisfying the state’s continuing obligation to conduct effective Article 2 investigations, when taken together with other measures.<sup>19</sup>

Although the CM did not envisage that the HET would satisfy the Article 2 investigative requirement by itself, we have considered, in light of our findings as set out previously, and in accordance with our terms of reference, the respects in which the HET’s process does and does not meet the four requirements of an Article 2 compliant investigation. This may be relevant to the question whether, and to what extent, the HET is capable of playing a role in the satisfaction of Article 2, when taken together with other measures. It may also be relevant to any future consideration by the CM whether to reopen its examination of the HET as part of its review of the UK’s compliance with the ECtHR’s judgments in the *McKerr* cases.

Whether or not they indicate a breach of the UK’s ECHR obligations, the imperfections we have identified raise concerns about the HET’s conformity with best practice and policing standards, consistency of approach, and effectiveness in delivering the objectives which the HET set out to deliver from when it was established in 2005 to the present date.

## **Independence**

If an investigation is to be Article 2 compliant, the people carrying out the investigation must be independent, both structurally and practically, from those implicated in the events. The HET has clearly endeavoured to ensure that its processes reflect the necessary independence by having ‘independent’ teams which are staffed with people who have no previous association with the RUC or the PSNI.

The structure of the HET, therefore, is designed to guarantee the necessary independence. However, our findings raise two concerns about whether the

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<sup>19</sup> CM/Inf/DH(2008)2 revised, 19 November 2008, paragraph 49.

HET's processes, in practice, reach the required level of independence for the purposes of Article 2.

Firstly, a former RUC officer led the HET's enquiry into a state involvement case, in breach of: the HET's policy; undertakings given to NGOs and solicitors; and an express wish of the family in question. In addition, we understand that the officer in question actually knew the SIO in charge of the original investigation. The HET adopt a 'self-declaration' process to prevent this happening; however, we did not find any evidence that these declarations were subject to any formal checks and validation. We consider that without a clear policy to identify former RUC or PSNI officers' previous involvement in historical investigations the HET cannot guarantee that its systems are capable of preventing such situations in future.

Secondly, as we have detailed, the HET's intelligence unit is staffed largely by former employees of either the RUC or the PSNI. Staff in the PSNI intelligence branch, some of whom are former RUC special branch officers, are the gatekeepers for intelligence being passed to the HET. Given the sensitivity of intelligence matters in the context of Northern Ireland the HET needs to do everything it can to make sure its independence is safeguarded. For this reason, it would be preferable to institute some independent procedure (see recommendation 11) for guaranteeing that all relevant intelligence in every case is transmitted for the purposes of review, to ensure compliance with the Article 2 standard.

**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.**

### **Effectiveness**

An Article 2 compliant investigation must be capable of leading to a determination of whether the force used was or was not justified, and to the identification and punishment of those responsible. A number of our findings have a bearing on these criteria.

Our inspection raises a general concern about the lack of explicit systems and processes underlying the HET operation. We have found, for instance, that: the HET's storage and cataloguing of relevant material is haphazard and inconsistent; there is no standard format for recording policy decisions; and many such decisions are not recorded at all. We have also found that 50 percent of the HET staff come from outside of Northern Ireland, and bring with them different working practices, and adopt inconsistent approaches to review. There was no effective induction process capable of addressing these differences.

We have noted that the HET has not been inspected before, and that there is no evidence of its having undertaken, or been subject to, any quality assurance or review processes.

These failings threaten to undermine the HET's effectiveness.

There is a more serious, and specific, concern, however, relating to the approach adopted by the HET in relation to state involvement cases.

As detailed in this report, the HET, as a matter of policy, treats deaths where there was state involvement differently from those cases where there is no state involvement. There does not seem to us to be any good basis in law for this difference, which is set out in the HET's *Operational Guide*, and which clearly dictates its approach to the review of such cases.

Cases in which there has been state involvement are assigned to the red or white teams. We have learned that red team staff sometimes conduct interviews under caution in relation to state involvement cases, whereas, in all other types of cases, if evidential leads are uncovered, suspects are referred to C2 for interview under caution. Moreover, it is left to the red team staff member's discretion, under the '*pragmatic approach*', whether to treat an interviewee as a suspect, and so to conduct an interview under caution, or whether to dispense with this.

We have also learned that, where interviews under caution are conducted by the HET in the context of state involvement cases, interviewees tend to be provided with extensive pre-interview disclosure well in advance.

In addition, we have found that the HET does not always seek verification where a potential interviewee in a state involvement case claims to be unfit for interview due to illness.

We consider that these practices, which would appear to derive from the HET's different approach in state involvement cases, may seriously undermine the capability of the HET's review process to lead to a determination of whether the force used was or was not justified in state involvement cases, and to the identification and punishment of those responsible. They may also undermine the effectiveness of the PSNI and the PPS to the extent that state involvement cases are not routinely referred to these bodies. Since 2010 it is striking that not one state involvement case relating to the British Army has to date been referred to the PSNI for further investigation or for prosecution.

We consider that the HET's approach to state involvement cases in this regard is inconsistent with the UK's obligations under Article 2 ECHR. As well as undermining the effectiveness of the review in Article 2 terms, the inconsistency in the way that state involvement and non-state involvement cases are treated easily gives rise, that the process lacks independence.

We note that one of the documents submitted to the CM by the UK Government in 2008, in advance of the CM's decision to close its examination, was a presentation: "*Policing the Past: Introducing the Work of the Historical Enquiries Team*" which stated that the HET applied a consistent standard in each case. Regrettably, we have not been able to conclude that the HET's approach is consistent across all types of case.

### **Promptness**

The CM has recognised that the HET is not in a position to satisfy the promptness requirement of Article 2, given its focus on historical cases. The question of whether the HET review is progressing at satisfactory speed is therefore primarily a concern in terms of best practice and compliance with current policing standards, rather than an issue of ECHR compliance.

It is of some concern that the examinations of some cases which started in 2006 have still not been closed. We have recommended that the question of whether, and how, the HET's review can be completed within a reasonable timeframe should be reviewed.

### **Transparency and accountability**

The HET is carefully designed to enable and encourage the engagement of families with the process, and this is commendable. Families who wish to engage are able to do so.

We consider that the transparency of the HET process could be improved by the publication of terms of reference and explicit HET policies and procedures, which would afford families clarity about the role of the HET, and what they can expect from the HET review. We have also noted that the HET does not have a formal complaints procedure. There does not appear to exist any structured means by which families who have concerns about the HET process may air their grievances.

In addition, we are concerned by the lack of any public reporting mechanism or accountability structure other than the reporting line from the Director of the HET to the Chief Constable. RSRs are, in principle, a good source of information; however, their efficacy as a means of accountability is potentially undermined by the fact that they are only – with the exception of red team cases – produced in cases in which there is family engagement, and by the fact that, as we were recently told, they do not always answer the questions that families have raised.

We consider that there is significant room for improvement in this area, and that, there is a real danger that the HET process may be inadequate to meet Article 2 standards of transparency and accountability. We have made recommendations accordingly.

## **Examination of HET's policy and procedures in relation to Articles 3, 6 and 14 ECHR**

In accordance with the terms of reference we examined the HET's compliance with Article 3 ECHR, prohibition of torture; Article 6 ECHR, right to a fair trial; and Article 14 ECHR, prohibition of discrimination. We found no evidence of any breaches in relation to these three Articles.

## **CONCLUSIONS**

### **Does the HET's approach conform to current policing standards and practices?**

Our inspection identified some areas where the HET was operating well and conforming to current policing policies and practice. For example, the disclosure function is operating to a high standard. However, outside of these areas of work our inspection raised a general concern about the lack of explicit systems and processes underlying the HET operation. We found, for instance, that: the HET's storage and cataloguing of relevant material is haphazard and inconsistent; there is no standard format for recording policy decisions; and many such decisions are not recorded at all. We also found that staff, who come from outside of Northern Ireland, bring with them different working practices, and adopt inconsistent approaches to the review process. There was no effective induction process capable of addressing these differences.

The lack of a clearly defined complaints process for the HET together with an absence of any reporting of its work directly to the public was also of concern to us.

We also noted that the HET has not been inspected before, and that there is no evidence of its having undertaken, or been subject to, any quality assurance or review processes.

Our findings indicate an unacceptably large range of areas where the HET's approach does not conform to current policing standards and practices.

### **Does the HET adopt a consistent approach to all cases?**

Our inspection found that the HET, as a matter of policy, treats deaths where there was state involvement differently from those cases where there is no state involvement. State involvement cases appeared to be treated less rigorously in areas such as: how interviews under caution are conducted; the nature and extent of pre-interview disclosure; and the way claims made by state agents about suspects being unfit for interview under caution were verified. We consider that these practices may seriously undermine the capability of the HET to review cases in order to determine whether the force used was or was not justified in state involvement cases, and to the identification and punishment of those responsible. They may also undermine the effectiveness of the PSNI and PPS to the extent that state involvement cases relating to the British Army are not routinely referred to these bodies.

### **Is the HET's approach to cases with state involvement compliant with European Convention of Human Rights and Fundamental Freedoms?**

Taken together, our conclusions lead us to consider that the HET's approach to state involvement cases is inconsistent with the UK's obligations under Article 2 ECHR. The inconsistency in the way that state involvement and non-state involvement cases are dealt with undermines the effectiveness of the review process in Article 2 terms. In addition, the deployment of former RUC and PSNI officers in state involvement cases easily gives rise, to the view that the process lacks independence.

These conclusions raise an important issue in relation to the CM's closure of its examination of the issue of the investigation of historical cases in Northern Ireland. Information submitted to the CM by the UK Government in 2008 in advance of the CM's decision to close its examination, was a presentation: *'Policing the Past: Introducing the Work of the Historical Enquiries Team'* which stated that the HET applied a consistent standard in each case. Regrettably, we have not been able to conclude that the HET's approach is consistent across all types of case.

Finally, we feel it is important to note that although many of the people we met would have preferred the HET to have been independent of the PSNI; they also articulated an almost universal desire for it to be retained so long as improvements were made to the way it works.

# 1 INTRODUCTION

## 1.1 Legal authority and commission

Her Majesty's Inspectorate of Constabulary (HMIC) is an independent inspectorate which has a legal responsibility under Section 41, Police (Northern Ireland) Act 1998, to inspect the Police Service of Northern Ireland (PSNI), and to report on its efficiency and effectiveness.

In 2012, the Minister of Justice for Northern Ireland commissioned HMIC to inspect the role and function of the PSNI Historical Enquiries Team (HET), in accordance with terms of reference produced jointly by the Chief Constable of the PSNI and the Northern Ireland Policing Board (NIPB). These can be found at annex A.<sup>20</sup>

The HET was established, and has had to operate, in an extraordinarily challenging environment where past and present conflict divides communities across Northern Ireland. This context led to the HET being designed to become more than a way of re-examining deaths attributable to 'the troubles'; it was also designed to bring a "measure of resolution" to the families of those whose deaths were attributable to 'the troubles'. This was a hugely ambitious and indeed unique project for a police force to undertake, a task made even more challenging by the absence of the wider governmental and societal arrangements for dealing with the past, for example those that were recommended in the "*Report of the Consultative Group on the Past in 2009*".<sup>21</sup>

During our inspection we were told that the HET has had a positive impact on the lives of many families who have engaged with the process. But it has also found evidence of significant shortcomings in the way HET operates. Many of these failures were previously identified in 2009 by Dr (now

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<sup>20</sup> The Terms of Reference at annex A were initially drafted by the Chief Constable and annotated with clarifying comments drafted by the NIPB.

<sup>21</sup> Report of the Consultative Group on the Past, 2009.

Professor) Lundy in her paper “*Can the Past be policed: Lessons from the Historical Enquiries Team Northern Ireland*”.<sup>22</sup>

Although serious, we believe that these problems can be corrected if the Chief Constable of the PSNI, with the support and critical oversight of the NIPB, delivers the improvements necessary to address the recommendations we make in this report.

We conducted our inspection between November 2012 and May 2013. This report sets out our findings and recommendations.

## **1.2 The reason for our inspection**

In 2007, Dr (now Professor) Lundy, a senior lecturer in Sociology at the University of Ulster, Northern Ireland, approached the then Chief Constable of the PSNI and secured access to the HET to undertake research into how it operated.

In 2009, Professor Lundy published her research paper<sup>23</sup> in which she raised concerns about the HET in relation to its: governance; purpose; accountability; independence; leadership; policies; procedures; lack of consistency; and equality of treatment. She focused on cases involving the British Army between 1970 and 1973, which she referred to as Royal Military Police (RMP) investigation cases, and contrasted how they were handled with those cases without any state involvement.

In this report, we use the term ‘state involvement’ to refer to cases in which a person was killed by a member of the British Army, the Royal Ulster Constabulary (RUC) or any other agent of the state. The phrase ‘without any state involvement’ is applied to those deaths that occurred at the hands of others. However, for the purposes of this inspection the term ‘state involvement’ relates to deaths involving the British Army.

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<sup>22</sup> *Can the Past be Policed?: Lessons from the Historical Enquiries Team Northern Ireland*, Dr P Lundy, Journal of Law and Social Challenges, Volume 11, 2009,109.

<sup>23</sup> *Can the Past be Policed?: Lessons from the Historical Enquiries Team Northern Ireland*, Dr P Lundy, Journal of Law and Social Challenges, Volume 11, 2009, 109.

On 2 April 2012, Professor Lundy published further research in which she recommended that: ‘a more in-depth investigation, with full access to the HET policies, procedures and comparative reports, should be undertaken by the Criminal Justice Inspector for Northern Ireland’.<sup>24</sup>

Professor Lundy’s findings generated widespread debate and concern, culminating in the drafting of terms of reference by the Chief Constable and the NIPB as part of the process to commission HMIC to carry out this inspection. This is the first time that the HET has been inspected.

### **1.3 The structure of this report**

In the sections that follow, we have set out the background to the creation of the HET and the methodology of our inspection. We have then grouped our findings under three headings:

1. Findings (Section 4);
2. European Convention on Human Rights and Fundamental Freedoms (ECHR) compliance (Section 5); and
3. Conclusions (Section 6).

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<sup>24</sup> *Assessment of HET Review Processes and Procedures in Royal Military Police Investigation Cases*, Dr P Lundy, ([Research report (external)], 2012).

## 2 BACKGROUND

### 2.1 Historical context

Between 1968 and 1998, more than 3,260 people lost their lives in Northern Ireland due to conflict during the period commonly referred to as ‘the troubles’.

The cases involving the British Army, referred to by Professor Lundy, occurred between 1970 and 1973 when, as was widely known and confirmed by The Bloody Sunday Enquiry,<sup>25</sup> the General Officer Commanding (GOC) of the British Army in Northern Ireland and the Chief Constable of the RUC agreed that the Special Investigation Branch of the RMP would deal with any soldiers, who were witnesses or suspects, and that the RUC would deal with all civilians, who were witnesses and suspects, and who were involved in deaths during that period.

In September 1973, the Director of Public Prosecutions (DPP) for Northern Ireland<sup>26</sup> made it clear that this approach was unsatisfactory, and the responsibility for investigating all deaths reverted to RUC from that time.

### 2.2 Scrutiny by the European Court of Human Rights

Between 2000 and 2003, the European Court of Human Rights (ECtHR) considered a number of complaints concerning deaths in Northern Ireland during ‘the troubles’ in which there had been state involvement. These cases came to be known as the *McKerr* cases.<sup>27</sup> The complainants in those cases alleged (among other things) that there had not been any adequate investigation into the circumstances of the deaths as required by Article 2 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

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<sup>25</sup> *Report of the Bloody Sunday Inquiry*, (chairman The Rt Hon The Lord Saville of Newdigate). A full transcript of the proceedings is available at <http://www.bloody-sunday-inquiry.org.uk>.

<sup>26</sup> *Op cit.*, chapter 194, paragraph 194.10.

<sup>27</sup> *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).

Article 2 ECHR provides:

*“Everyone’s right to life shall be protected by law...”*

It is well established that Article 2 imposes a negative obligation not to take life without justification, and a positive obligation to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. It also imposes an obligation on states to conduct an effective official investigation where individuals have been killed as a result of the use of force.<sup>28</sup> The investigative duty is engaged:

*“[b]y any death occurring in circumstances in which it appears that any one or more of the substantive obligations that Article 2 imposes not to take life without justification, and to establish a framework of laws, precautions, procedures and means of enforcement which will to the greatest extent practicable protect life, has been or may have been, violated in circumstances in which it appears that agents of the state are, or may be, in some way implicated”.*<sup>29</sup>

The criteria that must be satisfied before an investigation is compliant with Article 2 was identified by the court in *Jordan v UK*.<sup>30</sup>

In that case, the applicant claimed that there had not been any adequate investigation into the death of his son, who had been shot and killed by an officer of the RUC.

The ECtHR confirmed that Article 2 requires by implication some form of effective official investigation when individuals have been killed as a result of the use of force. The Court held that the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may

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<sup>28</sup> *McCann v UK* (1995) 21 EHRR 97.

<sup>29</sup> *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, paragraphs 2-3.

<sup>30</sup> *Jordan v UK* (2003) 37 EHRR 2.

vary depending on the circumstances. However, whatever mode is employed, the authorities must act, once the matter has come to their attention.

The Court identified four requirements that an adequate investigation for the purposes of Article 2 must satisfy.

First, for an investigation into alleged unlawful killing by state agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of structural connection but also a practical independence.

Secondly, the investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances, and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.

Thirdly, a requirement of promptness and reasonable expedition is implicit. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining the public's confidence in the authorities' adherence to the rule of law, and in preventing any appearance of collusion in or tolerance of unlawful acts.

Fourthly, for the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be

involved in the procedure to the extent necessary to safeguard their legitimate interests.<sup>31</sup>

The ECtHR went on to apply these criteria to all the *McKerr* cases. In each, it concluded that the Article 2 rights of the deceased had been violated by a failure of the state to put in place an adequate and effective investigation to protect the right to life. The investigative failings in question were:

in *McKerr v UK*, the police officers concerned had not been interviewed until three or four days after the death, and then attempted to conceal information from the investigation;

in *Jordan v UK*, the authorities had, among other things, failed to exercise due control over the scene of the investigation or to seek follow-up information from persons present at the scene;

in *Kelly v UK*, they had failed to interview military personnel immediately after the incident or to allow access to the deceased for medical personnel;

in *Shanaghan v UK*, the DPP had failed to give any reasons for deciding not to prosecute any police officer for collusion in the incident;

in *Finucane v UK*, there was a failure to provide a prompt and effective investigation into allegations of collusion by security personnel; and

in *McShane v UK*, the authorities had failed to make proper efforts to obtain witness statements from civilian (as opposed to police) witnesses and there had been delay in taking the evidence of key witnesses.

All the cases raised concerns about the independence of the investigating officers.

The Police Act (NI) 1998 Part VII does not permit the police in Northern Ireland to investigate complaints made by members of the public about police officers, or any case in which the conduct of a police officer may have resulted in the death of some other person. These must be referred to the

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<sup>31</sup> *Jordan v UK* (2003) 37 EHRR 2, paragraphs 106-109.

Police Ombudsman for Northern Ireland (PONI) for independent investigation. The HET therefore refers any matter arising from its work which raises a concern of possible police criminality to the PONI.

## **2.3 Scrutiny by the Committee of Ministers and the establishment of the Historical Enquiries Team**

Responsibility for the implementation of ECtHR judgments lies with the Committee of Ministers of the Council of Europe in Strasbourg (CM).<sup>32</sup>

Following the ECtHR's findings of a breach of Article 2 in the *McKerr* cases, the UK Government presented the CM with a 'package of measures' designed to address the Court's findings. These included individual measures, designed to address the breaches that had been found in the *McKerr* cases themselves, and general measures (A-K),<sup>33</sup> which were designed to address systemic failings in the approach to investigating deaths arising out of 'the troubles' and to prevent such failings from happening again.

The CM examined the UK's progress at fifteen meetings between 2002 and 2009.<sup>34</sup> Each meeting was informed by a memorandum prepared by the Secretariat, which recorded updated information provided by the UK Government in relation to the 'package of measures'. Wherever satisfied on the basis of information provided that progress in relation to a particular measure was satisfactory, the CM closed its examination of the measure in

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<sup>32</sup> The Committee of Ministers is the Council of Europe's decision-making body. It comprises the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg. It is both a governmental body, where national approaches to problems facing European society can be discussed on an equal footing, and a collective forum, where Europe-wide responses to such challenges are formulated. In collaboration with the Parliamentary Assembly, it is the guardian of the Council's fundamental values, and monitors member states' compliance with their undertakings.

