



Addressing the Legacy of Northern Ireland's Past Consultation Response by the Public Prosecution Service

1. The PPS welcomes the opportunity to contribute to the consultation on addressing the legacy of Northern Ireland's past. We are in agreement with the Secretary of State's view that "the system currently used is not delivering enough for victims, survivors and the wider society" as processes are disjointed and institutions insufficiently funded to deliver within acceptable timeframes.
2. The consultation paper describes four proposed institutions: (i) The Historical Investigations Unit (HIU); (ii) The Independent Commission in Information Retrieval (ICIR); (iii) The Oral History Archive (OHA); and (iv) The Implementation and Reconciliation Group (IRG). We have considered these proposals from a prosecutorial perspective. Our greatest direct interest relates to the HIU where there are a number of novel aspects to the proposed relationship between the investigator and prosecutor. Important issues also arise in relation to the potential "parallel process" whereby information can be sought and obtained privately by families through the ICIR.
3. This response seeks to highlight the key operational and strategic issues in terms of providing for an effective relationship with the HIU, maintaining appropriate safeguards for our independence, and building confidence in the PPS and wider criminal justice system.
4. The key issues are set out under the following headings: Overview of Prosecutorial challenges; relationship between HIU and the PPS; lifespan of the HIU; impact of ICIR; referrals by the DPP; and onward disclosure.

Overview of Prosecutorial Challenges

5. It is clear that the investigation and prosecution of legacy cases presents significant challenges for the PPS and to those charged with the responsibility of undertaking the relevant investigations. As is widely recognised, the quality and availability of evidence tends to diminish over time and it becomes more difficult to secure evidence that is capable of withstanding the challenges of a criminal trial and providing a reasonable prospect of proving a criminal allegation beyond reasonable doubt. Experience shows us that prosecutions in relation to historical offences can be brought and convictions secured, but the proportion of cases in which this will occur is significantly lower compared to more recent offending.

6. Over recent years there has been an upward trend in the prosecutorial resource required to handle legacy casework. Examples of current legacy cases in respect of which work is ongoing are the Gary Haggarty case (Operation Stafford) and Bloody Sunday, both of which have required a dedicated prosecutorial resource allocated to them for a period of years. This trend is expected to continue as files are received as a result of major investigations such as Operation Kenova and Operation Klina. This creates capacity issues for the PPS as there is no separate funding stream for PPS to draw from to deal with legacy work, and resources have to be balanced alongside other important casework pressures such as serious sexual offences and current terrorist prosecutions.

7. Legacy cases are complex, requiring senior and specialist teams to consider, direct and conduct any subsequent prosecutions, and that the level of resource is often significantly beyond that required to deal with more recent cases involving fatalities.

There may be various reasons for this, including the fact that a case may form part of a linked series, there may be large amount of relevant sensitive material relevant to the case that has to be considered for disclosure and potential PII applications, and/or the case may have been the subject of previous investigations or reviews which have generated volumes of material and the

potential for legal applications relating to the admissibility of evidence or the fairness of proceedings.

8. We are acutely aware that those who are bereaved have been waiting for many years for the possibility of justice. Whilst the PPS seeks to progress such cases as expeditiously as possible, their complexity and the existence of competing pressures often make it difficult to meet expectations.
9. The PPS considers it essential that time is taken to meet with families and their representatives and explain in detail the decisions taken in these cases. Decisions not to prosecute are almost invariably received with great disappointment and other legal avenues, such as requests for reviews (in accordance with the PPS Code for Prosecutors) and applications to the High Court for judicial review frequently follow. We have found that transparency in the provision of reasons and the provision of as much explanatory information as possible can help families even where the criminal justice outcome is not what they may have hoped for. The wider public interest in decisions taken in high profile legacy cases is often very significant and an appropriate resource is required to ensure the proper and effective communication of information relating to the case to the media and other key stakeholders.
10. For the reasons outlined above, legacy cases require a significantly greater investment of resource, both from prosecutors, senior managers and support functions (such as communications and witness care teams), and it is essential that this is recognised when planning for and resourcing the investigative and prosecutorial response to dealing with the past. Given the scale of the challenge to source experienced prosecutors to staff any new legacy function within the PPS and the need for a close working relationship with the HIU Director to agree clear and transparent processes, the earlier that there is clarity on statutory arrangements for dealing with the past the sooner planning can begin in earnest.
11. The consultation document states at page 17 that the organisations with responsibilities for investigating the past were not designed to deal with the challenges of a large caseload of often controversial historical incidents. This is

undoubtedly true and ever more the case in the context of reducing budgets. It applies equally, of course, to the PPS which carries sole responsibility for deciding whether to prosecute such cases and the conduct of any subsequent proceedings.

12. The consultation asks the question whether maintenance of the current system for dealing with the issues of the past is the right approach or whether there is a need for reform. It is clear that the current system is not working in the sense that there are large backlogs of cases that have developed within the relevant investigating agencies that cannot be progressed in satisfaction of the legal obligations that apply. Whilst the investigative “bottlenecks” have acted as somewhat of a buffer for the PPS, our current legacy caseload is putting extreme pressure on our existing resources and undoubtedly impacting upon our ability to expeditiously progress both legacy cases and other serious and complex casework simultaneously. The receipt of further complex legacy cases (including separately funded and resourced investigations such as Operation Kenova and Operation Klina) will, in the absence of additional resources, only exacerbate the current position. The PPS is therefore anxious that there is reform and that the resources required to properly and expeditiously discharge the investigative and prosecutorial responsibilities associated with legacy cases are made available as soon as possible.

13. However, it should be clearly understood that the resourcing challenge for the PPS in terms of the HIU workload is more than a pure financial one. Northern Ireland is a small jurisdiction and the pool of criminal lawyers with the necessary experience to undertake this type of work is limited. If legislation is brought forward to create a HIU the PPS will be considering a range of options in terms of recruitment which may include trying to attract experienced lawyers from outside the jurisdiction and the development of training programmes. At this stage the extent to which the PPS can be successful in doing so is unclear. It is imperative that any future impact assessment of the delivery of new institutions gives careful consideration to the consequences for the PPS having regard to the case volumes that fall, or may fall, within their remit.

The relationship between the HIU and the PPS

14. Before turning to the proposed relationship between the HIU and the PPS it may be helpful to briefly explain the legislative framework governing the relationship between: (i) the PPS and PSNI; and (ii) the PPS and PONI.

15. The PPS was established by Part 2 of the Justice (Northern Ireland) Act 2002 (“the 2002 Act”). It is headed up by the Director of Public Prosecutions (DPP) who, by virtue of Section 35 of the 2002 Act, is required to take over the conduct of all criminal proceedings which are instituted in Northern Ireland on behalf of any police force. The DPP may also institute, and have the conduct of criminal proceedings in any other case where it appears appropriate for him to do so. The DPP can delegate these powers to members of his staff.

16. In practical terms, serious criminal offences that are investigated by police can result in either an individual(s) being charged or reported to the PPS for a decision as to prosecution. If charged the proceedings will continue only if a prosecutor, having reviewed the relevant evidence and information, decides that the Test for Prosecution is met. The Test for Prosecution is met if the available evidence provides a reasonable prospect of conviction and prosecution is in the public interest. If the individual is reported to the PPS and a prosecutor subsequently issues a decision to prosecute (because it has been concluded that the Test for Prosecution is met) proceedings will be commenced by way of a summons issued by the PPS.

17. Thus the position is that decisions as to prosecution in such cases are solely a matter for the PPS. The responsibility for the conduct of the investigation, on the other hand, lies with the Police Service of Northern Ireland (PSNI). There will inevitably be close cooperation between the PPS and PSNI, particularly in the conduct of serious cases, and a prosecutor will, for example, issue a request for further evidence or information if they consider it necessary to enable them to reach a properly informed decision. The prosecutor will also work closely with police in relation to other aspects of case building and case management such as disclosure.

18. However, there are many criminal investigations that conclude *without* any identified suspect and in these circumstances no individual is charged or reported to the PPS. There are also cases where a suspect is identified and interviewed under caution (perhaps on the basis of intelligence) but there is no credible evidence against that person who is therefore released unconditionally, i.e. not subject to a report to the PPS for a decision as to prosecution.
19. The police can, at any stage of an investigation, whether a suspect has been identified or not, seek prosecutorial advice from the PPS. Section 31(5) of the 2002 Act provides that the Director must give to police forces such advice as appears to him appropriate on matters relating to the prosecution of offences. Prosecutorial advice is limited to issues bearing directly upon the prosecution of offences, such as the quality and admissibility of evidence, or the evidence needed to support the prosecution of a person for a particular offence. The PPS does not provide prosecutorial advice upon investigative matters (e.g. the lawfulness of a proposed arrest or search), although the consequence for any prosecution of an unlawful exercise of such powers is a matter upon which prosecutorial advice might properly be sought. Pre-charge advice is a specific example of prosecutorial advice which occurs when advice is sought by investigators about the specific charges, if any, which should be preferred against any person suspected of committing a criminal offence.
20. Section 35(5) of the 2002 Act further provides that the Chief Constable of the PSNI must, at the request of the DPP, ascertain and give to the DPP: (a) information about any matter appearing to the DPP to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland; and (b) information appearing to the DPP to be necessary for the exercise of his functions. The section 35(5) power underpins the requests for further evidence and information referred to at paragraph 17 above. It also allows the DPP to require the Chief Constable to report to him upon potential criminal offences (not otherwise under investigation) which come to the attention of the DPP in the course of the exercise of his functions. The types of circumstances in which this tends to arise include where potential criminal conduct has been