<sup>33</sup> The General Measures are set out in Interim Resolution ResDH(2005)20 "*Information provided by the Government of the United Kingdom to the Committee of Ministers on general measures taken so far or envisaged to comply with the European Court's judgments*" which can be found at annex I of this report.

<sup>34</sup> The meetings were held in: December 2002 (819<sup>th</sup> meeting); April 2003 (834<sup>th</sup> meeting); October 2003 (854<sup>th</sup> meeting); April 2004 (879<sup>th</sup> meeting); September 2004 (bilateral meeting); February 2005 (914<sup>th</sup> meeting); November 2005 (948<sup>th</sup> meeting); February 2006 (955<sup>th</sup> meeting); March 2006 (960<sup>th</sup> meeting); May 2006 (bilateral meeting); June 2006 (966<sup>th</sup> meeting); July 2006 (970<sup>th</sup> meeting); June 2007 (997<sup>th</sup> meeting); March 2008 (1,020<sup>th</sup> meeting); and March 2009 (1,051<sup>st</sup> meeting).

question. Consequently, the number of measures in relation to which there was on-going scrutiny declined over time.

Over this period, the CM published three Interim Resolutions relating to its on-going supervision of the 'package of measures'.<sup>35</sup> These resolutions were based on information submitted to the Secretariat by the UK Government and other interested parties as summarised in its memoranda, and on recommendations made by the Secretariat.

### **2.3.1 The Serious Crime Review Team**

Among the issues which the 'package of measures' was designed to address were the defects in previous police investigations (general measure B). In this regard, the UK Government reported to the Secretariat that, on 28 March 2003, it had established a Serious Crime Review Team (SCRT), the remit of which was: *"to review a number of unsolved major crimes, including murder and rape, where it is thought that new evidential leads may be developed"*.<sup>36</sup> Where new evidence came to light in the course of a SCRT review, it was envisaged that reinvestigation of the crime might follow. The passage of time itself was not treated as a bar to reinvestigation by the SCRT, though it was acknowledged that timing would affect the availability of witnesses, exhibits and documentation.

The CM resolved to pursue the supervision of the execution of the *McKerr* judgments: *"until all necessary general measures have been adopted and their effectiveness in preventing new, similar violations has been established and the Committee has satisfied itself that all necessary individual measures have been taken to erase the consequences of the violations found for the applicants"*.<sup>37</sup> The general measures included the PONI, and the use of 'calling-in' arrangements whereby the Chief Constable of the PSNI could request that an incident be investigated by officers from a police force from

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<sup>35</sup> Interim Resolution ResDH(2005)20; Interim Resolution CM/ResDH(2007)73; and Interim Resolution CM/ResDH(2009)44.

<sup>36</sup> Ministers' Deputies Information documents, CM/Inf/DH(2004)14Revised 2, 7 December 2004, paragraphs 32-34.

<sup>37</sup> Interim Resolution ResDH(2005)20.

mainland Britain, in order to ensure independence. In relation to the retrospective activities of the SCRT, the CM noted the following:

*“the PSNI has adopted a three-stage approach to “historical” cases. First, a preliminary case assessment is carried out to ascertain if any potential evidential opportunities exist to move the investigation forward. Second, where these are identified then a full deferred case review will be commissioned by the Assistant Chief Constable. Subsequently, as the third stage of the process, the case may be referred to a murder investigation team for further investigation subject to the accepted recommendations of the review.*

*The work of the SCRT is painstaking and places significant demands on police resources. As a consequence the Government have been discussing with the PSNI how this work might be expanded to process greater numbers of unresolved deaths and to do so in a way that commands the confidence of the wider community”.*<sup>38</sup>

### **2.3.2 The Historical Enquiries Team**

The HET was established, in September 2005, as a specialist unit of the SCRT, dedicated to examine all deaths attributable to the security situation that occurred in Northern Ireland between 1968 and the Belfast Agreement in 1998.<sup>39</sup> There were 3,260 deaths attributable to ‘the troubles’ within this period, arising from 2,555 separate incidents. Deaths after 1998 are investigated by the PSNI Crime Operations department murder investigation teams of the PSNI, with the exception of a few historical cases which had been referred by the Chief Constable to the HET.

From its outset, the HET adopted three main objectives:

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<sup>38</sup> Interim Resolution ResDH(2005)20, which can be found at annex I.

<sup>39</sup> Initially, the HET was funded to examine some 1,800 unsolved deaths arising from ‘the troubles’, the remit of the HET was later widened to the examination of all deaths that occurred in Northern Ireland that were attributable to ‘the troubles’.

- 1 *to 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 *to 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;<sup>40</sup>*
- 3 *to do so in a way that commands the confidence of the wider community.<sup>41</sup>*

In 2005, the UK Government informed the CM that the HET had been established, and, thereafter, provided updated information on an on-going basis about the HET’s role and operations. And so, the Secretariat’s memorandum of October 2005 recorded:

*“this Historical Enquiries Team has been conceived to provide a thorough and independent reappraisal of unresolved cases, with the aim of identifying and exploring any evidential opportunities that exist. The Team [sic] will contain two investigative units, one of which will be entitled the Special Cases Section and will be staffed by officers seconded from police forces outside Northern Ireland. This section will deal exclusively with cases in which independence from PSNI is seen as a pre-requisite. The second unit, the General Enquiry Section, will be staffed by a mix of police officers and civilian staff recruited from both within the PSNI and externally. The team will be commanded by two senior staff from outside PSNI, but with experience of Northern Ireland issues gained from working on the Stevens Enquiries. Decision-making*

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<sup>40</sup> The *Code of Ethics for PSNI* was first published in 2003 and was revised and reissued in 2008. Its contents are drawn from a number of sources, including the ECHR. Article 2 of the Code relates to the conduct of police investigations and should not be confused with Article 2 ECHR.

<sup>41</sup> *HET Operational Guide* paragraph 2.1.

*will be independent and supported by access to independent legal advice from outside Northern Ireland.”<sup>42</sup>*

The CM also received submissions from non-governmental organisations (NGOs) in relation to the HET.

In late June 2006, a Secretariat memorandum<sup>43</sup> contained a consolidated summary of the information that had been provided by that stage in relation to the HET, including a bullet-pointed list of ‘main points’.<sup>44</sup> The memorandum stated that, if evidential opportunities were identified, the HET would exploit them like any police team, the options including arrest, interview and report to the DPP in appropriate cases,<sup>45</sup> and noted *“the UK authorities state that the HET have a very good working relationship with the PONI”*.<sup>46</sup> The Secretariat’s overall assessment was as follows:

*“...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 [sic] kind of cases. Once possible, reports on concrete results achieved would be appreciated. The*

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<sup>42</sup> Ministers’ Deputies Information documents, CM/Inf/DH(2005)21 revised 3, 6 October 2005, page 33.

<sup>43</sup> CM/Inf/DH(2006)4 revised 2.

<sup>44</sup> *Op Cit*, para 54.

<sup>45</sup> *Op Cit*, para 55.

<sup>46</sup> *Op Cit*, para 56.

*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.”<sup>47</sup>*

It is clear that the CM did not envisage that the HET’s review would be able to constitute an investigation into historical deaths that complied with the requirements of Article 2 ECHR.

At its 997<sup>th</sup> meeting in June 2007, the CM adopted an Interim Resolution,<sup>48</sup> by which it resolved to continue to supervise the implementation of general measures designed to address:

- the lack of independence of police investigators investigating an incident from those implicated in the incident (general measure A); and
- defects in the police investigation (general measure B).

The CM invited the UK Government to continue to keep it informed about the progress made in the investigation of historical cases and, in particular, to provide information concerning concrete results obtained in this context by both the HET and the PONI.

The information which the UK Government provided in relation to the HET was recorded as follows:

*“[t]he United Kingdom authorities have indicated that, on 28 March 2003, the Chief Constable of the PSNI established the Serious Crimes Review Team, whose remit is “to review a number of unsolved major crimes, including murder and rape, where it is thought that new evidential leads may be developed”. If, as a result of this review, it appears that new evidence might come to light, reinvestigation of any of the present cases might follow.*

*“The PSNI, with the support of and funding from the Northern Ireland Office, has established a new unit of the SCRT, that is*

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<sup>47</sup> *Op Cit*, para 65.

<sup>48</sup> *Op Cit*, para 65.

*dedicated to re-examining all deaths attributable to the security situation in Northern Ireland between 1968 and the Good Friday Agreement in 1998 ('the troubles'). This Historical Enquiries Team (HET) has been designed to provide a thorough and independent reappraisal of unresolved cases, with the aim of identifying and exploring any evidential opportunities that exist. The HET is operationally independent and reports directly from its Head of Branch to the Chief Constable.*

*"The review process is designed to be exhaustive, and includes a re-examination of all documentation, any exhibits associated with the case and any intelligence on the case (both internal, partner agencies and open source). The intention is to take advantage of any developments in forensic science (e.g. fingerprint technology, DNA possibilities) to identify any evidential opportunities arising from witnesses (either people never seen or where the passage of time allows for changed loyalties etc), and to exploit any potential opportunities from intelligence that may have arisen since or which were not used at the time.*

*"If evidential opportunities are identified during the review process by the HET, the investigation of the death will proceed and where there is credible evidence available reports will be forwarded to the Public Prosecution Service with a view to prosecution. The investigation process will be undertaken 'in-house' by the HET, and will be focused on the evidential opportunities that the review process identifies.*

*"The first and primary objective of the HET is to provide a 'family centred' approach, seeking to identify and address issues that are unresolved from the families' perspectives. The HET's intention is to address, as far as possible, all the unresolved concerns that families raise. A bespoke Family Liaison Strategy has been designed, comprising a help desk, individual liaison officers for families and access for families to the two senior commanders in any case that is required. The principle that the HET adopts in*

*dealing with families, underwritten personally by the Chief Constable, is maximum permissible disclosure, in line with legal and ethical considerations.*

*“As regards the possible interplay between the HET and the Police Ombudsman with regard to historical cases, the HET have a very good working relationship with the Office of the Police Ombudsman (OPONI).<sup>49</sup> Since the inception of the unit, discussions have taken place on how issues that affect each agency, within individual or linked cases, can be progressed. A programme of minuted meetings has been instituted, at strategic (monthly), tactical (weekly) and operational (as required) levels. The HET have provided office space and IT support for an OPONI presence at the HET site. To preserve the independence of each party, discussions are continuing on how a parallel investigation process can best be managed in relevant cases. At present, the HET's view is that those cases that allegedly involve the actions of police officers exclusively will be reviewed by the Ombudsman alone, however the HET is committed to supporting them in any way possible that legislation allows. In those cases of parallel investigation (e.g. some police and some external collusion alleged) the meetings structure is designed to facilitate prompt exchange of relevant information and co-ordinated investigative response.”<sup>50</sup>*

The Secretariat published a further memorandum on 19 November 2008, which took stock of the progress achieved since CM/ResDH(2007)73.<sup>51</sup> The memorandum recorded that the UK Government had provided detailed information on the work carried out by the HET, including its objectives, processes and the rationale behind its establishment. That information was

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<sup>49</sup> The Police Ombudsman for Northern Ireland is more widely known as PONI but is referred to as OPONI in the memorandums published by the Secretariat to the CM.

<sup>50</sup> Interim Resolution CM/ResDH(2007)73, which can be found at annex I.

<sup>51</sup> Ministers' Deputies Information documents, CM/Inf/DH(2008)2 revised.

summarised over 25 paragraphs.<sup>52</sup> The Secretariat then set out its assessment as follows:

*“[t]he Secretariat recalls that the HET does not carry out Article 2 compliant investigations in historical cases. 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.*

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

*“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.*

*“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).*

*“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.*

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<sup>52</sup> Paragraphs 20-57 of the memorandum are set out in annex B to this report.

*“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 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>53</sup>*

*“Secondly, the HET has received 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.*

*“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.*

*“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.*

*“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..., 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.*

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<sup>53</sup> Citing the ECtHR’s finding in *Brecknell v UK*, 27 November 2007 at para 76 that: “the PSNI was institutionally distinct from its predecessor [RUC] even if, necessarily, it inherited officers and resources”.

*“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.”<sup>54</sup>*

On 19 March 2009, the CM adopted CM/ResDH(2009)44, whereby, in light of the information that had been provided, it decided to close its examination of the issue of the investigation of historical cases: *“as the HET has the structure and capacities to allow it to finalise its work”*.<sup>55</sup>

## **2.4 Events since March 2009**

In 2007, Professor Lundy requested and was granted access to the HET’s policies and procedures, in order to enable her to conduct an independent piece of research. There were no terms of reference agreed between Professor Lundy and the HET. Professor Lundy published her findings in 2009 in a paper entitled: *“Can the Past be Policed? Lessons from the Historical Enquiries Team Northern Ireland”*.<sup>56</sup> Her paper identified fundamental, institutional flaws in the HET process and raised concerns about governance; purpose; accountability; independence; leadership; policies; procedures; a lack of consistency; and equality of treatment. One particular concern was the inconsistency between the way in which deaths in which there was state involvement, and deaths in which there was no state involvement, had been reviewed.

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<sup>54</sup> Ministers’ Deputies Information documents CM/ResDH(2007)73 paragraphs 47-57.

<sup>55</sup> Interim Resolution Res DH(2005)20 which can be found at Annex I.

<sup>56</sup> *Can the Past be Policed? Lessons from the Historical Enquiries Team Northern Ireland*, Dr P Lundy, Journal of Law and Social Challenges, Vol. 11, 2009, paragraphs 109-156.

In its memorandum of 19 November 2008,<sup>57</sup> the Secretariat to the CM referred to Professor Lundy's research, which was not then in finalised form. It commented as follows:

*“[t]he work of the HET has been analysed, at its request, by an external academic, whose initial research has identified strengths and weaknesses in the HET approach, a useful diagnostic. A number of problems were identified in the working of the HET. These include that approximately 25% of the HET staff previously worked for the RUC, Special Branch or the Ministry of Defence. The continuing churn of investigators who originate in Scotland, Wales and England has impeded the effective operation of the HET, contributing to the delay in closing files. Problems are being experienced recruiting qualified investigators to replace those who leave. Policing Board members, from both communities, have questioned the allocation of funding to the HET, noting that in fact it has come from the PSNI budget rather than the additional funding originally indicated. Certain of the reports delivered to families have been poorly prepared: it is also noteworthy that it was the work of an NGO which prompted the recall of reviews of killings by soldiers in the period up to 1973. (In response to these comments, the United Kingdom authorities have noted that the report compiled by the external academic, Patricia Lundy, remains in draft form and has not yet been finalised. The work carried out by Professor Lundy was limited to the setting up of the HET and many of the issues identified in the report have been addressed. There are some areas where the HET accept that the report makes some useful points, and it is considering how these might be incorporated into its work. However, the small scope and narrow focus of the report mean that the UK authorities do not accept that the report on its own is an appropriate means by which to judge the work of the HET.)”*

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<sup>57</sup> Ministers' Deputies Information documents CM/Inf/DH(1008)2 revised, 19 November 2008.

It appears that the CM did not have sight of the finalised 2009 paper before deciding to close its examination of the HET.

In 2007, the HET publicly acknowledged at a meeting with solicitors and NGOs representing families, that its work and initial reports into deaths where there was state involvement had been inadequate.<sup>58</sup> It undertook to reassess the 157 state involvement cases that it had already reviewed; these were the cases to which Professor Lundy had referred in her initial research.

In 2012, Professor Lundy published two further papers: “*Assessment of HET Review Processes and Procedures in Royal Military Police Investigation Cases*”,<sup>59</sup> and: “*Prerequisites for Progress in Northern Ireland*”.<sup>60</sup>

## **2.5 The Historical Enquiries Team’s current structure**

The HET is accountable to the Chief Constable of the PSNI who, in turn reports on the effectiveness, efficiency and impartiality of the PSNI to the NIPB. The HET has a senior command team that is led by its Director. The Director and his senior team set the strategic direction. The senior team members individually lead the review teams and manage their allocated cases. The Chief Constable has delegated responsibility for HET’s resourcing and finance to the Assistant Chief Constable (ACC) - Crime Operations, who also has overall responsibility for any case that the HET refers to the PSNI for investigation.

This is a contentious issue; in February 2012, a joint submission was presented to the CM by NGOs suggesting a significant alteration to the structural relationship between the HET and the PSNI.<sup>61</sup> The NGOs stated that the HET no longer reports directly to the Chief Constable but to the ACC – Crime Operations. However, the most recent organisational structure for the PSNI,

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<sup>58</sup> Notes of a meeting between NGOs and the HET, 13 September 2007.

<sup>59</sup> *Assessment of HET Review Processes and Procedures in Royal Military Police Investigation Cases*, Dr P Lundy, (Research report (external)), 2012.

<sup>60</sup> *Prerequisites for Progress in Northern Ireland*, a research brief to the Commission of Security and Co-operation in Europe, US Helsinki Commission, Dr P Lundy, 2012.

<sup>61</sup> Joint submission (no. 376) by the Committee on the Administration of Justice and the Pat Finucane Centre in relation to the supervision of cases concerning the action of the security forces in Northern Ireland, February 2012, p 4.

which can be found at annex H, clearly shows that the line of accountability is between the Chief Constable and the Director of the HET.<sup>62</sup>

The HET is made up of operational review teams, and these are supported by an intelligence unit and a support structure to manage family contact, file management and general administration. Finance and human resources support are supplied by the PSNI with staff delegated to work at the HET.

The case review section which examines the deaths that occurred during 'the troubles' has 88 posts. All these posts are staffed by former police officers who have experience in criminal investigations.

The case review section is sub-divided into three units (red, purple and white), each led by a lead senior investigating officer (LSIO) who is responsible for ensuring that cases are dealt with appropriately. These three units are further divided into nine operational review teams (four red, four purple and one white). The red and white teams are referred to as 'independent' because they are staffed by individuals who have not previously worked for the RUC or the PSNI, whereas the remaining four purple teams are known as 'local' because they include individuals who have.

The HET entered into an agreement with NGOs and solicitors who represent families that the review of deaths in which there was state involvement should be allocated only to members of the 'independent' teams.<sup>63</sup>

## **2.6 How the Historical Enquiries Team works**

At the time of this inspection, the HET had re-opened 2,068 cases which related to the deaths of 2,682 people. They had completed 1,713 cases<sup>64</sup> which related to the deaths of 2,209 people. In order to establish the HET, the Northern Ireland Office made £34m available to fund the project. This

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<sup>62</sup> Annex H: PSNI organisation structure.

<sup>63</sup> *Briefing Paper – Historical Enquiries Team*, Director of the HET Dave Cox, (internal), July 2012.

<sup>64</sup> There is some dispute around the definition of completed cases. An NGO has recently raised a concern that the HET are counting cases as complete despite not answering the specific questions from families when they receive their RSR. See section 4.7 review summary reports, page 72.

was ring-fenced funding that was separate from the main police grant and which was initially apportioned over a six-year period until 2010/2011. Funding was later provided by the DoJ (NI).

The HET considers its cases in five stages, known as the CARIR process:<sup>65</sup>

1. **Collection**
2. **Assessment**
3. **Review**
4. **Investigation**
5. **Resolution**

The first task of the HET was the collection of all relevant material from across the force area. In addition, in many of the earlier cases, material was recovered from 'open sources'<sup>66</sup> or other agencies, such as the Public Records Office for Northern Ireland (PRONI) and the Public Prosecution Service (PPS). This took a dedicated team over three years to complete, although work on cases started in the meantime.

The collection phase was a success as the HET claims that in 98% of all cases concerning deaths related to 'the troubles', the HET found some material which was catalogued and sealed in boxes. This is a major achievement and one that is of central importance to the HET's on-going work.

When a case is scheduled for review, it is allocated to the most appropriate team at a Review and Allocation Panel meeting. A letter is sent to the identified next-of-kin of the deceased advising them of the HET review. The family is provided with a HET contact number and given the opportunity to engage in the process.

If a family wishes to engage (as is the position in approximately 70 percent of cases), the lead senior investigating officer (LSIO) or another member of the team meets the family members to explain the process. Families are asked

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<sup>65</sup> *HET Operational Guide*, paragraph 3.0.