brought to the attention of the DPP by a Court in the course of proceedings being conducted by the DPP; or where the Attorney General has referred a matter to the DPP and asked him to consider whether he wishes to consider a review of an historical decision not to prosecute. It should be noted that, beyond this type of situation, complaints and request for investigations, for example by victims or families, are properly directed to the Chief Constable of PSNI and it is not the role of the Director of Public Prosecutions to review difficult investigative judgments that police may be required to make.

21. The background outlined above is the product of the recommendations arising from the 2000 Criminal Justice Review and has been carefully designed to ensure that investigators and prosecutors work together effectively but that there remains a clear distinction between investigative and prosecutorial responsibilities and the independence of both organisations is effectively secured and maintained.
22. The draft Northern Ireland (Stormont House Agreement) Bill contains certain arrangements that differ from the existing ones. Clause 13 of the Bill provides that all criminal investigation reports, *regardless of whether a conclusion is reached that any criminal offences were committed*, must be provided to the DPP. It further provides that, upon receipt of the report, the DPP may require the HIU to ascertain, and supply to him, all further information relating to the death which appears to the DPP to be necessary for the discharge of his functions.
23. It is important to also note that criminal investigations (and hence the production of a criminal investigation report) are not prevented by virtue of the fact that a suspect is no longer alive – see, for example, Clause 9(7) and 9(13)(c). The HIU is required to exercise its investigatory function in relation to potential criminal offending not only where the DPP has reasonable grounds for believing that there are reasonable investigative steps that could be taken which are capable of leading to the prosecution of a person; it must also exercise its power if such steps are capable of leading to the identification of a person who committed that offence. The fact that that person has died since the offence was committed does not prevent the HIU Director from forming this belief.

24. Clause 13 provides for a relationship between prosecutor and investigator that is fundamentally different from that which exists with the PSNI. The effect of this clause is to require the HIU Director to report to the DPP in cases where the Director of the HIU has not identified any individual in respect of whom a decision as to prosecution is required. In these circumstances it is not immediately clear what information the DPP could identify as “necessary for the discharge of his functions” which, under the 2002 Act, extend to deciding whether to institute or take over the conduct of proceedings. Indeed, it seems that such a report will be submitted even in circumstances where the person who may have committed the offence is no longer alive and therefore, even if credible evidence were available, no prosecution could be brought.

25. It is understood by the PPS that the intention of Clause 13 is to act as a “check” on the conclusions reached by the HIU Director and to encourage a close working relationship between the HIU and the PPS; and that it is also designed to bring about closer liaison between the investigative body and the PPS than occurred in the case of the PSNI’s Historical Enquiries Team. The PPS is fully committed to working closely with any investigative body undertaking legacy cases and is also keen to play its role in maximising public confidence in the criminal justice element of dealing with the past.

26. The PPS does, however, have concerns about this particular aspect of the draft Bill. As outlined above, a decision that no further investigations are required is properly one for the independent investigator and, in the case of the HIU, rests with the HIU Director who must exercise his judgment in accordance with the particular statutory framework contained within the draft Bill (including, in particular, Clauses 7 and 9). There are likely to be some difficult judgments for the HIU Director to make in this regard (and he may well be challenged in relation to some of these judgments) but it is right that it is the HIU Director who makes them. If some independent oversight of how the HIU Director exercises his investigatory function is considered desirable, then alternative arrangements could be considered that rely upon persons with investigative experience. The arrangement under the draft Bill whereby the criminal investigation report is

automatically provided to the DPP so that he can consider whether further information is required for the exercise of his functions (which could be perceived as concurring with the investigative judgment of the HIU Director) risks a blurring of the crucial independence that exists between the investigator and prosecutor. It is arguable that such an arrangement is not in the longer term interests of maximizing public confidence in either the HIU or the PPS.

27. There is also a real risk that a requirement to send every criminal investigation report to the DPP could introduce further delay for families for whom the next stage is the preparation of a family report. The PPS envisages that a criminal investigation report is likely to be produced in the vast majority, if not all, cases. The result would be that senior prosecutors would be required to review hundreds of reports each year in cases where no prosecutorial decision is required. The challenges for the PPS in building a team of prosecutors with the necessary experience to manage a dramatic increase in legacy work are alluded to above and are very significant. It may be considered that the limited prosecutorial resource that will be available is most effectively and efficiently focused on those cases in which the Test for Prosecution might realistically be met.

28. A close working relationship between the HIU and the PPS is indeed essential but the PPS considers that this can be secured with transparency and without any compromise to the independence of the PPS by the agreement of published protocols between the HIU Director and the DPP setting out the circumstances in which reports will be submitted or prosecutorial advice should be sought. The PPS can readily envisage circumstances in which prosecutorial advice is properly sought in relation to investigations that do not result in the identification of an individual in respect of whom a decision as to prosecution is ultimately required. It is entirely proper that such advice is available and this is provided for at paragraph 5 of Schedule 12 of the draft Bill. However, as explained above, it is not appropriate that the report prepared following the conclusion of such an investigation is required to be forwarded to the DPP in circumstances where no decision as to prosecution is ultimately required.

29. The relationship between the PPS and the Police Ombudsman for Northern Ireland (PONI) is different in some respects to that between the PPS and PSNI. First, there is no statutory requirement for the DPP to provide the Police Ombudsman with prosecutorial advice. However, in practice such advice is available and the DPP will always oblige any reasonable request for such advice to be provided. The PPS considers it appropriate that the requirement to provide advice to the HIU Director as contained within the draft Bill should apply to all cases and, as is the case in the draft Bill, no distinction should be drawn between those cases that were previously part of the PSNI's Historical Enquiries Team (HET) or PONI's Historical Investigations Directorate (HID) caseloads.
30. The second significant difference is that there is no equivalent to the section 35(5) power as regards the Police Ombudsman. There is a somewhat analogous provision under section 55 of the Police (Northern Ireland) Act 1998 whereby a referral of potential criminal conduct by a police officer, or certain conduct justifying disciplinary proceedings, must be made (unless it appears that the Ombudsman is already aware of the matter) but the Ombudsman is only required to investigate the matter *if it appears to him that it is desirable in the public interest that he should do so*. It is the view of the PPS that any power of referral should apply equally across the different case types handled by the HIU, regardless of whether they were inherited as part of the HET or HID caseload.

Lifespan of the Historical Investigations Unit

31. The draft Bill provides for an initial investigatory phase of five years which can be subject to one year extensions thereafter. The experience of the PPS would indicate that this timeframe may not be achievable. It is important to recognise that the process of taking decisions as to prosecution and conducting cases (and potentially appeals and re-trials) is one that could continue for a number of years after the HIU submits its final report to the PPS. It is essential that the PPS continues to receive the investigatory support required to conduct any such proceedings and that the funding window is sufficiently long to cater for this

reality.

Impact of ICIR on Potential Criminal Proceedings

32. Part 3 of the draft Bill provides for the creation of the Independent Commission on Information Retrieval (ICIR) which provides for a non-criminal justice route by which families can, upon request, seek and receive information about deaths within the remit of the Commission.

33. Insofar as the ICIR is concerned, the interest of the PPS lies primarily in ensuring that its operation does not prejudice any criminal investigations or prosecutions that might arise in relation to cases falling within the remit of the HIU. In this regard there are a number of provisions of particular note contained within the draft Bill:

- (i) Clause 45(3) of the draft Bill provides that information provided to the Commission is not admissible in any legal proceedings. There is, however, no provision preventing information provided to the Commission and contained within a family report from forming the basis of lines of enquiry that subsequently result in the securing of (potentially) admissible evidence.
- (ii) Clause 45(4) provides that the preceding provision does not affect the admissibility of information which is held by a person other than the Commission, unless that information has been obtained from the Commission.
- (iii) Clause 42(2) provides that a family report must contain only information the credibility of which has been established to the satisfaction of the Commission.
- (iv) Clause 43(2) requires the Commission not to do anything which might have a prejudicial effect on any actual or prospective legal proceedings.