<sup>66</sup> 'Open source' material is information that is available to the general public free of charge.

whether there are any particular questions that they would like the HET report to address. Some families choose to be represented by a solicitor or NGO who, generally, are far more intrusive, probing the findings of the HET reports. NGOs say that the families they represent are treated differently than those who are unrepresented.

In cases where the family of the deceased does not engage with the process, the case is referred to the Non-engagement Assessment Team (NEAT) for review. In every case, a senior investigating officer (SIO) review report is produced. However, generally, in cases where the family of the deceased engages with the HET, a far more detailed RSR is also produced. Both are quality assured and checked for factual accuracy.

At the time of our inspection, the HET endeavoured to complete 40 cases per month.<sup>67</sup>

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<sup>67</sup> In its latest business case, the HET stated that it now works on the basis of completing 30 cases per calendar month.

### 3 METHODOLOGY

The detailed phases of our inspection are set out in annex C.

The review team which conducted this inspection included staff with experience of major crime and homicide investigations; the review of historical cases; and the management of intelligence. The team also used staff with previous knowledge of inspections in Northern Ireland.

We consulted widely. This included interviewing 13 families of victims - some in Belfast and others in Derry-Londonderry. We adopted a sensitive approach to the selection of the families and allowed the NGOs, solicitors and the HET to identify the ones we interviewed. They represented a cross section of the very distinct communities that exist across Northern Ireland. Some families were extremely satisfied with their engagement with the HET process and others less so.

In total, we interviewed over 180 people and visited 15 criminal justice agencies, five NGOs, three solicitors and 25 teams in the HET. We have set out in annexes E and F the individuals and agencies with whom we consulted during our inspection.

We examined 31 cases. The majority of the cases we examined were from the 157 state involvement deaths that occurred between 1970 and 1973. The cases we examined were predominantly deaths that occurred at the hands of the state. However, compared to the total number of deaths that occurred during 'the troubles', this only represents a small number.

The examination involved reading numerous RSRs, examining the hard copy material contained within the folders,<sup>68</sup> assessing the electronic material stored on the 'G' drive,<sup>69</sup> and observing a parliamentary debate.<sup>70</sup>

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<sup>68</sup> The HET use a case management system whereby, once a case has been opened and allocated for review, the relevant original hard copy material in each case is collated in a folder (document wallet).

<sup>69</sup> The HET also uses a computerised system, commonly referred to as the 'G' drive, to store electronic material in each case.

<sup>70</sup> *Ministry of Defence response to the Historical Enquiries Team Report on the death of Mr William McGreanery*, (Mark Durkan, SDLP, Foyle), Westminster Hall, House of Commons, April 2013.

Our inspection focused on the HET's policies and procedures, and, although not exclusively, on the question of whether deaths in which there had been state involvement, but no police involvement, had been investigated or reviewed according to the correct procedures and standards. Of specific interest were the cases which Professor Lundy had referred to as RMP cases, that is, cases involving the British Army between 1970 and 1973. We compared the approach that the HET had taken in those cases of state involvement in which families had been represented, either by an NGO or a solicitor, with its approach in those cases in which the families had been unrepresented.

The evidence collection phase was conducted between November 2012 and May 2013.

We recognise the inconvenience that any inspection process can cause and we are grateful for the cooperation and support that we were given by so many people.

## 4 FINDINGS

### 4.1 General considerations

#### 4.1.1 Clarity of the Historical Enquiries Team's role and purpose

We expect an organisation, such as the HET, to have terms of reference which clearly set out the parameters of its operational activity. Whilst the HET does have established objectives, we consider that they do not provide the clarity that terms of reference would give. In addition, the HET does not have coherent or prescriptive policies and procedures to ensure consistency across the whole unit. This causes confusion, both internally and externally, about whether the HET is a body which investigates crime; reviews previously investigated cases; conducts 'cold case' reviews<sup>71</sup>; or gathers information for families. It is also not clearly set out anywhere how the HET should achieve its stated aim of "*bringing a measure of resolution*" to families.

#### 4.1.2 Review versus investigation

There is a fine line between investigating and reviewing cases but, in terms of policing, an important distinction has to be drawn.

A body charged with investigation should conduct a systematic and formal inquiry to discover and examine the facts, in order to establish the truth. A body charged with review, however, usually assesses a previous investigation and critically appraises the material already in existence. *The Association of Chief Police Officers (ACPO) Murder Investigation Manual (MIM) 2006* states:

*"[t]he object of any review is to constructively evaluate the conduct of an investigation to ensure:*

- *it conforms to nationally approved standards;*

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<sup>71</sup> A cold case is a crime or an accident that has not yet been solved to the full and is not the subject of a recent criminal investigation, but for which new information could emerge from new witness testimony, re-examined archives, retained material evidence, as well as fresh activities of the suspect. New technical methods developed after the case can be used on the surviving evidence to reanalyse the causes, often with conclusive results.

- *it is thorough;*
- *it has been conducted with integrity and objectivity;*
- *that no investigative opportunities have been overlooked;*  
*and*
- *that good practice is identified.*<sup>72</sup>

Prior to 2010, it was general practice that the HET would review cases and, if any evidential opportunities existed, investigate them. This is consistent with the CM's observation in 2007 that investigations would be conducted '*in-house*'. In 2010, there was a change in this regard. A catalyst for this change was the recommendation by PONI that the PSNI should re-investigate a series of murders,<sup>73</sup> attempted murders and other serious crime which the PONI had code-named Operation Ballast. The then Chief Constable of the PSNI referred the cases to the HET, which set up a Complex Enquiry Team to deal with them.

It is to the HET's credit that it was able to make progress on the cases, which it renamed Operation Stafford. It was a complex investigation and, as it developed, it used a significant amount of the HET's resources. Eventually, according to the LSIO in charge of the operation, the HET was not able properly to resource the cases alongside its other work and a decision was made by the Chief Constable to transfer the operation to the PSNI. By that stage, a substantial number of suspects had already been charged and the scale of the operation was such that it took three months to transfer it to the PSNI.

In addition, the Chief Constable decided that all cases with potential evidential opportunities would be transferred to the PSNI for further investigation instead of being investigated '*in-house*' by the HET. We found that there was a range of different views in the HET about what this meant in

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<sup>72</sup> ACPO Murder Investigation Manual, 2006.

<sup>73</sup> Operation Ballast: investigation into the circumstances surrounding the murder of Raymond McCord Jr. Police Ombudsman for Northern Ireland, January 2012.

practice which, as will be seen later in this report, resulted in some ambiguity about what cases should be transferred, when and how.<sup>74</sup>

#### **4.1.3 Measure of resolution**

In addition to finding a lack of clarity around the role and purpose of the HET in relation to its examination of all deaths attributable to the security situation that occurred in Northern Ireland between 1968 and the Belfast Agreement in 1998, we found that the objective of bringing a “*measure of resolution*”<sup>75</sup> to those affected by such deaths lacked definition and clarity about how it should be achieved.

That is not to say that families did not value the work of the HET; we were told many did and some expressed their satisfaction to us. We are aware that the work of the HET has been instrumental in obtaining at least five apologies for families in relation to the deaths of family members from the Ministry of Defence (MOD).

NGOs and solicitors representing families who were engaging or had engaged with the HET, told us that the absence of published terms of reference and policy meant that families did not always understand what they should expect from the HET and, just as importantly, what they should not expect, either in relation to Article 2 ECHR or other relevant areas of the law and procedure. This brings into question whether the families were sufficiently informed to be truly and fully involved in the way the HET examined their respective cases.

#### **4.1.4 Interaction with other agencies**

The absence of terms of reference and policy also has implications for the way the HET interacts with a wide range of other bodies that have an obligation in relation to historical cases. The following bodies have statutory responsibilities that, in some way, connect with the work of the HET:

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<sup>74</sup> Cross reference to section 4.8.6 of this report.

<sup>75</sup> *HET Operational Guide - 'A document that provides an overview of the work of the HET'*, Historical Enquiries Team, (internal), (undated).

1. the PSNI Crime Operations Department (C2) has responsibility for cases referred to it by the HET where potential investigative opportunities exist;
2. the PONI investigates complaints against the PSNI and other bodies whose staff have police powers in Northern Ireland;
3. the Coroner's Service has responsibility for all coronial functions;
4. the PPS has prosecutorial responsibility;
5. the Criminal Cases Review Commission is an independent body set up to investigate possible miscarriages of justice in England, Wales and Northern Ireland; and
6. the Criminal Justice Inspectorate for Northern Ireland is an independent statutory inspectorate with responsibility for inspecting all aspects of the criminal justice system in Northern Ireland apart from the judiciary.

It is incumbent on the HET publicly to clarify its procedures so that the contact between agencies can be as effective and efficient as possible.

We consider that everyone has the right to know exactly what the HET's role and purpose are: families have a right to know what they can expect from the HET, while other agencies need to be able to gauge the potential effect of the HET's work on their own areas of responsibility. Due to the years of not knowing and the absence of any terms of reference, this position remains confused internally with the HET staff, and externally with interested parties and families.

**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.**

## **4.2 Accountability**

The HET is a body in which there is considerable public interest and, as such, we expected to find evidence of it being open and transparent with the

public about what it has done and how it has done it. Indeed, one of its explicit objectives is to work in a way that “*commands the confidence of the wider community*”.<sup>76</sup>

#### **4.2.1 Communication strategy**

Our inspection did not find any evidence of any communication strategy aimed at letting the public know what the HET is doing. There was no public reporting mechanism, for example a published annual report, and no public scrutiny of what it was doing. This paucity of public accountability was further exacerbated by the absence of a HET specific complaints procedure - something that is dealt with later in this section.<sup>77</sup> The only accountability structure is the reporting line from the Director of the HET to the Chief Constable.

We believe a lack of scrutiny has been an important contributing factor to many of the imperfections in the HET process that we found during our inspection. We are clear that, if the HET had responded positively to Professor Lundy’s report in 2009, many of the concerns set out in this report would already have been addressed satisfactorily.

If the HET is to achieve its objectives, it needs families and interested parties to continue to engage. When families engage with the HET so many years after the death of their family members, they experience a sudden rise in their expectation of an outcome that might satisfy their hopes. All the families we spoke to talked of their hopes and expectations, and of the importance of trust, confidence and justice when dealing with the legacy of ‘the troubles’. They were naturally disappointed if their expectations were not met, but were equally realistic about what could practically be achieved so long after a death. In particular, they understood that the likelihood of securing a conviction was remote and they were aware that, under the terms of the Belfast Agreement, anyone convicted of a killing during ‘the troubles’ was likely to be released within two years. Hence, many realised that their best hope was an acknowledgment that mistakes had been made.

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<sup>76</sup> *Op.Cit.*

<sup>77</sup> See section 4.2.2 Complaints, page 60.

In any truth recovery process, what is anticipated by families is varied and best depicted as a continuum from full acknowledgement as a remedy in itself, to holding people to account through criminal prosecution.

Many of the completed RSRs given to families acknowledge mistakes and provide some comfort. However, we were also told of a level of mistrust in the way that the HET is carrying out its work. Some of this mistrust can be put down to a perception of what is or is not happening, and we believe this could be overcome by better communication and public accountability arrangements. We also found that a large part of the mistrust was founded on things not being done correctly and we believe that, in order to restore this trust, the HET and the PSNI need publicly to acknowledge where things have not been done correctly.

The HET needs to be open and transparent to the public about its work. There should also be an improvement in the way the public are able to play their part in holding it to account.

**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.**

#### **4.2.2 Complaints**

During our inspection, families and NGOs expressed their concern that there was no clearly signposted way of complaining about things that they felt were not being done correctly or to the required standards by the HET. We found that they were right; the HET does not have a formal complaints procedure. We could not find any guidance to help people complain about the HET.

The HET Director has stated, however, that “[a]ny family, if dissatisfied with the HET process, can ultimately meet with us personally to discuss their case”.<sup>78</sup>

The lack of guidance has caused confusion amongst families and NGOs. We also found widespread confusion within the HET about how staff should deal with complaints made by the public.

A family told us that when they tried to make a complaint against a specific individual, the family members were referred back to the very person with whom they were unhappy and told to “work it out”.

How a complaint against a member of the HET is managed may be dependent on the employment status of the HET member concerned.

All HET staff are financed by the PSNI, but there are different terms of employment. Thirteen percent of the HET’s staff are PSNI employees. They fill support roles and any complaint made against them would be dealt with in accordance with the PSNI conduct regulations for support staff (via the Human Resources (HR) department).

The majority of the HET are employed as agency staff and any internal employment issues, such as grievances, should be referred to the relevant recruitment agency. Complaints from members of the public involving agency staff working within the PSNI have previously been dealt with through the PSNI HR department but the HET had to seek the permission of the recruitment agency before doing so.

We met several families who engaged with the HET and their experience has been a positive one. However, others told us that they were less satisfied and their grievances tended to be directed towards one or more of the following:

1. the actions of individual members of the HET staff;
2. the length of time taken to review the family’s case;

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<sup>78</sup> Letter dated 30 September 2008 from the Director of the HET, David Cox, to Professor Lundy concerning: ‘study report - Can the Past be Policed’.

3. disappointment with the content of the final RSR presented to the family;
4. the methods employed by the HET staff; or
5. a failure to answer specific questions raised by the family at the first meeting when the HET delivered the completed RSR.

An example of such a grievance related to a family who has yet to receive a final report for a case that the HET started in 2006. This is not unique, although the instances of delayed cases are relatively low in comparison to those completed in good time.

We consider it of grave concern that the HET does not have a specific complaints policy. This makes it very difficult for a dissatisfied family, or anyone else, to pursue a complaint. If the public is to have confidence in the HET, the existence of an accessible, robust and transparent complaints process is crucial.<sup>79</sup>

**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.**

### **4.3 Systems, policies and processes**

The HET has produced an *Operational Guide*. The copy provided to us was undated but appeared, from its content, to have been issued in 2012. It is subtitled: *A document that provides an overview of the work of the HET*.

The document explains the component parts of the HET, but it does not provide clear and unequivocal guidance on policies and processes which should be adopted in key areas such as the records of interview; the storage of material; and the maintenance of policy files.<sup>80</sup>

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<sup>79</sup> The issue of agency staff accountability has been previously raised by the Northern Ireland Audit Office in its 2012 report: *The Police Service of Northern Ireland: Use of Agency Staff*, Part 3, page 26, paragraph 3.16. A full copy of the report can be downloaded at [www.niauditoffice.gov.uk](http://www.niauditoffice.gov.uk).

<sup>80</sup> The issues around interviews under caution; verification of illness; storage of material; and maintenance of policy files are explained further in sections 4.8.3 Interviews under caution; 4.8.5 Verification of illness; and in section 5.2 Effectiveness, of this report.

We consider that this has resulted in an inconsistent approach in these areas. This was exemplified by a remark made to us by a member of staff that the HET operated in “*little silos*” and that he did not know how other teams worked.

The negative effect of working in silos was illustrated to us by a number of families and an NGO who raised the issue of family access to public documents. Until recently, it was common practice for HET investigators to ask families to apply to the PRONI for documentation relating to their cases.

We were told that families were stopped from obtaining records about the death of their family member by the PRONI. Whilst the ultimate responsibility for this decision rested with the PRONI, it was taken only after representation from the PSNI following the consideration of a Freedom of Information application originating from the Courts services and held by the PRONI. The HET was fully aware of this decision.

Unfortunately, this change in approach was not communicated to the HET’s staff who were unaware of the development and continued to ask families to apply for the documentation, only for the applications to be refused by the PRONI.

On one occasion, an SIO met a family and recommended that they should obtain the relevant documents from the PRONI. The family informed the SIO that they had tried to do this but had been denied access to the material. In this instance, the failure to notify the HET’s staff and the lack of a simple internal process to inform them of a change of approach led to frustration amongst families and staff at the PRONI. In addition, it placed the HET’s staff in the embarrassing position of having to apologise for the confusion and, ultimately, it undermined the HET’s credibility.

The relevant material recovered in each case is kept at the central PSNI store. When a case is brought forward for review, all the material is transferred from PSNI to the HET. The HET uses a system whereby a folder<sup>81</sup> is used to collate all material, including records of policy decisions, collected throughout the examination of the case. We looked at a number of

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<sup>81</sup> These are document wallets that the HET commonly refer to as ‘blue folders’.

these folders and found that there was no consistency in what they contained, or in how material was stored in them and indexed. The folders were variously described by the HET staff as “a mess” and “of varying standards”. One SIO said he was not told what to put in the folders or even where they should store interview notes.

In addition to this manual system, the HET has a computerised case management system, commonly referred to as the ‘G’ drive; however this cannot house the original hard copies of documents. An SIO interviewed said there was no policy around what to keep on the ‘G’ drive.

We found that the HET had insufficient systems and processes for the cataloguing and storage of relevant material.

We also found that there was no standard format for recording policy decisions and that many of these decisions were not recorded at all. We were told that policy files, which are routine in murder investigations, were thought unnecessary and that SIOs adopted their own approaches to recording the progress of their enquiries and the decisions taken. One individual commented that there was a “*tremendous lack of appreciation*” of this issue amongst HET staff.

A running log of decisions should be kept in case folders but these were not routinely maintained.

We consider that the accurate recording of the decision-making process and of the decisions themselves is a fundamental requirement to be overseen by the person in charge of each case. A failure to do this is poor practice and denies the HET the information it requires to support its decision-making process in any subsequent inspection.

**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.**

#### **4.4 Staff induction**

One area that showed good performance was the work of the disclosure unit which deals with disclosure under Criminal Procedure and Investigations Act 1996 (CPIA). The unit's staff recognised that investigators had been drawn from various regions with different working practices and realised that a consistent and coherent approach had to be applied to the unit's line of work. They also saw that changes to an RSR should be 'tracked' to show why and when they were made. The good work of this unit sets an example of the standards that should be applied across all areas of operation.

We found that the issue of inconsistency in the systems and processes of the HET was exacerbated by personnel issues.

Independent staff account for approximately 50 percent of the HET's workforce. Whilst this helps promote independence, difficulties arise if individuals use different working practices. In theory, because of the existence of nationally accepted standards in serious crime investigation and review, working practices should be reasonably consistent within and across forces. The reality, however, was not that simple, as different working practices were evident.

This situation was compounded by the presence of officers whose knowledge was based upon their previous police experience, which, in the case of some of the retired police officers, could be several years before they joined the HET. Each LSIO is an experienced investigator, having previously operated at a senior detective level; however, they were left to devise their own approaches to undertaking reviews. This resulted in a lack of consistency and effectiveness.

The existence of different working practices amongst staff, based on the experience, knowledge and skills of each, emphasises the need for

investigators to adhere to a clear set of policies and procedures. Arguably, such variability in approach could have been mitigated during the induction process for new staff joining the HET. Staff criticised the induction process for new recruits, saying that it was a case of “*get on with it*”. We found that induction was left to each LSIO to do and that there was an expectation that new recruits would conduct their own research before starting. New recruits were provided with induction packs, but there was evidence that they were rarely used.

Despite its restructuring and the decision to refer cases to the PSNI for investigation, the HET remains an organisation in which inconsistency of approach across its major functions and in the way it allows its staff to operate is apparent. This undermines the confidence that each individual may have regarding the HET’s ability to treat each case that it considers in the same way and with the same thoroughness.

We consider that this is a serious failure and one which needs to be addressed urgently. The presence of an induction process for new staff is critical to the success of the HET if it is to reach and maintain the necessary high standards in its work, and to ensure the smooth integration of new employees into the work place.

**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.**

## **4.5 Performance management**

At the time of our inspection, the HET endeavoured to complete 40 cases per month. This is a substantial undertaking and there is a risk to the quality of work carried out in each case. Concern about the quality of the HET reports was particularly prevalent in the early days and especially in relation to the cases with state involvement. On 13 September 2007, the HET met solicitors and NGOs when it is claimed that the HET acknowledged that

some of their review reports had been below standard and that they had '*dropped the ball*'.<sup>82</sup>

According to information contained in a briefing paper submitted by the Director of the HET in July 2012 to the Chief Constable of the PSNI, the HET had closed 1,625 cases since it began in 2006.<sup>83</sup> A breakdown of the closed cases is as follows:

- year ending 2009 – 490 cases;
- year ending 2010 – 493 cases;
- year ending 2011 – 470 cases;
- 1 January 2011 until 19 July 2012 – 172 cases.