- (v) Clause 43(3)(a) precludes the Commission from disclosing the identity of the source of its information.
- (vi) Clause 43(3)(b) precludes the Commission from disclosing the name or identity of anyone identified to it as being responsible for the death or for any act from which the death resulted.
- (vii) Clause 45(2) provides that the provision of information to the Commission does not give any person an amnesty for any criminal offence.

34. The PPS understands the twin objectives of encouraging persons to come forward and provide information to the Commission (and thereby to families) whilst at the same time protecting the integrity of any potential prosecutions. It is, however, a difficult balance to strike. The precise legal outworkings of some of the provisions is unclear and might ultimately have to be determined by a Court but the following are issues that arise:

- (i) To what extent will persons come forward in circumstances where the information that they provide can be used to generate lines of enquiry that may incriminate themselves or others?
- (ii) Whilst the information contained within the Report is statutorily declared as inadmissible in criminal proceedings that does not mean that it could not be *relevant* to such proceedings. It could, for example, attract a duty of disclosure by providing a basis for the defence to pursue certain lines of enquiry.
- (iii) The anonymisation of the source of the information and the identities of those alleged to have been involved in the death may reduce the likelihood of information contained within a Report being relevant to criminal proceedings; but the possibility of it being relevant remains real, e.g. if it provides a narrative that is inconsistent with the prosecution case and, by inference, points away from the involvement of the defendant.

- (iv) In the context of live criminal proceedings one could foresee attempts by the defence to ascertain whether a family report existed and, if so, inspect the content of same.
- (v) The prosecution may also require to consider whether, in certain circumstances, access to a family report is a reasonable line of enquiry.
- (vi) In the context of disclosure the defence would argue that the value of the information is enhanced by the fact that the Commission was required by statute to satisfy itself as to the credibility of information included within the Report (although it is not clear how the Commission is to approach this task).
- (vii) There is the potential for anyone disposed to prejudice a potential or actual prosecution to seek to exploit the ICIR process for that purpose. An example of this would be where false information is fed into the system with the intention that a family report is produced containing information that undermines the prosecution case or assists the defence case. It might be thought that the intentional provision of false or inaccurate information to the ICIR in order to undermine a prosecution has the potential to prejudice not only any potential criminal proceedings, but also the integrity of the ICIR process itself.
- (viii) In terms of addressing any issue of admissibility it may be difficult to establish whether information provided separately from the Report did, or did not, in fact originate from the Report itself.
- (ix) Whilst the ICIR is required not to do anything which might prejudice any actual or prospective proceedings, it is unclear how it would approach the task of making the necessary assessment. If a body or individual is concerned about the potential of certain contemplated action to prejudice proceedings there is usually close consultation with the PPS which involves revelation of the proposed action and advice from the PPS as to the potential for any prejudice to be caused. This occurs for example if the

Police Ombudsman for Northern Ireland issues a report before related criminal proceedings have concluded. Is it envisaged that the ICIR will share a copy of a draft report with the PPS in circumstances where it intends to publish and there remains a prospect of criminal proceedings in relation to the death?

35. It would therefore appear that the establishment of the ICIR which would exercise its functions in parallel with the work of the HIU may, in certain circumstances, create risks to the administration of justice. As noted above, the operation of parallel processes might also create some risks to the ICIR process in terms of discouraging persons to come forward with truthful information and also encouraging the supply of untruthful information. Ultimately it will be for others to balance those risks against the public policy considerations in favour of running both processes in parallel and decide whether the proposals within the Bill are the most appropriate way forward.

Referrals by the DPP

36. Deaths within the HET and HID caseloads are only within the remit of the HIU *if they require further investigation* by the HIU (Clause 5(1)).

37. Paragraph 3 of Schedule 3 sets out the circumstances in which a death requires further investigation. In summary, these are that the investigatory process in relation to a case within the HET or HID caseload had not commenced or was not complete; that the case is one that requires re-examination in light of the 2013 HMIC Report (essentially the soldier cases); or that the investigation into the case was complete but new evidence has become available. Paragraph 6 of Schedule 3 sets out how the HIU Director is to approach the issue of new evidence in completed cases and decide whether it is sufficient to warrant further investigations. If the new evidence meets the relevant threshold then the case will require further investigation and the case will consequently fall within the remit of the HIU.