The HET's predicted return of 245 closed cases in 2011/2012 is the lowest to date and a significant reduction on previous years. The Director has acknowledged that it will be necessary to reinstate previous levels of performance if the work is to be completed in a realistic time frame.<sup>84</sup>

According to the HET, the most recent assessment of the outstanding work will require further funding to take the project to April 2015. In addition, the HET has now reassessed the number of reviews it is capable of completing a month and states that the previous figure of 40 cases is likely to reduce to 30 cases.

We feel this is an ambitious objective.

We are concerned that, given the complexity of some of the cases with which the HET is presented, even a target of completing 30 reviews a month may not be achieved without sacrificing quality. We did not find any rationale on how the HET arrived at either figure. If, as anticipated, the later cases contain more material to review, achieving this target becomes significantly harder. Furthermore, a good quality review requires time and it would seem

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<sup>82</sup> Notes of meeting between NGOs and the HET, 13 September 2007.

<sup>83</sup> The most recent data provided by the HET as of April 2013 indicate that 2,068 cases had been opened which related to the deaths of 2,682 people. The HET had completed 1,713 cases which related to the deaths of 2,209 people.

<sup>84</sup> Briefing Paper – Historical Enquiries Team, July 2012.

sensible for there to be an independent assessment of what it is possible to achieve within the cost and timescales currently agreed.

**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.**

## **4.6 Quality assurance**

### **4.6.1 Internal and external review processes**

This is the first time that the HET has been inspected and we could not find any evidence of any quality assurance or review processes.

As a publicly funded body, operating in an area of significant public interest, we consider it is necessary for the HET to be subject to appropriate levels of oversight and inspection. This should be aligned to the recommendation set out in section 4.2 for an annual report of the HET's performance.

**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.**

### **4.6.2 Review of Intelligence product**

The management of intelligence is a fundamental element of the HET process and we have examined the HET system closely.

There may be sensitive and non-sensitive intelligence available to reviewing officers that adds context to events surrounding a death. For example, intelligence may exist about: the individual who died; the circumstances leading up to the death; the identity of the killer; or why the death occurred.

Police intelligence contains information of a very sensitive nature and is held on confidential systems. There are strict rules as to its handling, which are designed to make sure that it is used appropriately and proportionately so that the lives of the people it identifies are not put in danger.<sup>85</sup>

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<sup>85</sup> *Osman v UK* (2000) 29 EHRR 245 and *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50.

The HET accesses the majority of its intelligence through the PSNI intelligence branch (C3). A MoU has been agreed between the HET and C3 concerning the exchange of intelligence material held by the PSNI. The HET has to access, store and handle intelligence in accordance with national protocols. Only staff with relevant security clearance can access intelligence.

The HET has a dedicated unit of 17 staff (of whom 15 are former employees of the RUC or the PSNI) which deals with all intelligence received from C3 intelligence branch as well as from other agencies, such as the Ministry of Defence (MOD), the Security Service and forensic service providers. Once a case is listed for review, the HET intelligence unit is notified and a request is made to recover all material.<sup>86</sup>

Two members of the HET intelligence unit have unfettered access to all material held at C3 intelligence branch. They are responsible for collating and delivering all the relevant intelligence held by the PSNI to the HET.

This material is received at the HET intelligence unit and scanned onto a secure computer system and made available to an appropriately vetted LSIO, who has responsibility for the particular case.

We examined closely the way in which the HET handled intelligence. We found that it was robust and auditable, with both paper and computer-based records of what had been accessed and by whom. Intelligence was made available to a LSIO or a SIO with the appropriate level of security vetting. Overall, the processes which we observed were operating to a high standard.

However, we are left with two concerns. The first is that the LSIO responsible for the intelligence unit works remotely, outside Northern Ireland. This leaves the day-to-day responsibility for managing staff and processes to the intelligence manager. The benefits of this arrangement are not clear to us and, in the context of the risks inherent in managing intelligence systems, we think this arrangement is worthy of review.

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<sup>86</sup> The request is made by the HET intelligence unit to the PSNI C3 intelligence branch.

The second is the fact that the HET's ability to demonstrate independence in the intelligence process is undermined by the involvement of former RUC and PSNI officers working for the HET in managing the information from the PSNI C3 intelligence branch. The HET believes that it is important to have officers both with the local knowledge necessary to make sure the intelligence is relevant to the individual cases and with an understanding of the PSNI systems.

We do not question the capability or integrity of the individuals who manage the HET intelligence process. We found that they are extremely professional in their approach. We can also see the benefits of having officers with local knowledge doing this work. However, the HET needs to do everything it can to make sure its independence is safeguarded.

Until 2008, an independent seconded police officer from outside Northern Ireland dip-sampled intelligence files received from C3. His role was to review what the HET staff based at the PSNI had extracted from the C3 intelligence files and assess whether they had extracted all relevant material.

If satisfied, the officer signed a certificate to the effect that the intelligence file had been examined and that all the relevant material had been correctly copied from the original intelligence logs. This process stopped in 2008 when the individual concerned left the HET.

We consider that re-instating that process would go a long way to safeguarding the independence of the intelligence process whilst also providing a measure of confidence for families that reviewing officers are undertaking their work on the basis of full access to all appropriate intelligence material.

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

#### **4.6.3 Satisfaction Surveys**

In an attempt to evaluate the satisfaction levels of families engaged by HET, the HET procured an independent consulting company to undertake a series

of surveys. Three surveys were conducted between February 2009 and August 2011.

Each survey identified high levels of satisfaction with the performance of the HET team. For example, in the August 2011 survey, 64 percent of families were found to be “*very satisfied*”. Only a small cohort of the families surveyed expressed dissatisfaction with the HET. In the first survey in 2009, 5 percent were dissatisfied, which reduced to 3 percent in the most recent survey in 2011.

We found that the methodology used by the consulting company was sound and well structured. All surveys were conducted in accordance with the code of conduct of the Market Research Society, with the anonymity of respondents preserved.

However, we have some concerns about how the families are selected. As explained below, we have found that not all the families who receive a final RSR are selected to participate in the satisfaction survey. In addition, the selection process also excludes those who did not wish to engage with the HET; those who disengaged along the way; and those who are still awaiting a report.

A more balanced picture might be produced by including all who have been contacted by the HET. This would help to evaluate the different stages of the process, and could highlight any issues which, hitherto, have been missed.

A further concern relates to the discrepancy between the numbers of cases that the HET has completed and the numbers referred to the market research company. In 2009/10, the HET completed 493 RSRs, but only referred 164 cases to the market research company, and, in 2010/11, they completed 470 RSRs, yet only referred 231. The reason for this remains unclear and is worthy of further investigation.

We consider that the HET needs to see these surveys as a way of identifying opportunities to improve. Restricting those families that are surveyed inhibits the ability to obtain a balanced picture and as a consequence reduces HETs ability to learn from the process.

**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.**

## **4.7 Review summary reports**

There is inconsistency in how cases are dealt with when families engage with the HET and when it does not. A RSR is generated in cases when there is family engagement. A less detailed SIO report is generated in cases when there is no such engagement, apart from cases reviewed by the red teams.<sup>87</sup> The benefits gained from the HET generating two different reports remains unclear.

Some families or their representatives received a number of different versions of a RSR. The HET denies that it ever distributes draft copies of a report, preferring to call them versions; however, we found a reference in one case to a final RSR having been delivered to an NGO in draft format.

Whether drafts or versions, the HET seems to have little control over the subsequent distribution and circulation of different editions of a RSR. A draft report might be altered to make it more accurate, or to remove an error, not simply to cover up wrongdoing. It is vital that the HET is able to justify any changes made to a RSR.

By way of example, Professor Lundy raised concerns about changes to one report, saying: *"[i]t is not clear how in one report the wording of an account given by a soldier to the HET, about his direct involvement in and recollection of a fatal shooting changed in a redrafted report."*<sup>88</sup>

We are satisfied that, in this particular case, the report was changed at the insistence of the family concerned. This view is echoed by the NGO that represents the family. But Professor Lundy's concerns are understandable and could have been avoided by more rigid control of the different versions of a report.

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<sup>87</sup> The red team produce an RSR for each case that is reviewed whether the family concerned engage in the process or not.

<sup>88</sup> *Prerequisites for Progress in Northern Ireland*, a research brief to the Commission of Security and Co-operation in Europe, US Helsinki Commission, Dr P Lundy, 2012.

We understand that a report should not be altered once released, and that any issues arising from it should be dealt with in a supplemental report. In practice, however, that does not seem to be the case.

The problem is exacerbated by the fact that the HET does not keep all versions of a particular report. One member of staff, who is involved in the editorial process, said that they do not necessarily retain drafts, which seemed to be corroborated upon examination of the case folders.

During the course of the fieldwork, an NGO provided information that a RSR was shown to the MOD in a state involvement case.<sup>89</sup> We found this to be correct. This was contrary to the express wishes of the family and breached an understanding that the HET had reached with the family for this not to happen. However, we did not find any evidence that draft reports were routinely provided to the PSNI, the military or former RUC officers, or any of their representatives. Indeed, there were complaints from the solicitors, who represent the soldiers in state involvement cases, that they were unsighted and unable to prepare an immediate response when one was required.

Recently, an NGO has stated that the HET is completing cases and delivering RSRs to families without engaging with them fully or answering the specific questions which the families wanted addressing in the report.<sup>90</sup> This seems to go against the undertaking outlined in the draft SOP from 2005 that the HET was said to have adopted when they first engaged with families<sup>91</sup> and reiterated in the most recent 2012 *Operational Guide*.<sup>92</sup> It is recognised that some questions simply cannot be answered.<sup>93</sup>

We are of the view that this practice damages the relationship between the HET and the families and should be reviewed immediately. It needs to be more transparent around the definition of completed cases.

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<sup>89</sup> Series of letters exchanged between CAJ and HET between October 2012 and February 2013.

<sup>90</sup> Information from Relatives for Justice 19 March 2013.

<sup>91</sup> *HET (draft) Standard Operating Procedures 2005*, paragraph 1.6.

<sup>92</sup> *HET Operational Guide*, paragraph 3.13.

<sup>93</sup> There are a variety of reasons why some questions cannot be answered including: the answers are simply not known; security reasons and the HET staff having to avoid expressing opinion.

Furthermore, the failure to maintain a robust management and control of draft versions of RSRs leaves the HET vulnerable, as there is no auditing process to any alterations made to a report as it evolves prior to delivery to the family.

**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.**

## **4.8 Specific considerations**

### **4.8.1 State involvement cases**

The most contentious accusations of inconsistency arise where there is a perception by some NGOs, families and solicitors that cases in which there was state involvement in the death are examined less rigorously than cases where there is no state involvement. This was certainly the position according to the research conducted by Professor Lundy. We have considered this issue both in terms of the policy that the HET adopts when considering the legal position in such cases, and in terms of the practice that the HET adopts when undertaking its reviews.

### **4.8.2 Legal position**

We have been provided with the latest copy of the HET's *Operational Guide* which we believe was published in 2012. We have also obtained an SOP from 2005. However, we obtained this from Professor Lundy and not from the HET. It is marked as a draft. Therefore, we cannot say with any certainty that it has been used during the period since the HET became operational. It is unclear who the HET consulted with during the process of developing either the 2005 SOP or the 2012 *Operational Guide*.

During our inspection, we found that the HET treats deaths with state involvement differently than those where there is no state involvement.

The HET *Operational Guide* states:

*“HET maintains it is not appropriate to compare the review processes in military cases with reviews of murders committed by terrorists. Soldiers were deployed on the streets of Northern*

*Ireland in an official and lawful capacity, bound by the laws of the UK and military Standard Operating Procedures of that time.*<sup>94</sup>

This view was reinforced in March 2012 by the HET's Director in a written response to Professor Lundy's research findings.

*"Attempts to correlate the reviews of military cases with reviews of murders committed by terrorists are ludicrous. HET has yet to find a case in which paramilitary killers provided their identities to investigators, their weapons for inspection, co-operated with investigators, provided statements and depositions for investigations or inquests or are amenable to engaging in a HET review process decades later."*<sup>95</sup>

The views expressed in the HET's *Operational Guide* in respect of state involvement cases are very similar to the views expressed in a statement made approximately 40 years ago by Her Majesty's Attorney General for Northern Ireland, who considered the actions of a soldier who shot and killed a man in September 1971. In assessing the soldier's culpability, the Attorney General stated:

*"[s]oldier A, whether he acted wrongly or not, was at all times acting in the course of his duty and I cannot see how the malice, express or implied, necessary to constitute murder could be applied to his conduct."*<sup>96</sup>

When the HET reviewed this particular case in 2010, it reproduced the Attorney General's statement in the RSR as an explanation for why they had not re-interviewed the soldier under caution.<sup>97</sup>

We have a number of observations to make about the HET's policy position.

Murder is defined as follows:

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<sup>94</sup> *HET Operational Guide*, paragraph 6.19.

<sup>95</sup> HET response to NIPB (March 2012) re Dr Lundy's research.

<sup>96</sup> Copy of advice from Her Majesty's Attorney General for Northern Ireland to the Chief Crown Solicitor, dated 3 December 1971.

<sup>97</sup> A HET Review Summary Report 2010. The report can be downloaded at <http://www.patfinucanecentre.org/cases/mcgreanery.html>

*“[s]ubject to three exceptions, the crime of murder is committed where a person of sound mind and discretion unlawfully kills any reasonable creature in being and under the Queen’s Peace with intent to kill or cause grievous bodily harm.”<sup>98</sup>*

By reference to this definition, a soldier who kills a person with the necessary intent to kill or cause grievous bodily harm, and who does not fall within any of the exceptions referred to in the definition (the most obviously applicable exception being self-defence) will, be guilty of murder.

It is clear that, when a soldier fires his weapon at a person, he is *“almost certain to cause serious injury or death”<sup>99</sup>* and the Judicial Committee of the House of Lords has recognised that there is *“no scope for graduated force”*. It follows, therefore, that a soldier who intentionally fires his weapon in these circumstances may in principle be guilty of murder.

The availability and scope of a defence of self-defence in such circumstances was considered by the Judicial Committee of the House of Lords. Their Lordships considered the following question:

*“Where a soldier or police officer in the course of his duty kills a person by firing a shot with the intention of killing or seriously wounding that person and the firing is in self-defence or in defence of another person, or in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large, but constitutes force which is excessive and unreasonable in the circumstances, is he guilty of manslaughter and not murder?”<sup>100</sup>*

Their answer was as follows.

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<sup>98</sup> *Archbold; Criminal Pleading, Evidence and Practice 2013*. Para 19-1.

<sup>99</sup> *Attorney General for Northern Ireland's Reference (No. 1 of 1975) [1977] A.C.105*, per Lord Diplock.

<sup>100</sup> *R v Clegg [1995] 1 AC 482* at page 485.

*“On the facts stated, and assuming no other defence is available, the soldier or police officer will be guilty of murder, and not manslaughter.”<sup>101</sup>*

As far as we are aware, this correctly states the law in Northern Ireland today.

It is necessary here to deal with two other issues to avoid any confusion.

First, their Lordships in *R v Clegg* [1995] 1 AC 428 settled the question whether a soldier who killed a person could successfully mount a defence based on the argument that he was following orders. Their Lordships stated:

*“...the point at issue here is not whether [he] was entitled to be acquitted altogether, on the ground that he was acting in obedience to superior orders. There is no such general defence known to English law... As long ago as 1816 it was held in *Rex v Thomas* that a sentry who fired in the belief that it was his duty to do so had no defence to a charge of murder.”*

Secondly, the specific issue raised in the Attorney General’s comments concerns the absence of malice. Their Lordships cited with approval the remarks of the trial judge who considered this point. The judge stated:

*“[t]here is one obvious and striking difference between [him] and other persons found guilty of murder. The great majority of persons found guilty of murder, whether they are terrorist or domestic murders, kill from an evil and wicked motive. But when [he] set out on patrol on the night of 30 September 1990 he did so to assist in the maintenance of law and order and we have no doubt that as he commenced the patrol he had no intention of unlawfully killing or wounding anyone. However, he was suddenly faced with a car driving through an army checkpoint and, being armed with a high velocity rifle to enable him to combat the threat of terrorism, he decided to fire the fourth shot from his rifle in*

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<sup>101</sup> Op cit, page 500.

*circumstances which cannot be justified and the firing of his fourth shot was found to be unlawful.”*

The Judicial Committee of the House of Lords held, dismissing the appeal by the defendant, that it was settled law that where on a charge of murder a plea of self-defence failed because the force used was excessive and unreasonable, the offence was not reduced from murder to manslaughter. No distinction was to be made between the use of such force in self-defence, or in the prevention of crime or in arresting an offender, whether by a serving soldier, or a police officer acting in the course of his duty.

As a result of the decision of the highest court in Northern Ireland, we are satisfied that, to the extent that the Attorney General's quoted remarks in 1971 represented the law at the time, they certainly did not after 1995.

It follows that we have great difficulty if, as it appears, the HET differentiates between state and non-state deaths. It is clear to us that, at least since 1995 and the years before the creation of the HET, the law does not distinguish between soldiers, police officers or other agents of the state acting in the course of their duty and any other person who causes the death of a third party.

It follows that the HET's views expressed to Professor Lundy in March 2012 are inappropriate at best, and simply wrong at worst.

This situation gives rise to a broader, underlying concern. The HET became operational in 2006 and put together its SOP. The copy obtained by HMIC was provided by Professor Lundy and is marked as a draft so we cannot say with any certainty that this document was used operationally. It appears that this SOP was replaced by an *Operational Guide* some time after.

However, the latest *Operational Guide* provided by the HET states that it is not appropriate to compare state involvement cases (referred in the *Operational Guide* as “*military cases*”) and those without any state involvement. It appears as though the HET's guidance in regard to cases with state involvement was adopted without any reference to what was, by then, established case law. It concerns us greatly that such an important organisation in Northern Ireland should adopt an approach to such a key

area of its work based upon a view of the law that, even if it were ever correct, was manifestly and provably not correct by the time such policy came to be drafted.

This substantial legal error was perpetuated by the fact that the HET did not seem to seek the views of others regarding the accuracy of its *Operational Guide*. At the very least, we would have expected the HET to seek the views of the DPP for Northern Ireland and Her Majesty's Attorney General for Northern Ireland, given that they were then responsible for prosecution policy.

We consider the HET's approach to be entirely wrong.

We have arrived at two conclusions:

1. it is clear that the HET has adopted a different approach between cases that have state involvement and those that do not; and
2. the approach that the HET has adopted in state involvement cases is susceptible of challenge, as it appears to be based on a misunderstanding of the law.

**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.**

The HET's approach with regard to state involvement cases influences the practical steps that it takes to consider these deaths. We set out below particular aspects of its approach that concern us.

#### **4.8.3 Interviews under caution**

Under the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE(NI)), if a person is suspected of involvement in a criminal offence, an interview must be carried out under caution.<sup>102</sup>

We are clear that an interview under caution is part of the investigative process, as its purpose is to put the allegation to the suspect and elicit his or her side of the story.

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<sup>102</sup> Code C, Police and Criminal Evidence (Northern Ireland) Order 1989.

As we noted earlier, since Operation Stafford C2 has responsibility for investigating cases in which the HET has identified “*a realistic evidential opportunity that needs to be developed and progressed by executive action requiring the use of police powers*”.<sup>103</sup>

An MoU has been drawn up between the HET and C2 regarding the referral of cases, although it is not explicit about the precise stage when cases should be transferred. This may have contributed to the HET’s inconsistent approach to cases.

Under the MoU, once the HET has identified: “*realistic evidential opportunities that can be pursued...HET will then focus on such evidential lines e.g. DNA, new witness evidence and establish their viability*”.<sup>104</sup> This process is further explained in the HET’s *Operational Guide*.<sup>105</sup>

*“Re-investigations are initially focussed on the new opportunities identified to gather further evidence or answer family questions.*

*“The whole case is kept under review while these are completed to monitor whether developments change our understanding or perception of existing evidence or the circumstances of the case. Focussed investigations can be incremental, leading to a wider review if appropriate. This means that if HET’s work uncovers new information or evidence we re-assess the whole investigation to take account of it.*

*“The investigation will be progressed and, depending on the nature of the review, if compelling new evidence is found, the case will be passed to the PSNI to progress these opportunities.”*

However, the HET’s *Operational Guide* also contains the following:

*“Involvement with HET is a voluntary process, unless the HET review uncovers compelling new evidence that would alter the situation to the effect that a power of arrest was involved. HET interviews are also intended to find new information to help*

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<sup>103</sup> Letter from PSNI ACC Crime Operations to British Irish Rights Watch, 11 October 2011.

<sup>104</sup> MoU between HET and PSNI Serious Crime Branch (C2).

<sup>105</sup> *HET Operational Guide*, paragraphs 3.8 and 3.9.

*explain to the families what happened. However, if individual circumstances dictate, interviews can be conducted under caution.*<sup>106</sup>

The earliest opportunity must be taken to address all anomalies, both in the MoU and in the HET's *Operational Guide*.

It follows from the contents of the HET's *Operational Guide* that any team could conduct an interview under caution. However, we were told that, in practice, only the red teams – which deals with cases of state involvement – carries out this procedure.

We are aware that in a number of cases the HET use what has been referred to as the '*pragmatic approach*'. This appears to involve the notion that suspects may be interviewed under caution, but, if for any reason, the relevant member of the HET decides that such a procedure is inappropriate, he or she is at liberty to dispense with the formal, legal requirement.

*"This 'pragmatic approach' was adopted specifically to give the HET maximum opportunity to obtain as much information as possible for the benefit of [the family]. People who are interviewed under caution as 'suspects' are typically either extremely guarded in what they say, or exercise their right not to say anything at all.*<sup>107</sup>

In the example above, we were told that HET staff felt that a soldier should have been interviewed under caution but, as the soldier was not prepared to be so interviewed, they decided to proceed without the caution.

The HET justifies the use of this approach on the basis that it may obtain answers for families that would not otherwise be forthcoming.

We understand that the term '*pragmatic approach*' was used some time in 2010 by the HET; it is unclear how many times this approach has been applied. That was at the time that the Chief Constable of the PSNI decided that the HET should be a reviewing body only. We do not consider that the

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<sup>106</sup> *HET Operational Guide*, paragraph 6.17.

<sup>107</sup> A HET Review Summary Report 2010. The report can be downloaded at <http://www.patfinucanecentre.org/cases/mcgreanery.html>

*'pragmatic approach'* (which assumes that interviews under caution may be conducted by the HET) is compatible with the Chief Constable's decision.

The *'pragmatic approach'* has been a cause of concern to others. We are aware that, on 10 January 2011, there was a discussion between the HET and the PPS about this issue. During the meeting, a senior lawyer: *"asked the HET representatives to review their strategic decision not to caution and involve the police in relation to interviewees who made admissions to serious crime"*.<sup>108</sup>

We are not persuaded that, even when interviews under caution are conducted, they are of any real benefit. We found that, when soldiers are interviewed under caution, they tend to be seen by appointment at the offices of their legal representatives. They and their solicitors are provided with pre-interview disclosure well in advance and, at the start of the interview, they tend to present the HET with a prepared written statement.<sup>109</sup>

We have sympathy with the view of families and their representatives that such a process tends not to help the HET to meet its objectives and frustrates the families who receive the RSR.

During our inspection we established that, in practice, only the red teams conduct interviews under caution or interviews under the *'pragmatic approach'*. We also established that the lack of consistency of approach of the HET in this issue was widely recognised across all teams and senior management.

Since the MoU with C2 came into effect in 2010, the HET has referred 39 legacy cases involving 119 victims to the PSNI for further investigation. Of these 39 cases, not one is a case of state involvement. Of these referrals, PSNI has sought prosecutorial advice in four cases; in other cases, four people have been charged, two of whom have been convicted.<sup>110</sup>

We do not see any reason for the HET to conduct interviews under caution and we have a number of serious concerns:

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<sup>108</sup> PPS notes of meeting with HET 10 January 2011.

<sup>109</sup> See section 4.8.4 of this report.

<sup>110</sup> List of the HET cases investigated by C2 from PSNI.

1. when the HET staff conduct interviews under caution, they are acting as investigators, which is contrary to the Chief Constable's decision in 2010 that any case which requires investigation should be referred to the PSNI;
2. because, in practice, only the red team conducts interviews under caution, there is a material difference in approach within the HET to cases with state involvement and cases without any state involvement. Cases involving paramilitary suspects, on the other hand, are referred to C2 for interview; and
3. the '*pragmatic approach*', in our judgment, could only be defensible if a decision had already been made that criminal proceedings could never be taken against the suspect. As a matter of law, there remains, in all cases, a chance albeit perhaps usually a remote one that a prosecution could take place.<sup>111</sup>

**Recommendation 15. The Chief Constable should enforce his decision that any case which requires investigation should be referred to the PSNI. He 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 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.**

#### **4.8.4 Pre-interview disclosure**

Notwithstanding the fact that, in our view, the HET should not have been conducting any interviews under caution since 2010, another highly contentious issue involving state involvement cases and legal interpretation arises from the amount of material that the HET provides to a former soldier or his legal representative in advance of any such interview. This is

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<sup>111</sup> An admission by the person responsible that his or her actions were unlawful, for example, an individual walking into a police station to confess to a murder.

commonly referred to as pre-interview disclosure and generally applies to suspect interviews under caution.

PACE(NI) states that a person has the right to be informed of the nature of the offence in respect of which he or she is a suspect, which usually takes the form of pre-interview disclosure by the police to the solicitor. In more serious and complex cases, material is often provided by way of staged disclosure as the interview process progresses.<sup>112</sup>

When conducting an interview under caution, the interviewer is not under any obligation to reveal the prosecution case to the suspect or his or her solicitor before questioning begins. However, the Court of Appeal has held that the police's failure to provide sufficient information about the case against the suspect to enable a solicitor properly to advise his client may be a good reason for the solicitor to advise his client to remain silent.<sup>113</sup>

On occasion, the HET has given a very liberal interpretation to the term; 'sufficient information'.

*"There is a legal obligation placed upon the HET to serve on those representing an interviewee a pre-interview disclosure package. This consists of all existing evidential documentation and other material that is relevant to the case."<sup>114</sup>*

The HET accepted that this legal interpretation was wrong but said that the teams decided what to disclose on a case-by-case basis.

We also found that, if a solicitor representing a paramilitary suspect asked for full disclosure, he would not be given it. This apparent lack of consistency has proved contentious.

*"It is of considerable concern that there appears to be inequality in treatment where state agencies (in this case the military) are involved, compared to non-state or paramilitary suspects. There*

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<sup>112</sup> A person interviewed under caution may be the subject of more than one interview therefore additional disclosure, commonly known as staged disclosure, may be released as the interview process continues.

<sup>113</sup> *R v Argent* (1997) 2 Cr App R 27; *R v Imran and Hussain* (1997) Crim L.R. 754 CA; *R v Roble* (1997) CLR 346; and *Farrell* (2004) EWCA Crim 597.

<sup>114</sup> HET Review Summary Report, dated 12 July 2011.

*are examples in paramilitary related historic cases where suspects have received significantly less fulsome pre-interview disclosure. There is no clear rationale for this less favourable differentiation in treatment.”<sup>115</sup>*

A solicitor illustrated this point to us by referring to a case involving the murders of RUC officers in 1983. His client had, comparatively recently, been arrested by the PSNI. When the solicitor attended the police station, he was provided with pre-interview disclosure that amounted to one line of script.

We explored the rationale behind these different approaches. The HET stated that they operated on the assumption that, unlike non-state actors, soldiers involved in a shooting had co-operated with investigators at the time and had provided their identities and produced their weapons for inspection – two things which non-state actors did not do. This is similar to the view expressed in the *Operational Guide* and referred to in the legal position section in this report.<sup>116</sup>

It is clear that different approaches are adopted by the HET teams in relation to the extent of the information which they provide to those who may be later interviewed, based on whether the suspect is a state actor or not. This approach to state involvement cases is illegal and untenable as it is inconsistent with the UK’s obligations under of Article 2 ECHR.

**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.**

#### **4.8.5 Verification of illness**

The HET’s assessment of illness and whether an individual is fit for interview has also caused concern amongst families and their representatives. Those

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<sup>115</sup> *Prerequisites for Progress in Northern Ireland*, a research brief to the Commission of Security and Co-operation in Europe, US Helsinki Commission, Dr P Lundy, 2012.

<sup>116</sup> *HET Operational Guide*, paragraph 6.19. Cross reference section 4.8.2 page 74 of this report.

concerns were summarised by Professor Lundy in a research brief that she produced in April 2012.

*“Importantly, it is evident that the verification of illness i.e. medical evidence of soldiers directly involved in fatal shootings in RMP cases is not always confirmed and/or sought by the HET. The process involved is not transparent.*

*It was confirmed in a recent meeting with [name] HET Director and other senior staff that the HET do not always seek verification of illness with regards to soldiers directly involved in fatal shootings in RMP cases i.e. medical evidence.”<sup>117</sup>*

Professor Lundy also made reference to a letter that a solicitor had received from the HET after he sought clarification on whether a soldier had been interviewed under caution, and of the steps the HET had taken to verify his medical condition before interview.

The HET responded by saying:

*“[h]is ill health was all too plain to see and to attempt to interview him under caution would have been ludicrous. As you are aware, there is nothing in law that would have compelled him to speak to the HET in any event.”<sup>118</sup>*

Our enquiries have shown that the soldier concerned was actually spoken to by telephone, in which case it is unclear how the HET’s staff were able to ‘see’ his state of health. Furthermore, it poses the question how the HET was able to confirm that they were even speaking to the right person. This case related to the death of an eleven-year-old boy who died after being struck by a rubber bullet during the course of ‘the troubles’.<sup>119</sup>

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<sup>117</sup> *Prerequisites for Progress in Northern Ireland*, a research brief to the Commission of Security and Co-operation in Europe, US Helsinki Commission, Dr P Lundy, 2012.

<sup>118</sup> Letter from the HET to a solicitor, 28 February 2012.

<sup>119</sup> ‘*Rubber Bullet*’ was a term used in the early 1970s for a baton round fired from a specialised gun. They were used extensively by the British Army in Northern Ireland. Rubber bullets were replaced in 1973 and are now referred to as Attenuating Energy Projectiles.

We are concerned that the HET failed fully to appreciate the importance of getting this investigation right first time. In June 2012, a decision by the Attorney General directed that a fresh inquest be held into this death.<sup>120</sup>

If a person is identified as a suspect, he or she needs to be interviewed under caution and the matter should be referred to the PSNI to conduct this process. As a result, the HET would not be in a position where they had to verify an individual's state of health as this would be an issue for the PSNI to resolve.

#### **4.8.6 The referral of cases**

The MoU between the HET and C2 should determine whether there is sufficient evidence to refer the case to the PSNI for further investigation. However, as mentioned previously in this report it is not explicit about the precise stage when cases should be transferred. This may have contributed to the HET's inconsistent approach to cases.

Generally speaking, we found that the HET seldom seeks advice from the PPS. In particular, investigators rarely seem to consult lawyers about any previous legal decisions, or about new evidence, or the status of a potential suspect. Perhaps most worryingly, HET staff take the decision whether there is a case to answer at the conclusion of a review. In effect, in cases of state involvement, the HET acts as investigator and prosecutorial decision-taker – a state of affairs that has not existed in England and Wales since 1986 and in Scotland for hundreds of years.

Having said that, in one specific RSR, the HET wanted to include information about a prosecutorial decision made by Her Majesty's Attorney General for Northern Ireland in 1971. On that occasion, they did seek the advice from the PPS about whether this information should be included in the RSR. On other occasions, they have directed the families to the PPS so that they can make their own representations. We consider that a clear specific policy and procedure would prevent inconsistency.

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

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<sup>120</sup> Letter from Attorney General for Northern Ireland, 21 June 2012.



## 5 EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS COMPLIANCE

The Secretariat to the CM acknowledged that the HET would not be carrying out Article 2 compliant investigations in historical cases. Rather, it was envisaged that the HET could be a useful model for bringing a “*measure of resolution*” to those affected by ‘the troubles’, and that institutions, such as the HET, “*could play an important role*” in satisfying the state’s continuing obligation to conduct effective Article 2 investigations, when taken together with other measures.<sup>121</sup>

We note that the UK Government’s submission to the CM in 2008 was that:

*“[t]he Review process is designed to be exhaustive and includes a re-examination of all documents, exhibits and intelligence material associated with a case. The intention is to take advantage of any developments in forensic science to identify any evidential opportunities arising from witnesses and to exploit any potential opportunities from intelligence on the case that may have arisen since the original investigation or which were not used at the time.*

*“If evidential opportunities are identified during the Review process which can be realistically pursued, the investigation of the death will proceed and where there is credible evidence available, files will be forwarded to the Public Prosecution Service for consideration.”<sup>122</sup>*

We have found that the extent of the HET’s role in conducting investigations has not been clearly understood; resulting in some confusion, internally and externally, about what the HET is intended to deliver. As detailed earlier in this report, in 2010, the Chief Constable directed that all investigations, following review, should be undertaken by the PSNI. However, there remains some blurring of these roles in relation to state involvement cases.

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<sup>121</sup> CM/Inf/DH(2008)2 revised, 19 November 2008, paragraph 49.

<sup>122</sup> Op cit, paragraphs 29-30.

Although the CM did not envisage that the HET would satisfy the Article 2 investigative requirement by itself, we have considered, in light of our findings as set out previously, and in accordance with our terms of reference, the respects in which the HET's process does and does not meet the four requirements of an Article 2 compliant investigation. This may be relevant to the question whether, and to what extent, the HET is capable of playing a role in the satisfaction of Article 2, when taken together with other measures. It may also be relevant to any future consideration by the CM whether to reopen its examination of the HET as part of its review of the UK's compliance with the ECtHR's judgments in the *McKerr* cases.

Whether or not they indicate a breach of the UK's ECHR obligations, the shortcomings we have identified raise concerns about the HET's conformity with best practice and policing standards, consistency of approach, and effectiveness in achieving the objectives for which it was established between 2005 and the present date.

## **5.1 Independence**

In order for an investigation to be Article 2 compliant, the persons responsible for and carrying out the investigation must be independent, both structurally and practically, from those implicated in the events.

The HET has clearly endeavoured to ensure that its processes reflect the necessary independence. The Director of the HET stated that cases of state involvement are assigned to the red and white teams, which are in principle staffed by people not previously associated with the RUC or the PSNI. Also, the only connection between the two has been the reporting line between the Director of the HET and the Chief Constable. However, a number of NGOs state that the line of accountability was, in fact, between the ACC – Crime Operations and the Director of the HET. Furthermore, the HET is a unit of the PSNI and is located in police premises. In our view the NGO's found and

produced credible evidence that the line of accountability is with ACC crime operations.<sup>123</sup>

The Secretariat to the CM noted in 2008:

*“[t]o provide reassurances about operational independence, the HET reports directly to the Chief Constable. It is largely staffed by retired senior police officers from Scotland, Wales and England. There is [sic] also a number of serving police officers seconded from other police forces across the UK. A number of retired Royal Ulster Constabulary officers, as well as several serving PSNI officers work with the HET. These latter officers work in a separate team and only on cases where families have raised no concerns about the independence of the investigation. The officers are required to declare any past interest in a case and no officer will work on a case in which they have previously been involved.”<sup>124</sup>*

On this basis, the Secretariat considered, having regard to the structural arrangements and organisation of the HET, that it was independent for ECHR purposes.<sup>125</sup> (The summary above is no longer entirely accurate, in that the HET no longer has any seconded officers. However, this does not make a material difference.)

The structure of the HET, therefore, would appear to guarantee the necessary independence in principle. However, our findings raise two concerns in relation to whether the HET’s processes, in practice, reach the required level of independence for the purposes of Article 2.

We are aware of one instance in which a former RUC officer led the HET’s enquiry into a state involvement case, in breach of: the HET’s policy; undertakings given to NGOs and solicitors; and an express wish of the family

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<sup>123</sup> Joint submission (no. 376) by the Committee on the Administration of Justice and the Pat Finucane Centre in relation to the supervision of cases concerning the action of the security forces in Northern Ireland, February 2012, page 4.

<sup>124</sup> CM/Inf/DH(2008)2 revised, 18 November 2008.

<sup>125</sup> Op cit, citing the ECtHR’s finding in *Brecknell v UK*, 27 November 2007 at page 76 that: “the PSNI was institutionally distinct from its predecessor [RUC] even if, necessarily, it inherited officers and resources”.

in question. In addition, we understand that the officer in question actually knew the SIO originally in charge of the case.

Through our examination of the process used to exclude PSNI and RUC officers from state involved cases, we found that the HET adopted a 'self-declaration' process. HET staff are required to declare their previous involvement or prior knowledge in cases. We did not find any evidence that these declarations were subject to any formal checks and validation.

We consider that, without a policy that requires the thorough vetting of the HET staff involved in each case, this situation could be repeated.

This is of grave concern. We consider that the independence necessary to satisfy Article 2 can only be guaranteed if former RUC officers are not involved in investigating state involvement cases, and if processes designed to ensure this are, in fact, effective. In order to ensure ECHR compliance, the HET must be in a position to guarantee that its systems are capable of preventing such situations in future.

Secondly, as we have detailed, the HET's intelligence unit is staffed largely by former employees of either the RUC or the PSNI. Staff in the PSNI intelligence branch, some of whom are former RUC special branch officers, are the gatekeepers for intelligence being passed to the HET. The assembling of relevant intelligence material plays a central role in the review process and in any subsequent investigation.

Staff in the HET intelligence unit and the PSNI intelligence branch process intelligence requests originating from the HET reviews. Given the sensitivity of intelligence matters in the context of Northern Ireland, the HET needs to do everything it can to make sure its independence is safeguarded.

For this reason, it would be preferable to institute some independent procedure for guaranteeing that all relevant intelligence in every case is made available for the purposes of review, to ensure compliance with the Article 2 standard.

**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.**

## **5.2 Effectiveness**

An Article 2 compliant investigation must be capable of leading to a determination of whether the force used was or was not justified, and to the identification and punishment of those responsible. A number of our findings have a bearing on these criteria.

We have raised a general concern about the lack of explicit systems and processes underlying the HET operation. We have found, for instance, that: the HET's storage and cataloguing of relevant material is haphazard and inconsistent; there is no standard format for recording policy decisions; and many such decisions are not recorded at all. We have also found that 50 percent of the HET staff come from outside Northern Ireland, and bring with them different working practices, and adopt inconsistent approaches to review. There was no effective induction process capable of addressing these differences.

We have noted that the HET has not been inspected before, and that there is no evidence of its having undertaken, or been subject to, any quality assurance or review processes.

These failings threaten to undermine the HET's effectiveness.

There is a more serious, and specific, concern, however, relating to the approach adopted by the HET in relation to state involvement cases.

As detailed in this report, the HET, as a matter of policy, treats deaths where there was state involvement differently from those cases where there is no state involvement. There does not seem to us to be any good basis in law for this difference, which is set out in the HET's *Operational Guide*, and which clearly dictates its approach to the review of such cases.

Cases in which there has been state involvement are assigned to the red teams. We have learned that red team staff sometimes conduct interviews under caution in relation to state involvement cases, whereas, in all other types of cases, if evidential leads are uncovered, suspects are referred to C2

for interview under caution. Moreover, it is left to the red team staff member's discretion, under the '*pragmatic approach*', whether to treat an interviewee as a suspect, and so to conduct an interview under caution, or whether to dispense with this.

We have also learned that, where interviews under caution are conducted by the HET in the context of state involvement cases, interviewees tend to be provided with extensive pre-interview disclosure well in advance.

In addition, we have found that the HET does not always seek verification where a potential interviewee in a state involvement case claims to be unfit for interview due to illness.

We consider that these practices, which would appear to derive from the HET's different approach in state involvement cases, may seriously undermine the capability of the HET's review process to lead to a determination of whether the force used was or was not justified in state involvement cases, and to the identification and punishment of those responsible. They may also undermine the effectiveness of the PSNI and the PPS to the extent that state involvement cases are not routinely referred to these bodies. Since 2010, it is striking that not one state involvement case relating to the British Army has to date been referred to the PSNI for further investigation or for prosecution.

We consider that the HET's approach to state involvement cases in this regard is inconsistent with the UK's obligations under Article 2 ECHR. As well as undermining the effectiveness of the review in Article 2 terms, the inconsistency in the way that state involvement and non-state involvement cases are treated easily gives rise to what may be well-founded suspicions that the process lacks independence.

We note that one of the documents submitted to the CM by the UK Government in 2008, in advance of the CM's decision to close its examination, was a presentation: "*Policing the Past: Introducing the Work of the Historical Enquiries Team*" which stated that the HET applied a consistent standard in each case. Regrettably, we have not been able to conclude that the HET's approach is consistent in all types of case.

### **5.3 Promptness**

A requirement of promptness or reasonable expedition on the part of the authorities when investigating the use of lethal force is implicit in Article 2.

The CM has recognised that the HET is not in a position to satisfy the promptness requirement of Article 2, given its focus on historical cases. The question of whether the HET review is progressing at satisfactory speed is therefore primarily a concern in terms of best practice and compliance with current policing standards, rather than an issue of ECHR compliance.

It is of some concern that the examinations of some cases which started in 2006 have still not been closed. We have recommended that the question of whether, and how, the HET's review can be completed within a reasonable timeframe should be reviewed.

### **5.4 Transparency and accountability**

Article 2 compliance requires a sufficient element of public scrutiny to ensure accountability in practice as well as in theory, including involvement of the next-of-kin to the extent necessary to safeguard his or her legitimate interests.

The HET is carefully designed to enable and encourage the engagement of families with the process, and this is commendable. Families who wish to engage are able to do so.

We consider that the transparency of the HET process could be improved by the publication of terms of reference and explicit HET policies and procedures, which would afford families clarity about the role of the HET, and what they can expect from the HET review. As stated earlier in this report, we have also noted that the HET does not have a formal complaints procedure.<sup>126</sup> There does not appear to exist any structured means by which families who have concerns about the HET process may air their grievances.

In addition, we are concerned by the lack of any public reporting mechanism or accountability structure other than the reporting line from the Director of

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<sup>126</sup> Cross reference section 4.2.2, page 60 of this report.

the HET to the Chief Constable. RSRs are, in principle, a good source of information; however, their efficacy as a means of accountability is potentially undermined by the fact that they are only – with the exception of red team cases – produced in cases in which there is family engagement, and by the fact that, as we were recently told, they do not always answer the questions that families have raised.

We consider that there is significant room for improvement in this area, and that, there is a real danger that the HET process may be inadequate to meet Article 2 standards of transparency and accountability. We have made recommendations accordingly.

## **5.5 Article 3 ECHR**

Article 3 ECHR states that: *“[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”*.

Following our inspection we are satisfied that the HET is mindful of Article 3 ECHR and reports possible breaches in its consideration of cases.

## **5.6 Article 6 ECHR**

Article 6 ECHR states that: *“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”*

In the cases which we examined, our inspection found no evidence of any breaches of Article 6.

## **5.7 Article 14 ECHR**

Article 14 is concerned with the prohibition of discrimination.<sup>127</sup> There will be a breach of Article 14 where a person has been treated differently from

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<sup>127</sup> Prohibition of discrimination

others, in respect of rights protected under the ECHR, on a prohibited ground, and the state is unable to provide a reasonable and objective justification for such treatment.

We have set out our findings and concerns generally about the apparent differences in the way in which the HET handles cases in which there was state involvement, on one hand, and cases in which there was no state involvement, on the other. We have also identified differences in the way the HET handles cases in which the family is represented by an NGO or solicitor and those in which it is not.

These matters are of concern in their own right, especially when taken together. However, we consider it unlikely that they amount in law to a breach of Article 14 ECHR. Discrimination for Article 14 purposes requires a difference in treatment on the basis of ‘sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’. Although ‘other status’ has been liberally construed for these purposes, we do not consider it is broad enough to include differential treatment on grounds of whether the killing in question was performed at the hands of the state or the hands of someone else, or differential treatment on grounds of whether the party seeking an Article 2 investigation is represented or not. The ECtHR has held that the relevant question is whether the ground of discrimination relied on is a ‘personal characteristic’<sup>128</sup>

During the course of our inspection, we have not found any evidence that the HET has discriminated against any individual in a manner that satisfies the requirements of Article 14.

We have also considered allegations that the way in which the HET has prioritised cases amounted to discrimination against certain sections of the

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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>128</sup> *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711.

community, because police action arising from the HET's work to date has tended to focus upon their activities.

We did not find any evidence of discrimination in this regard; in our view, decisions as to priority are dependent upon evidential opportunities. Further, the prioritisation of cases for review is generally based upon chronological order and so is non-discriminatory.<sup>129</sup>

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<sup>129</sup> There are exceptions to this rule, namely cases: where investigations or reviews have previously been opened, for example, by the former PSNI serious case review team; where there are humanitarian considerations, such as a member of a victim's family being critically ill; where there are issues of serious public interest; and where cases fall within a linked series or where they are connected to others.

## 6 CONCLUSIONS

This inspection was commissioned to be carried out in accordance with terms of reference which are set out at annex A. The issues contained within the terms of reference can be summarised as:

1. does the HET's approach conform to current policing standards and practices;
2. does the HET adopt a consistent approach to all cases; and
3. is the HET's approach to cases with state involvement compliant with ECHR?

Our conclusions in relation to each of these questions are set out below.

### **Does the HET's approach conform to current policing standards and practices?**

The HET was established, and has had to operate, in an extraordinarily challenging environment where past and current conflict still divides communities across Northern Ireland. This context led to the HET being designed to become more than a way of examining deaths attributable to 'the troubles'; it was also designed to bring a measure of resolution to the families of those whose deaths were attributable to 'the troubles'. This was an ambitious undertaking which has without doubt had a positive impact on the lives of a number of the families who engaged with the process.

The operating context presented those who established the HET with challenges that are unparalleled in UK terms. However, it is also true to say that this context also made it important to establish terms of reference for the HET which would enable it to operate effectively, efficiently and with impartiality as well as being in accordance with relevant policy, practice and the ECHR.

Our inspection identified some areas where the HET was operating well and conforming to current policing policies and practice. For example, the disclosure function is operating to a high standard. However, outside these areas of work our inspection raised a general concern about the lack of

explicit systems and processes underlying the HET's operation. We found, for instance, that: the HET's storage and cataloguing of relevant material is haphazard and inconsistent; there is no standard format for recording policy decisions; and many such decisions are not recorded at all. We also found that staff, who come from outside Northern Ireland, bring with them different working practices, and adopt inconsistent approaches to the review process. There was no effective induction process capable of addressing these differences.

The lack of a clearly defined complaints process for the HET together with an absence of any reporting of its work directly to the public was also of concern to us.

We also noted that the HET has not been inspected before, and that there is no evidence of its having undertaken, or been subject to, any quality assurance or review processes.

Our findings indicate an unacceptably large range of areas where the HET's approach does not conform to current policing standards and practices.

### **Does the HET adopt a consistent approach to all cases?**

Our inspection found that the HET, as a matter of policy, treats deaths where there was state involvement differently from those cases where there is no state involvement. State involvement cases appeared to be treated less rigorously in areas such as: how interviews under caution are conducted; the nature and extent of pre-interview disclosure; and the way claims made by state agents about being unfit for interview under caution were verified. We consider that these practices may seriously undermine the capability of the HET's review process to lead to a determination of whether the force used was or was not justified in state involvement cases, and to the identification and punishment of those responsible. They may also undermine the effectiveness of the PSNI and the PPS to the extent that state involvement cases relating to the British Army are not routinely referred to these agencies.

## **Is the HET's approach to cases with state involvement compliant with European Convention of Human Rights and Fundamental Freedoms?**

Taken together, our conclusions lead us to consider that the HET's approach to state involvement cases is inconsistent with the UK's obligations under Article 2 ECHR. The inconsistency in the way that state involvement and non-state involvement cases are dealt with undermines the effectiveness of the review process in Article 2 terms. In addition, the deployment of former RUC and PSNI officers in state involvement easily gives rise to the view that the process lacks independence.

These conclusions raise an important issue in relation to the CM's closure of its examination of the issue of the investigation of historical cases in Northern Ireland. Information submitted to the CM by the UK Government in 2008 in advance of the CM's decision to close its examination, was a presentation: *'Policing the Past: Introducing the Work of the Historical Enquiries Team'* which stated that the HET applied a consistent standard in each case. Regrettably, we have not been able to conclude that the HET's approach is consistent across all types of case.

Finally, we consider it to be important to note that although many of the people we met would have preferred the HET to have been independent of the PSNI, they also articulated an almost universal desire for it to be retained so long as improvements were made to the way it works.

## **6.1 Recommendations:**

**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.**

## ANNEXES

### Annex A: Terms of reference

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.

## **Annex B: Ministers' Deputies Information documents**

### **CM/ResDH(2007)73, Paragraphs 20-57**

#### **2. Defects in the police investigations**

*In Interim Resolution [CM/ResDH\(2007\)73](#) the Committee of Ministers:*

INVITES the authorities to continue to keep the Committee informed as regards the progress made in the investigation of historical cases, and in particular to provide information concerning concrete results obtained in this context both by the Historical Enquiries Team (HET) and by the Police Ombudsman.

*Information submitted by the United Kingdom authorities:*

a. The Historical Enquiries Team (HET)

20. The United Kingdom authorities have provided detailed information on the work carried out by the Historical Enquiries Team (HET) including its objectives, processes and the rationale behind its establishment. This information is summarised below:

i. Rationale and objectives

21. The HET is an independent unit of the Police Service of Northern Ireland (PSNI) which reports directly to the Chief Constable. It was established in September 2005 and began its work in January 2006. The establishment of the HET evolved from the Chief Constable's policy on the review of unresolved deaths. The United Kingdom Government recognised the needs of the families of victims to have more information on the deaths of family members and, as a result of joint discussion between the Government and the PSNI, the Secretary of State (Northern Ireland) made additional resources available to the Chief Constable to establish the HET to deal solely with the unresolved deaths during the 1968 and 1998 period.

22. The HET has three objectives:

- to assist in *“bringing a measure of resolution”* to those families affected by deaths attributable to the security situation in Northern Ireland between the years 1968 to 1998;
- to re-examine all deaths in this respect and to ensure that all investigative and evidential opportunities are subject to a thorough, professional examination in a manner that satisfies the PSNI’s obligation of an “effective investigation”, in conformity with section 2 of the PSNI Code of Ethics, as far as possible; and
- to do so in a way that commands the confidence of the wider community.

23. The HET pledges to deal with families with honesty, trust and confidentiality. Providing such a ‘family centred’ approach is at the heart of the HET project. The team seeks to identify and address issues and questions that are unresolved from the families’ perspective. Its primary aim is to address, as far as possible, all the unresolved concerns that families raise.

24. The HET is part of a process (which includes the Public Prosecution Service) aiming to achieve as Article 2 compliant an investigation as possible, whilst recognising there are certain inevitable limitations, namely the HET’s focus on the review of historical cases which means they cannot satisfy the promptness requirement of Article 2.

ii. Funding and composition

25. Some 2,535 incidents fall within the HET’s remit with a total of more than 3,268 victims. The HET has received £34 million of UK Government funding over 6 years which cannot be used for other policing work. This money is apportioned to each of the organisations involved in the HET project, including the HET itself, the Office of the Police Ombudsman, the Public Prosecution Service and the Northern Ireland Forensic Science Agency.

26. To provide reassurances about operational independence, the HET reports directly to the Chief Constable. It is largely staffed by retired senior

police officers from Scotland, Wales and England. There is also a number of serving police officers seconded from other police forces across the UK. A number of retired Royal Ulster Constabulary (RUC) officers, as well as several serving PSNI officers work with the HET. These latter officers work in a separate team and only on cases where families have raised no concerns about the independence of the investigation. The officers are required to declare any past interest in a case and no officer will work on a case in which they have previously been involved.

### iii. The prioritisation of cases

27. The HET looks into the cases on a chronological basis, beginning with incidents which took place in 1968 and working through those which occurred before April 1998 and the Good Friday Agreement. There are exceptions to this chronological approach, which include:

- Previously opened investigations: prior to the establishment of the HET in 2005, the PSNI's Serious Crime Review Team (SCRT) had the task of reviewing past cases. The HET subsumed these cases when it took over the responsibility for historical cases and, in the interests of fairness to the families involved, prioritised their reviews;
- Humanitarian considerations: for example, if the relatives of victims are very ill or elderly;
- Involving issues of serious public interest: for example, the cases that are currently being examined by the Committee of Ministers;
- Linked series of murders: the HET will pursue the evidential opportunities presented by each case. If cases appear to be linked, then they will be considered together.

### iv. HET processes

28. A HET review of a case is a five-step process involving the following stages: collection, assessment, review, focussed re-investigation and resolution.

29. The Review process is designed to be exhaustive and includes a re-examination of all documentation, exhibits and intelligence material

associated with a case. The intention is to take advantage of any developments in forensic science to identify any evidential opportunities arising from witnesses and to exploit any potential opportunities from intelligence on the case that may have arisen since the original investigation or which were not used at the time.

30. If evidential opportunities are identified during the Review process which can be realistically pursued, the investigation of the death will proceed and where there is credible evidence available, files will be forwarded to the Public Prosecution Service for consideration.<sup>130</sup> The evidential standard applied is identical to that used by the police. However, it has to be noted that a considerable amount of time has passed since many of these offences were committed. There are therefore likely to be very few cases in which there is sufficient evidence to prosecute. It is not possible to recreate the investigative circumstances of 20 years ago (e.g. physical evidence could be lost or witnesses could now be unavailable etc).

31. This whole process is underpinned by a developing analytical database which contains details relevant to each case and which can be used to identify both links between cases (intelligence or forensic/ballistic), gaps in intelligence or any other trends/evidential opportunities.

#### v. Family liaison and resolution of cases

32. Families are under no obligation to engage with the HET should they not wish to do so. However, reviews of cases will take place regardless of whether or not there is family involvement in order to ensure that families do not come under pressure by any individual or group to prevent a HET review.

33. A bespoke Family Liaison Strategy has been put in place comprising a help desk and liaison officers dealing directly with families. From the outset of the Review process families have the opportunity to raise any questions or

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<sup>130</sup> To date, the HET has referred one file to the PPS in relation to a fatal shooting in 1972. The PPS has reviewed the 1973 decision not to prosecute following the further investigation by the HET. It has concluded that the original decision of no prosecution should stand. The PPS has also been providing prosecutorial advice in relation to a number of cases the HET is examining as part of its investigations.

concerns that they may have about their particular case which the HET will then endeavour to answer as far as possible.

34. Once a case review is completed, a HET 'Resolution Panel' will closely scrutinise all aspects of the review. The Deputy Director of the HET sits on the Panel. The findings of the review are contrasted with the requests made by the family to ensure that all their queries have been addressed as far as possible. A Review Summary Report is then produced. The Summary Report will set out: the HET's findings with respect to the case, any new information that has been uncovered and the answers to the family's questions as far as possible. In essence the Report is an attempt to tell the story of the case for families, often for the first time.

35. Once the Summary Report has been finalised, members of the HET will meet with the families, inform them of their findings and provide a copy of the report. The HET does not disclose the report to any third party other than the family. Families are always able to seek further clarifications of any issue or make representations. The HET is committed to reviewing its work should a family have further questions. If necessary, families also have the option of meeting with the senior managers of the HET to resolve any issues of concern.

#### vi. Cases where there are allegations of collusion

36. Cases in which there are allegations of state collusion are handled by the HET's White Team and Complex Inquiry Team, both of which are staffed by police officers from outside Northern Ireland. The teams will look for evidence of offences which might be characterised as 'collusion', such as murder, conspiracy to murder, causing/conspiracy to cause explosions, perverting the course of justice or misfeasance in public office (there is no specific criminal offence of 'collusion' in Northern Ireland law). The teams will also examine any links which can be identified between cases. These types of cases are also referred to the Police Ombudsman, who will conduct a parallel investigation. The HET will focus on investigating the incident itself while the Ombudsman looks at the conduct of police officers. Where there is sufficient evidence of offences, as with any HET case, this will be submitted

to the Public Prosecution Service for consideration and a decision on prosecution.

vii. Current state of play

37. The HET currently have approximately 1,344 cases open and underway. Approximately 471 reviews have been completed. The process is taking longer than was originally anticipated because many of the cases under review are extremely complex and families often raise further questions once a review has been completed.

b. Office of the Police Ombudsman for Northern Ireland (OPONI)

i. Relationship of the HET with the OPONI

38. The HET has a close working relationship with the OPONI. In cases where there are allegations about actions of police officers the HET refers them to the OPONI and separate, parallel investigations are conducted. HET and the OPONI hold monthly strategic and tactical meetings. A memorandum of understanding has been adopted between the two parties and is subject to regular review. Currently the OPONI has a total of 63 cases which have been referred to them by the HET.

ii. Historical cases examined by the OPONI so far

39. Under Section 62 of the Police (Northern Ireland) Act 1998 the OPONI may publish reports following major investigations. Decisions as to when to publish such reports and what material to include in them are taken at the discretion of the Police Ombudsman. There have been nine such reports published so far (these reports can be found at <http://www.policeombudsman.org/Publication.cfm?CatID=10&action=list>).

The Ombudsman has made a number of recommendations to the police in these reports.

40. The United Kingdom authorities have indicated that the above examples of retrospective investigations illustrate concrete results obtained by the OPONI in the investigation of historical cases. They have also stated that the results of the ongoing investigations referred to the OPONI by the HET may

be published in future if the Police Ombudsman considers this appropriate, under section 62 of the 1998 Act.

Comments received:

41. The Irish authorities have welcomed the additional information provided by the United Kingdom authorities on the work of the HET.

42. The work of the HET has been analysed, at its request, by an external academic, whose initial research has identified strengths and weaknesses in the HET approach, a useful diagnostic. A number of problems were identified in the working of the HET. These include that approximately 25% of the HET staff previously worked for the RUC, Special Branch or the Ministry of Defence. The continuing churn of investigators who originate in Scotland, Wales and England has impeded the effective operation of the HET, contributing to the delay in closing files. Problems are being experienced recruiting qualified investigators to replace those who leave. Policing Board members, from both communities, have questioned the allocation of funding to the HET, noting that in fact it has come from the PSNI budget rather than the additional funding originally indicated. Certain of the reports delivered to families have been poorly prepared: it is also noteworthy that it was the work of an NGO which prompted the recall of reviews of deaths involving soldiers in the period up to 1973. (In response to these comments, the United Kingdom authorities have noted that the report compiled by the external academic, Professor Lundy, remains in draft form and has not yet been finalised. The work carried out by Professor Lundy was limited to the setting up of the HET and many of the issues identified in the report have been addressed. There are some areas where the HET accept that the report makes some useful points, and it is considering how these might be incorporated into its work. However, the small scope and narrow focus of the report mean that the UK authorities do not accept that the report on its own is an appropriate means by which to judge the work of the HET).

43. The Irish authorities have noted that it is expected that as many as 300 files will be passed to the OPONI for investigation. However, slow progress is being made on the cases already received and a request for additional

finance has been made by the Ombudsman to facilitate dealing with historical cases. (In response to these comments, the United Kingdom authorities have noted that the OPONI has confirmed that it has received a number of referrals from the HET and that a substantial amount of work has been carried out in relation to the registration, evaluation and scoping of all the cases. Work on the cases is currently underway and is at various stages).

44. Lastly, the Irish authorities have noted that the HET is cooperating effectively with certain NGOs and others which represent families, and that this is contributing to an improved quality of investigation and reports. Noting that the work of the HET was externally analysed and diagnosed, and acknowledging the real difficulties presented to the work of the HET due to the effluxion of time, Ireland looks forward to continued learning and improvement on the part of the HET as it moves to finalise its work.

45. Relatives for Justice have stated that the credibility of the HET has been in constant decline as a result of the technical difficulties arising from investigation and examination of historic cases. The fact that the HET is not carrying out Article 2 compliant investigations is contributing to the lack of trust in the HET, in particular cases involving allegations of collusion.

46. The Northern Ireland Human Rights Commission has criticized the HET for providing limited information to the families for concerns around protecting the lives of others. According to the Commission, the absence of any further investigations showed that the HET is sharing partially what is already available rather than shedding light on the circumstances of unresolved cases.

Secretariat's assessment:

47. The Secretariat recalls that the HET does not carry out Article 2 compliant investigations in historical cases<sup>5</sup> [131]. 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

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<sup>131</sup> Note <sup>5</sup> See, [CM/Inf/DH\(2006\)4 revised](#) 2, paragraph 65

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 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>6 [132]</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

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<sup>132</sup> Note <sup>6</sup> Likewise, the European Court has found it satisfied that “the PSNI was institutionally distinct from its predecessor [RUC] even if, necessarily, it inherited officers and resources” (see, Brecknell v. the United Kingdom, judgment of 27 November 2007, § 76).

funding cannot be used for other policing work and is allocated to each of the organisations involved in the HET project.

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.

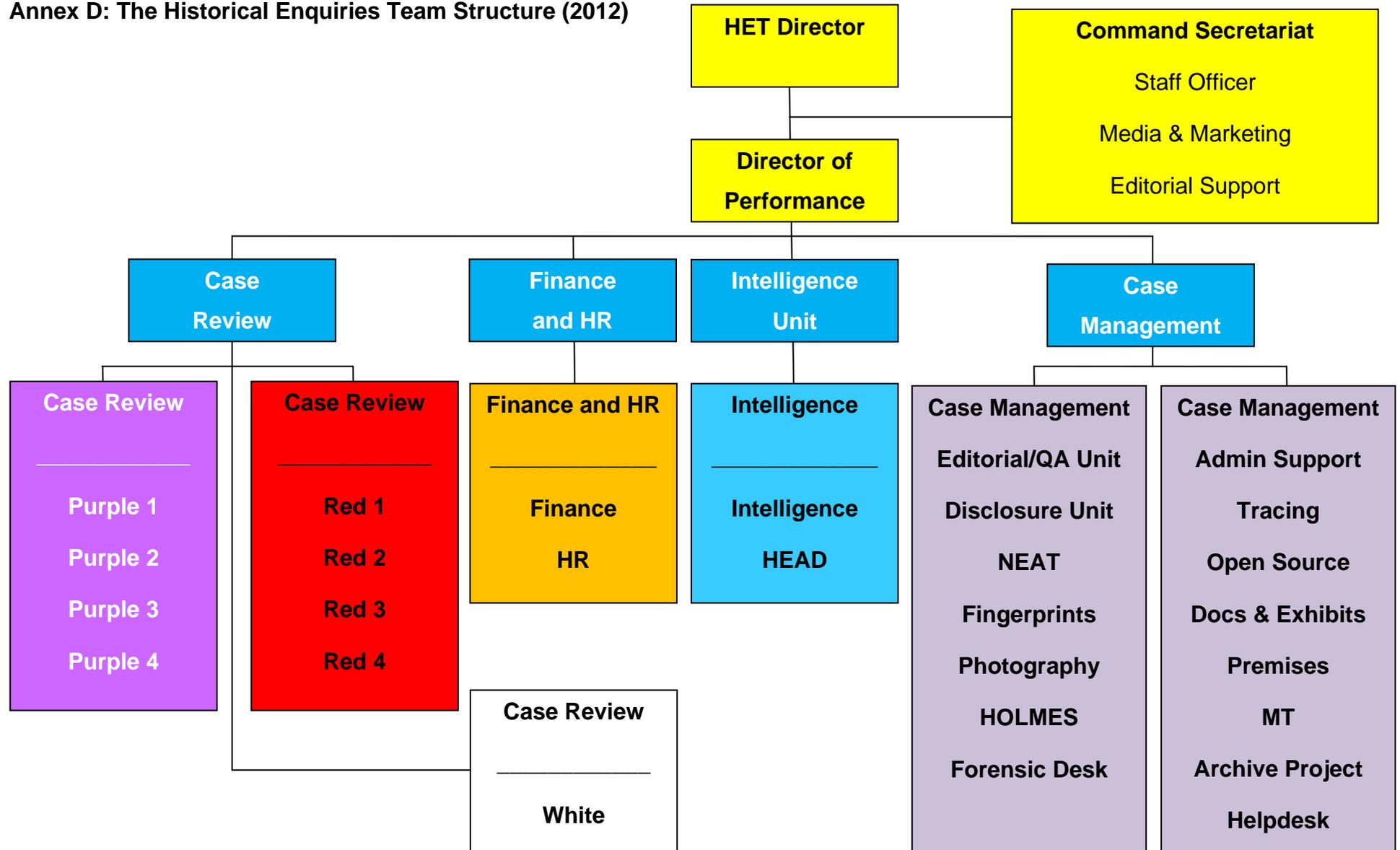
57. As to the concrete results obtained by the Police Ombudsman in the investigation of historical cases, the Secretariat welcomes the good working relations established between the HET and the OPONI and notes with satisfaction that these institutions have now agreed to adopt a memorandum of understanding 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.

## **Annex C: Methodology**

The inspection was conducted in ten phases:

1. reviewing and accepting the agreed terms of reference;
2. requesting relevant documentation from the HET;
3. researching the current legal framework relating to reviews, the ECHR and relevant criminal justice legislation;
4. collating relevant documents, including those relating to HET policies, systems and procedures;
5. collating, assessing and evaluating findings from a document review and using those findings to inform the fieldwork and the HMIC report;
6. conducting the fieldwork with key and significant individuals and interested parties, including numerous interviews, re-interviews and focus groups at various locations;
7. reading and assessing a sample of completed HET reviews, including RSRs, hard copy material and electronic documentation;
8. analysing the evidence obtained, and exploring opportunities to benchmark this against the terms of reference;
9. drafting the HMIC report, with findings, conclusions and recommendations, consulting with specific individuals for factual accuracy; and seeking advice from critical readers; and
10. delivering the final report.

**Annex D: The Historical Enquiries Team Structure (2012)**



## **Annex E: List of Individuals and Agencies Consulted**

Attorney General  
Commission for Victim and Survivors  
Committee for the Administration of Justice  
Court and Tribunal Services  
Criminal Justice Inspectorate of Northern Ireland  
Baroness Nuala O'Loan DBE MRIA  
Denis Bradley  
Department of Justice  
Devonshire Solicitors  
Dr Philip Scraton, Queens University Belfast  
HELP Northern Ireland  
Kevin Winters Solicitors  
Lord Eames  
Ministry of Defence (Historical Information Team)  
Ministry of Defence (Special Investigation Branch)  
Northern Ireland Retired Police Officer Association  
Padrigh O' Muiriugh, Solicitors  
Pat Finucane Centre  
Police Ombudsman of Northern Ireland  
PSNI ACPO  
PSNI Senior Managers  
Professor Patricia Lundy, University of Ulster  
Public Prosecution Service  
Public Records Office  
Quadriga Consulting Ltd  
Relatives for Justice  
Sir Hugh Orde  
Victims' Families  
Women Against Violence and Extremism

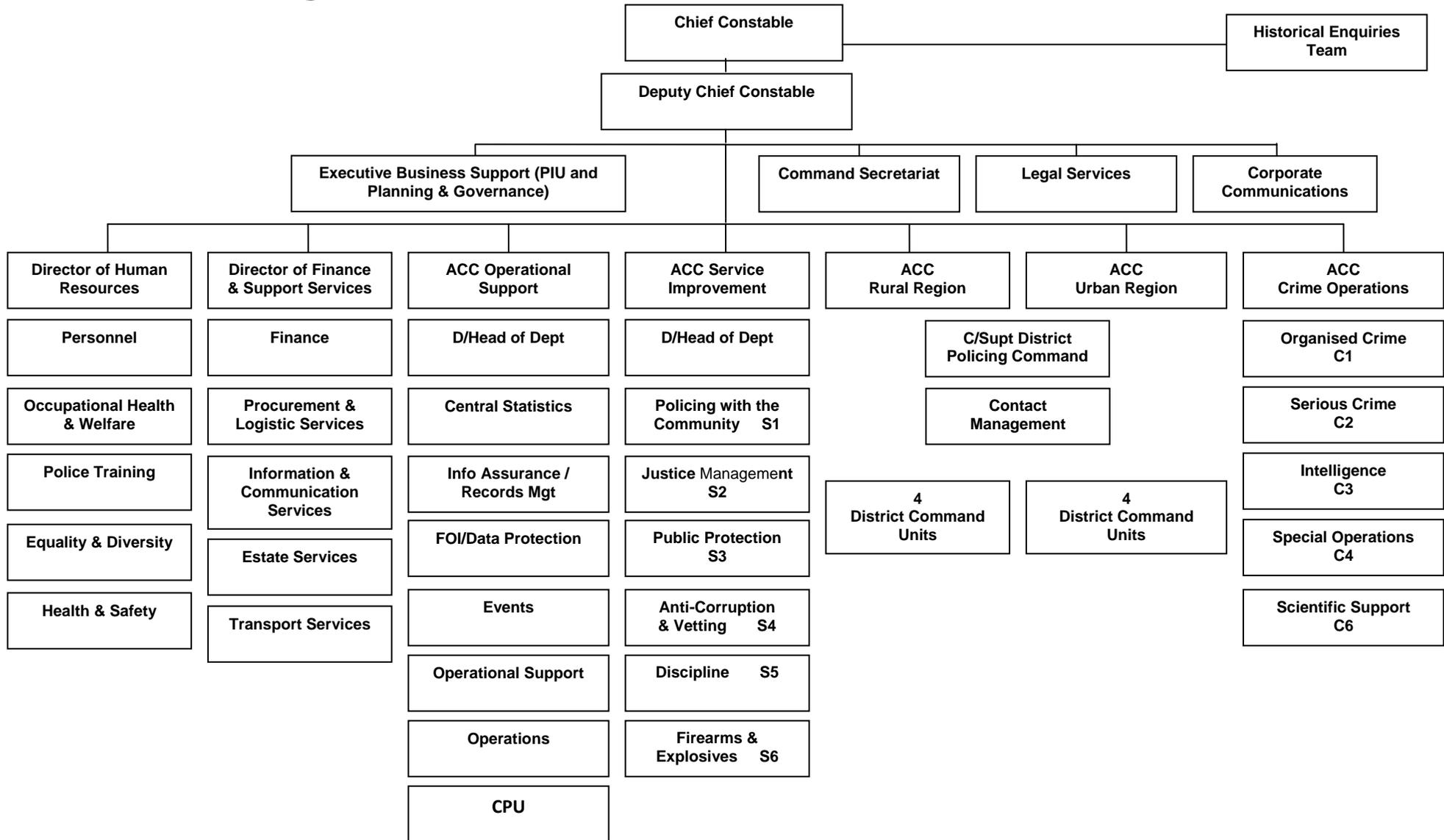
## **Annex F: List of the Historical Enquiries Team staff and departments consulted**

Director  
Director of Performance  
Director of Intelligence  
Disclosure Unit  
Documents and Exhibits Unit  
Editorial and Quality Assure Unit  
Editorial Board  
Family Liaison Co-ordinator  
Fingerprints and Photography  
Focus Group Intelligence Officers  
Focus Group Investigating Officers (Red and Purple)  
Focus Group LSIO (Red and Purple)  
Focus Group SIO (Red and Purple)  
Forensic Unit  
Freedom of Information Unit  
Help Desk  
Holmes Unit  
Human Resource Manager  
Intelligence Manager  
LSIO Red Team 3  
LSIO White Team  
Non-Engagement Assessment Team  
Open Source Unit  
SIOs Red Team 3  
Tracing Unit

## Annex G: Acronyms and abbreviations

ACC	Assistant Chief Constable
ACPO	Association Chief Police Officers
C2	PSNI Crime Operations department C2
C3	PSNI intelligence branch C3
CM	Committee of Ministers of the Council of Europe in Strasbourg
CPIA	Criminal Procedure and Investigations Act 1996
DoJ / DoJ (NI)	Department of Justice for Northern Ireland
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GOC	General Officer Commanding
HET	Historical Enquiries Team
HMIC	Her Majesty Inspectorate of Constabulary
HR	Human Resources
LSIO	Lead Senior Investigating Officer
MIM	Murder Investigation Manual
MOD	Ministry of Defence
MoU	Memorandum of Understanding
NEAT	Non-engagement Assessment Team
NGO	Non-Governmental Organisation
NICtS	Northern Ireland Court Service
NIPB	Northern Ireland Policing Board
OPONI	Office of the Police Ombudsman for Northern Ireland (see also PONI)
PACE	Police and Criminal Evidence Act 1984
PONI	Police Ombudsman for Northern Ireland (see also OPONI)
PPS / PPS (NI)	Public Prosecution Service for Northern Ireland
PRONI	Public Records Office for Northern Ireland
PSNI	Police Service of Northern Ireland
RMP	Royal Military Police
RSR	Review Summary Report
RUC	Royal Ulster Constabulary
SCRT	Serious Crime Review Team
SIO	Senior Investigating Officer
SOP	Standard Operating Procedures
UK	United Kingdom

# Annex H: PSNI organisational structure



# **Annex I: Interim Resolution ResDH(2005)20**

**COUNCIL OF EUROPE  
COMMITTEE OF MINISTERS**

**Interim Resolution ResDH(2005)20  
Action of the Security Forces in Northern Ireland  
(Case of *McKerr* against the United Kingdom and five similar cases)**

**Measures taken or envisaged  
to ensure compliance with the judgments of the European Court of Human Rights in the cases  
against the United Kingdom listed in Appendix III**

*(Adopted by the Committee of Ministers on 23 February 2005  
at the 914th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 46, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (hereinafter referred to as 'the Convention'),

Having regard to the judgments of the European Court of Human Rights in the cases against the United Kingdom listed in Appendix III and forwarded to the Committee of Ministers for supervision of their execution once they had become final under Article 44 of the Convention;

Recalling that in all these cases the applicants complained of violations of their right to an effective investigation into the death of their next-of-kin at the hands of the police or armed forces in Northern Ireland or in circumstances giving rise to allegations of collusion between the security forces and the killers;

Whereas in all of these judgments the Court unanimously held that there had been a violation of Article 2 of the Convention in respect of failings in the investigative procedures concerning the death of the applicants' next-of-kin (these findings are summarised in Appendix III to this resolution);

Whereas in the *McShane* case the Court also held, unanimously, that there had been a failure by the State to comply with its obligations under Article 34 of the Convention;

Having regard to the Rules adopted by the Committee of Ministers concerning the application of Article 46, paragraph 2, of the Convention;

Having invited the government of the respondent State to inform it of the measures which have been taken in consequence of the judgments, delivered on 4 May 2001, 28 May 2002 and 1 July 2003, having regard to the United Kingdom's obligation under Article 46, paragraph 1, of the Convention to abide by them;

Having satisfied itself that the government has paid the applicants the sums provided for in the judgments;

Whereas, from the outset of the Committee's examination of the present cases, the government of the respondent State has reiterated its commitment to abide by the Court's judgments in these cases in accordance with its obligations under Article 46, paragraph 1; Whereas the government of the respondent State has provided the Committee with information about the general measures taken so far or envisaged to this effect (this information appears in Appendix I to this resolution);

Whereas the said government has also provided information in each of these cases regarding the issue of individual measures to erase the consequences of the violations found for the applicants (this information appears in Appendix II to this resolution);

## **General assessment of the Committee of Ministers**

Welcomes the firm commitment of the government of the respondent State to abide by the judgments of the Court in the present cases;

Takes note with interest of the information provided by the government of the respondent State regarding the general measures taken so far or envisaged to comply with the judgments;

Notes nonetheless that certain general measures remain to be taken and that further information and clarifications are outstanding with regard to a number of other measures, including, where appropriate, information on the impact of these measures in practice;

Notes in this connection that the Committee's on-going assessment of measures taken so far or envisaged covers the range of issues referred to in the appended information, inter alia:

- 'calling in' arrangements for police investigations;
- the role of the Serious Crimes Review Team;
- the possibility of judicial review of decisions not to prosecute;
- new practices with respect to the verdicts of coroners' juries at inquests;
- developments regarding disclosure at inquests;
- legal aid for inquests under the previous ex gratia scheme;
- measures to give effect to recommendations following reviews of the coroners' system;
- the Inquiries Bill intended to serve as a basis for a further inquiry in one of these cases;

Calls on the government of the respondent State rapidly to take all outstanding measures and to continue to provide the Committee with all necessary information and clarifications to allow it to assess the efficacy of the measures taken, including, where appropriate, their impact in practice;

Recalls that the obligation to take all such measures is all the more pressing in cases – such as these – where procedural safeguards surrounding investigations into cases raising issues under Article 2 of the Convention are concerned;

Notes the information provided by the government of the respondent State regarding individual measures to erase the consequences of the violations found in these cases for the applicants;

Recalls in this regard the respondent State's obligation under the Convention to conduct an investigation that is effective "in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible", and the Committee's consistent position that there is a continuing obligation to conduct such investigations inasmuch as procedural violations of Article 2 were found in these cases; Calls on the government of the respondent State rapidly to take all outstanding individual measures in these cases and to keep the Committee regularly informed thereof;

### **Conclusions of the Committee of Ministers**

DECIDES to pursue the supervision of the execution of the present judgments until all necessary general measures have been adopted and their effectiveness in preventing new, similar violations has been established and the Committee has satisfied itself that all necessary individual measures have been taken to erase the consequences of the violations found for the applicants,

DECIDES also to resume consideration of these cases, as far as individual measures are concerned, at each of its DH meetings, and, as far as outstanding general measures are concerned, at the latest within nine months from today.

### **Appendix I to Interim Resolution ResDH(2005)20**

#### *Information provided by the Government of the United Kingdom to the Committee of Ministers on general measures taken so far or envisaged to comply with the European Court's judgments*

The Government of the United Kingdom has provided the following information with respect to general measures taken so far or envisaged to comply with the European Court's judgments in the present cases. Furthermore, in order to demonstrate its firm commitment to abide by the judgments and to allow a transparent and open debate on these measures, the Government wishes to point out that the most recent memorandum prepared for the Committee of Ministers' examination of the present cases (document CM/Inf/DH(2004)14rev2) was made public on 6 January 2005.

## **Independence of police investigators investigating an incident from the officers or members of the security forces implicated in the incident**

### **Investigations into deaths allegedly caused by the police**

#### *- Police Ombudsman*

Since November 2000, there has been an independent Police Ombudsman in Northern Ireland, established by virtue of the Police (Northern Ireland) Act 1998, with the power to investigate all complaints against the police, including deaths alleged to have been caused by police officers acting in the course of their duty. Where it appears that the conduct of a member of the police service may have resulted in the death of a person the Chief Constable is required, under section 55(2) of the Act, to refer the matter to the Police Ombudsman. The Ombudsman is an independent authority and has her own team of independent investigators. She can recommend criminal or disciplinary proceedings against police officers and may direct that disciplinary proceedings be brought where the Chief Constable refuses to do so. The Ombudsman does not adjudicate on guilt or punishment.

Where the Ombudsman considers that the report of the investigation indicates that a criminal offence may have been committed by a police officer, the Ombudsman is required to send a report, together with any appropriate recommendations, to the Director of Public Prosecutions, who carefully considers the evidence, information and recommendations of the Ombudsman. It is for the DPP to decide if a prosecution should be commenced; this decision is based on the application of the test for prosecution, namely whether there is sufficient, admissible evidence to afford a reasonable prospect of conviction and, if there is, whether prosecution is in the public interest. In all cases, the DPP informs the Ombudsman by letter of the decision taken and the reasons for it. The principles governing the giving of reasons for decisions not to prosecute, described below (see under 'Public scrutiny...'), apply.

#### *- 'Calling-in' arrangements*

In addition, under the Police Act 1996, where one police service may provide aid to another, the Chief Constable of the Police Service of Northern Ireland (PSNI) may request that an incident be investigated by officers from a police service from Great Britain. It is a matter for the professional judgment of the Chief Constable to decide if the assistance of another police service is required in an investigation, taking account of local knowledge, interpretation of any intelligence, or any specialised skills that may be required. When such assistance is required, an appropriate police service is identified in discussion with Her Majesty's Inspector of Constabulary.

Cases identified by the Chief Constable as potentially requiring the appointment of an external service are monitored and discussed with the Policing Board. Moreover, the Chief Constable, as a public authority within the meaning of the Human Rights Act 1998, would, under section 6(1) of the Act, be acting unlawfully if he acted in a manner incompatible with a Convention right. His decision whether or not to call in an outside force may accordingly be subject to judicial review.

### **Investigations into deaths allegedly caused by the armed forces**

In accordance with the relevant legislation and the Queen's Rules, military law does not apply to certain criminal offences, including murder, manslaughter, genocide, aiding, abetting, counselling or procuring suicide and various other offences. In Article 2 cases, therefore, as a matter of law, it is not the military but the civil authorities that investigate and prosecute. Accordingly, investigations into deaths caused by members of the armed forces are carried out by the police, who are separate from the armed forces and who are subject to scrutiny by the Police Ombudsman. The police investigation is subject to the Chief Constable's discretion to ask that the incident be investigated by another police force.

### **Allegations of collusion involving members of the armed forces and the police**

Where there is an allegation of collusion involving members of the armed forces and the police, the Chief Constable of the PSNI may use his above-mentioned powers to bring in an outside police force to investigate.

### **Steps taken in response to defects identified in police investigations**

On 28 March 2003, the Chief Constable of the PSNI established the Serious Crimes Review Team (SCRT), whose remit is "to review a number of unsolved major crimes, including murder and rape, where it is thought that new evidential leads may be developed". More than 2000 cases of unresolved deaths are to be examined by the SCRT. If, as a result of this review, it appears that new evidence might come to light, reinvestigation of any of the present cases might follow. The passage of time remains an influencing factor in that it can inevitably affect the availability of witnesses, exhibits and documentation, but it cannot be used in itself as a bar to reinvestigation.

*The PSNI has adopted a three-stage approach to 'historical' cases. First, a preliminary case assessment is carried out to ascertain if any potential evidential opportunities exist to move the investigation forward. Second, where these are identified then a full deferred case review will be commissioned by the Assistant Chief Constable. Subsequently, as the third stage of the process, the case may be referred to a murder investigation team for further investigation subject to the accepted recommendations of the Review.*

The work of the SCRT is painstaking and places significant demands on police resources. As a consequence the Government have been discussing with the PSNI how this work might be expanded to process greater numbers of unresolved deaths and to do so in a way that commands the confidence of the wider community.

### **Public scrutiny of and information to victims' families on reasons for decisions of the Director of Public Prosecutions not to prosecute any officer in respect of relevant allegations**

Judicial review of a failure to give detailed reasons for a decision not to prosecute in Article 2 cases would now be possible under the Human Rights Act 1998, based on the failure to conduct an Article 2-compliant investigation. This amounts to a claim of unlawfulness and already exists, independently of any further measures taken.

In addition, on 1 March 2002 the Attorney General tabled a statement in the House of Lords which recognised that there may be cases arising in the future where an expectation will arise that a reasonable explanation will be given for not prosecuting where death is, or may have been, occasioned by the conduct of agents of the State. The statement indicated that the Director of Public Prosecutions accepted that in such cases it would be in the public interest to reassure a concerned public, including the families of victims, that the rule of law had been respected by the provision of a reasonable explanation. The Director would reach a decision as to the provision of reasons, and their extent, having weighed the applicability of public interest considerations material to the particular facts and circumstances of each individual case.

A draft Code for Prosecutors in Northern Ireland was published for consultation in March 2004. Section 4.11 of the Code sets out the DPP's policy on the giving of reasons, which notes that in many cases the reason for non-prosecution is a technical one, lists the main interests at stake in striking a balance between the proper interest of victims, witnesses and other concerns, and reiterates almost verbatim the statement of the Attorney General referred to above. As regards the giving of reasons for not prosecuting where death is, or may have been, caused by state agents, this text clearly reflects the policy announced by the Attorney General in 2002 and is not subject to change. The final Code, like the drafts, will be public. It is intended that the final Code will be produced in spring 2005.

In accordance with a well developed doctrine in domestic law in the United Kingdom, if a public body states that it will follow a given policy, this creates a legitimate expectation that the body will follow that policy unless there exist compelling reasons not to do so. Judicial review of decisions not to prosecute in Article 2 cases would therefore be possible on the basis of the legitimate expectation arising out of the Attorney General's statement of 1 March 2002, and will in future be possible on the basis of legitimate expectations arising out of the Code. In addition, as regards information to victims' families more generally, both the PSNI and the Police Ombudsman now have family liaison officers, whose duty is to keep in contact with a victim's family during the course of an investigation.

## **Role of the inquest procedure in securing a prosecution in respect of any criminal offence that may have been disclosed**

The inquest provides a public forum for the investigation of a death. The inquest is heard in a courtroom open to the public. It is the practice of coroners to sit with a jury in inquests into the deaths of persons alleged to have been killed by the security forces (although this is not a statutory obligation). It is a statutory requirement under the Coroners Act (Northern Ireland) 1959 that the inquest determine who the deceased was and how, when and where he or she came to his or her death.

Under Article 6 of the Prosecution of Offences (Northern Ireland) Order 1972, the coroner is required to send to the Director of Public Prosecutions a written report where the circumstances of any death appear to disclose that a criminal offence may have been committed. The report will include all the evidence before the coroner together with a full record of the proceedings. Upon receipt of such a report, the Director of Public Prosecutions for Northern Ireland considers the evidence then available to him to determine whether to prosecute. Such a report will either result in a prosecution or in the Director applying the new policy on the giving of reasons.

In addition, the House of Lords delivered judgment on 11 March 2004 in the *Middleton case (R v. Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) ex parte Middleton (FC) (Respondent)* [2004] UKHL 10). This judgment makes clear that in order to provide an Article 2-compliant investigation, an inquest is required, when examining "how" the deceased came by their death, to determine not only "by what means" but also "in what circumstances" the deceased came by their death. This means that inquests are now required to examine broader circumstances surrounding the death than was previously the case.

Following this judgment, the Court of Appeal in Northern Ireland found on 10 September 2004 in the case of *Jordan* ([2004] NICA 29 and [2004] NICA 30) that Rule 16 of the Coroners' Rules for Northern Ireland could and must be read in such a manner as to allow the inquest to set out its findings regarding the contested relevant facts that must be determined to establish the circumstances of the death. This could be achieved either in the form of a narrative verdict or of a verdict giving answers to a list of specific questions asked by the coroner.

By way of example of the application of these principles in practice, the United Kingdom authorities have provided a copy of a verdict on inquest delivered in the County Court Division of Greater Belfast on 24 August 2004, in which the jury made detailed findings of fact in response to a list of specific questions asked by the coroner.

## **Scope of examination of inquests**

It is the duty of the coroner to decide on the scope of an inquest. The coroner is a "public authority" for the purposes of section 6(1) of the Human Rights Act 1998, and it is thus unlawful for him to act in a manner incompatible with the Convention rights. Accordingly, if an issue is now raised at an inquest which, under Article 2 of the Convention, ought to be the subject of investigation (such as an allegation of collusion by the security forces), it is the duty of the coroner to act in a manner compatible with Article 2 and in particular to ensure that the scope of the inquest is appropriately wide. The judgments of the European Court, as applied through the Human Rights Act, will thus allow inquest procedures which can play a role in securing a prosecution for any criminal offences that may have been revealed.

To ensure that coroners are fully aware of this duty, copies of four of the judgments have been circulated to all coroners in Northern Ireland. Moreover, training sessions for coroners have been organised both by the Judicial Studies Board for Northern Ireland and by the Home Office in London.

## **Compellability of witnesses at inquests**

The Lord Chancellor has brought forward an amendment to the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 so that, in future, witnesses suspected of involvement in a death can be compelled to attend the inquest, although they cannot be compelled to give self-incriminating answers.

The Government considered whether to replace the protection against self-incrimination under the amendment to the Coroners Rules with a rule which required a witness to provide incriminatory answers but which prevented those answers from being adduced in evidence at the criminal trial. However, as the principal objective of the procedural requirements of Article 2 is to ensure that criminal conduct is identified with a view to prosecution, it seems that compelling the giving of self-incriminating answers which could not themselves assist in the bringing of any prosecution would go beyond the purposes of the Article 2 investigation. Moreover, if such answers were required to be given under compulsion in the public inquest proceedings, that would itself be likely to jeopardise the possibility of there being a fair trial of the state agents themselves, and so would actually have the effect of undermining the effectiveness of the Article 2 procedures in holding state agents to account for their conduct.

### **Disclosure of witness statements prior to the appearance of a witness at the inquest**

A Home Office Circular of April 1999 dealing with deaths in police custody and deaths at the hands of the police has been implemented by the Chief Constable of the Royal Ulster Constabulary (now the PSNI) by a Force Order, issued under the Chief Constable's statutory authority to direct and control the Police Force under Section 33 of the Police Act (NI) 2000. While the Home Office Guidelines, on which the Force Order is based, are restricted to deaths in custody and deaths at the hands of the police, the Chief Constable has chosen to interpret the latter flexibly, so that the Force Order would apply, for example, to events such as those in the McShane case, where an army vehicle was ordered towards a barricade by a member of the police force.

As a result of the implementation of this circular, the Chief Constable normally will disclose to interested persons, including the family of the deceased, the statements sent to the coroner where the death occurred in police custody or where it resulted from the actions of a police officer acting in the course of his duty. The Chief Constable has followed this practice in all current cases relating to deaths caused by the security forces. The Chief Constable considers that he is obliged to provide to the coroner all statements concerning the death obtained by him in the course of an investigation, whether from police, security forces or civilian sources. Where he is also obliged to disclose statements to the next of kin or family, then the same situation pertains.

The application of the above practice is enforceable by judicial review, and has been enforced by the courts in Northern Ireland in the cases of McClory (judgment of the Queen's Bench division of the High Court of 8 January 2001) and Thompson.

As regards disclosure by the Ministry of Defence, it is the policy and practice of the Ministry of Defence to co-operate fully with all police inquiries. There are no circumstances in which the armed forces or the Ministry of Defence can avoid disclosure to the Chief Constable in the course of a criminal investigation. All relevant information and persons are made available to the police in the execution of their investigation. However, this is subject to the right of the Secretary of State for Defence, like other Government departments and agencies, to seek public interest immunity when disclosable information may be made available to other persons, the disclosure of which would cause harm to the public interest. This might take the form of damage to national security or the lives of individuals being threatened.

As witnesses, members of the armed forces are no different from any other government agent. The Ministry of Defence, on behalf of the armed forces, exercises its public interest duties in the same manner as any other government department. The assessment of the public interest in allowing the disclosure of witness statements by members of the armed forces is no different from that for any other witness.

As regards documents, before deciding whether to claim public interest immunity in respect of a document which is otherwise disclosable, the Secretary of State will have to balance the public interest in the administration of justice against the public interest in maintaining the confidentiality of the document of which the disclosure would be damaging to the public interest. He may decide to assert public interest immunity where he considers that disclosure would cause real damage or harm to the public interest. Where a claim for public interest immunity is made in an inquest and is challenged, it is for a court to decide where the balance lies between the interests of justice and, for example, the interests of national security. The Minister is never the final arbiter in relation to a claim for public interest immunity.

## **Public interest immunity certificates**

Since the domestic proceedings described in the *McKerr* judgment of the European Court, there have been significant developments in the law and practice in relation to public interest immunity. First, since the 1994 case of *R v Chief Constable of West Midlands, ex-parte Wiley*, it has been clear that where a minister examines material which is subject to public interest immunity and considers that the overall public interest does not favour its disclosure, or is in doubt as to whether to disclose the information, then the minister should put the matter to the courts. It is therefore the courts, and not the executive, which determine whether a public interest immunity certificate is necessary.

Second, in December 1996, the Attorney General announced to Parliament changes in the Government's practice in relation to public interest immunity. In particular, the Government would no longer apply the division of claims into class and contents claims, but would in future focus on the damage caused by disclosure. Although these changes were addressed to England and Wales, the Government has indicated that Ministers in the Northern Ireland Office have already applied the *Wiley* approach, and the new approach focusing on damage was also quickly adopted in Northern Ireland. Several examples of cases have been provided in which the claim of public interest immunity was at issue and in which the fairness of the trial was not found to be at risk. The approach taken was first to examine the necessity of the claim of public interest immunity and second to balance the competing interests of open justice and real damage to the public interest if full disclosure were made.

As regards the discharging of procedural obligations under Article 2 through inquests, the position on public interest immunity in respect of inquests has changed following the judgment of 20 January 2004 of the High Court in the judicial review case of *McCaughey and Grew*. It is now clear that the Police or Ministry of Defence are under a duty to disclose all documents to the coroner, and that it is then for the coroner to assess their relevance. At this stage the coroner will be aware of any public interest concerns that the Police or Ministry of Defence have in relation to the disclosure of the documents. If the documents that the coroner decides are relevant contain information which causes concern to the Police or Ministry of Defence, it is for them to decide whether to present to the coroner public interest immunity certificates setting out their concerns. If they do so, it will then fall to the coroner to conduct the balance for and against disclosure.

## **Legal aid for the representation of the victim's family**

Following the judgments in the present cases, an *ex gratia* scheme was established by the Lord Chancellor to provide for legal representation at certain exceptional inquests in Northern Ireland where the applicant had a sufficiently close relationship to the deceased to warrant the funding of representation. In deciding whether to grant legal aid under this Scheme, the Lord Chancellor was obliged, by virtue of the Human Rights Act, to act in a manner compatible with the Convention.

The scheme governing legal aid for inquests is now on a statutory footing. The relevant legislation came into operation on 2 November 2003. The scheme is supported by ministerial and administrative guidance. While there have been a number of judicial review applications concerning legal aid for the representation of the victim's family at inquests, the questions raised in these cases are essentially technical, in the Government's view, in that the question at stake is the scheme under which legal aid is available to families for preparatory work for inquests, rather than whether legal aid is available at all.

## **Steps taken to ensure that inquest proceedings are commenced promptly and pursued with reasonable expedition**

In accordance with the Human Rights Act 1998, coroners are now required to act in a manner compatible with Article 2 of the Convention to ensure that inquest proceedings are commenced promptly and pursued with reasonable expedition.

An additional full-time Deputy coroner has been appointed for Belfast to expedite business, so that in Belfast there are now one full-time coroner, one full-time deputy coroner and one part-time deputy coroner. The Northern Ireland Court Service is also providing additional administrative support to part-time coroners. The coroners in Belfast have an administrative support team of five staff and a computer system to facilitate their work. The coroners also have a dedicated legal resource and, in

more difficult cases, counsel is instructed. While a backlog of 40 inquests into deaths occurring prior to the judgments of the European Court of 4 May 2001 had built up at the office of the coroner for Greater Belfast, these deaths are cases to which Article 2 may apply and consequently had not been listed for hearing because the coroners were awaiting the outcome of the *Middleton* judicial review and not because of lack of judicial resources. Without prejudice to their judicial independence in that regard, coroners would take steps to list inquests for hearing once the Court of Appeal had given judgment in the *Jordan* case, which had also been adjourned pending the outcome of the *Middleton* case.

Two major inquiries have been conducted into the functioning of coroners' inquests in the United Kingdom. The report of the Fundamental Review of Death Certification and Coroner Services in England, Wales and Northern Ireland (Luce Review), which made a number of recommendations in relation to the inquest system for England, Wales and Northern Ireland, was published in June 2003. In addition, the Shipman Inquiry, established to investigate allegations of the murder by a doctor of at least 15 of his patients, issued its third report in July 2003, dealing with death certification and the investigation of deaths by coroners in England and Wales.

Following extensive consultation on the Luce Review, the Northern Ireland Court Service (NICtS) published a Consultation Paper outlining its proposals for the administrative redesign of the Coroners Service in Northern Ireland. The aim of the proposals is to modernise and improve the service by administrative means for all users, particularly the relatives of the deceased. The paper outlines the steps which might be taken to improve the inquest system in Northern Ireland in these areas and which can be implemented without primary legislation. The Home Office has also issued a position paper outlining the Government's response to the Luce and Shipman Reports.

In Northern Ireland, an interdepartmental working group has now been set up to consider and make recommendations for improving the arrangements for death certification and investigation in Northern Ireland having particular regard to the Luce Report, the Shipman Inquiry Third Report, the NICtS Proposals for Administrative Redesign and the Home Office position paper. The responses to the proposals of the NICtS, which were the subject of a period of public consultation, have been collated, and Ministerial approval will be sought to publish the full results of the consultation and a timetable for the introduction of the new proposals. It is hoped that the majority of the proposals can be introduced during 2005.

### **Individual right of petition**

As to the violation of Article 34 in the *McShane* case, the Government's firm policy is to ensure that its obligations under this Article are respected. The Government has drawn the terms of the *McShane* judgment to the attention of all responsible for litigation in Northern Ireland on behalf of the Security Forces. In a recent case, where an undertaking was sought not to use documents disclosed by the Royal Ulster Constabulary, the undertaking was modified to ensure that disclosure to the European Court would not constitute a breach of that undertaking. Thus the solicitor from whom the undertaking was sought would not commit a disciplinary offence if the documents were disclosed to the European Court.

### **Appendix II to Interim Resolution ResDH(2005)20**

*Information provided by the Government of the United Kingdom to the Committee of Ministers on individual measures taken so far or envisaged to comply with the European Court's judgments*

In terms of the obligations incumbent on the United Kingdom under the Convention, the Government has confirmed its commitment to abide by the judgments of the Court in these cases and to implement the judgments, in accordance with Article 46. This commitment is not affected by the findings of the House of Lords in the *McKerr* judgment of 11 March 2004 that the Human Rights Act 1998 does not have retrospective effect and that under domestic law, there was no continuing breach of Article 2 in that case. The House of Lords' judgment does not prejudge the question of the international obligations arising under Article 46. In the latter respect, different factors are at issue in each case and some reveal more problems than others. Further proceedings have been conducted and the Government considers that any measures required are under way in each case. The main question, in the Government's view, is whether, on the facts in each case, a fresh investigation is

actually possible. The Government concedes that new investigations in the present cases could not satisfy the Convention requirements in respect of promptness and expedition.

Information regarding the proceedings conducted prior to the judgment in each case is contained in the relevant judgments. The following information, provided by the Government, concerns the measures currently under way in each case:

In the Jordan case, the inquest opened in January 1995 experienced a series of adjournments relating, inter alia, to a number of judicial review applications by the applicants or in similar cases. Following the judgment of the Court of Appeal for Northern Ireland of 10 September 2004 in the Jordan judicial review application, however, the Coroner for Greater Belfast has indicated his intention to list the inquest in early 2005.

Civil proceedings were also instituted in 1992 alleging death by wrongful act. The applicant wishes to await the outcome of the inquest before pursuing civil action further.

In the McKerr case, the family of Mr McKerr brought legal proceedings seeking to compel the Government to provide a fresh investigation into his death. These proceedings concluded with the House of Lords' judgment, delivered on 11 March 2004 (*In re McKerr*, [2004] UKHL 12, on appeal from [2003] NICA 1). In that case, the House of Lords declined to order a fresh investigation, as it considered that no right to an investigation in accordance with the procedural requirements of Article 2 of the Convention existed under domestic law at the time of the relevant events and that as such, there could be no continuing right under domestic law to such an investigation at present, even after the Human Rights Act came into force on 2 October 2000. The House of Lords left open, however, the question whether such a continuing obligation existed under international law in this case, observing that it was for the Committee of Ministers to decide on this issue, in exercise of its functions under Article 46 § 2 of the Convention.

Without fresh evidence, there is, in the Government's view, no scope for reopening the investigation into the death of Gervaise McKerr. This case is, however, among the more than 2000 cases of unresolved deaths that will be reviewed by the SCRT to re-examine whether there are any evidentiary opportunities.

The Kelly and others case concerned a single incident in which nine men were killed. These deaths, like those in the McKerr and Shanaghan cases, fall within the terms of reference of the SCRT and will be among the more than 2000 cases of unresolved deaths to be re-examined.

As regards civil actions, the family of Anthony Hughes issued proceedings against the Ministry of Defence in 1988 and the case was settled in 1991. Six other families, including the Kelly family, issued proceedings in 1990 but the families have not set down the cases for hearing.

The Shanaghan case also falls within the terms of reference of the SCRT, since the perpetrator of the shooting was never identified. The applicant has taken no steps for 9 years in the civil proceedings commenced in 1994.

In the McShane case, an inquest was opened in May 1998 but adjourned pending the outcome of various legal proceedings and decisions at domestic level. However, a full-time coroner has now been assigned to this inquest and it is expected to commence in early 2005. The coroner remains under an obligation to report to the Director of Public Prosecutions any evidence that comes to light at the inquest that appears to disclose that a criminal offence may have been committed.

The applicant has not moved forward with civil proceedings brought against the Ministry of Defence and the Chief Constable of the Royal Ulster Constabulary.

In the Finucane case, two special police inquiries (the first two Stevens inquiries) were instituted to respond to concerns arising out of allegations of collusion between loyalist organisations and the security forces. The first of these two inquiries led to the reporting or charging of 59 people and the conviction of one person of conspiracy to murder persons other than Patrick Finucane. The second inquiry did not lead to the prosecution of any person. The third Stevens inquiry is squarely concerned with the Finucane murder and has led to a criminal prosecution being brought. One person was successfully prosecuted for the murder. This investigation continues.

The Government announced on 23 September 2004 that steps could now be taken to implement the decision to hold a new inquiry into this death. The inquiry will be held on the basis of new legislation, which is currently pending before the Parliament (Inquiries Bill).