38. There is a further means by which a case not otherwise within the HIU's remit (e.g. a completed HET or HIU case) can come to require further investigation and therefore fall within its remit. That is where the DPP refers the case to the HIU under paragraph 1 of Schedule 6.
39. Schedule 6 deals generally with the issue of new evidence relating to a death and the circumstances in which it will trigger the exercise of the HIU's investigatory function. It appears that Schedule 6 is primarily concerned with new evidence relating to cases already within the HIU's remit as there are separate provisions within Schedule 3 by which new evidence can bring a case within remit. A referral by the DPP under Schedule 6 paragraph 1 can result in a case previously within remit being the subject of the HIU's investigatory function, either for the first time or on a subsequent occasion. However, when read in conjunction with Schedule 3 paragraph 3, a referral can also have the result of a case not otherwise within the HIU's remit being brought within remit *and* the investigatory function becoming exercisable.
40. A preliminary point in relation to this provision is that families through their legal representative may approach the DPP in order to persuade him to make a referral on the basis of what they say is new evidence. Experience in relation to the section 35(5) power indicates that this approach is sometimes taken, with approaches either made directly to the PPS, or to the Attorney General who then refers the matter on for consideration by the DPP. It seems clear that families with new evidence who want to bring their case within the remit of the HIU should approach the HIU *directly* under the arrangements to be established under Schedule 3 paragraph 6(9). However, it might be helpful if this is made explicit in some way within the Bill.
41. Whilst one can see some similarities between this power of referral and the existing section 35(5) power there are also a number of important differences. The current section 35(5) power does not require the application of a statutory test to the evidence or information that prompts the request to the Chief Constable. Furthermore, whilst a section 35(5) request will often result in the Chief Constable undertaking a formal criminal investigation, it need not

necessarily do so. The Chief Constable is only required to give information to the DPP about the matter and it may be that a careful review of the material that has prompted the referral does not result in a proper basis for any further criminal investigation.

42. The PPS envisages difficulty in the practical application of paragraph 1 of Schedule 6, particularly in the context of cases which are not otherwise within the HIU's remit and which have not been the subject of any previous report to the PPS. The provisions within the draft Bill require that the DPP is aware of **new evidence** relating to the death before a referral would be made. Evidence, in the context of criminal justice, has a particular meaning and tends to be distinguished from intelligence or other information which would not itself be admissible in a criminal trial. It may be that the DPP could become aware of intelligence or other information relevant to the issue of whether a case should be included within the remit of the HIU but the current provisions do not allow for a referral in these circumstances. This difficulty is compounded by the subsequent condition that the DPP has reasonable grounds for believing that the new evidence (if found) would be capable of leading to the identification of a person involved in the death or the prosecution of a person for a criminal offence relating to the death. A number of issues arise from this provision and the related definitions in paragraph 4:

- (i) There is a potential tension between the requirement that the DPP *be aware of new evidence* and the subsequent reference to "new evidence (*if found*)". How will the DPP satisfy himself of the existence of new evidence which he has not yet seen and which may not be capable of being located?
- (ii) How is the DPP to make an assessment of the value of the new evidence in circumstances where he may have little or no knowledge of the details of the case and the other evidence relating to the death? As noted above, it may be a case that is not otherwise within the HIU caseload and has not been the subject of any previous report to his office? How is he to make an assessment of the credibility of the new evidence and take it into account

“with all other relevant matters” as he is required to do under paragraph 4(4)?

- (iii) How is the DPP to ascertain whether information that comes to his attention is new evidence which is defined at paragraph 4 of Schedule 6 as evidence that was not previously known to the HIU; or evidence as to which the relationship with the death was not previously known? Is this definition sufficient to cover cases that are otherwise outside the HIU remit where the evidence may have been considered by a previous investigation?
- (iv) It is currently no part of the statutory functions of the DPP to refer cases on the sole basis that evidence or information that becomes available to him may lead to the *identification* of a person involved in the death, regardless of whether that person may be alive and potentially the subject of a prosecution. That he would do so under the proposed arrangements appears to be the effect of paragraph 1(1)(b) of Schedule 6.
- (v) The draft Bill requires the DPP to exercise his functions in relation to the referral of a death in a manner consistent with the general principles as set out in section 1 of the draft Bill. This includes what are essentially policy objectives such as the promotion of reconciliation, the acknowledgement of the suffering of victims and survivors and the desire to deal with Northern Ireland’s past in a balanced, proportionate, transparent, fair and equitable manner. Whilst the PPS does not take issue with any of the general principles, the DPP is not well placed to weigh the different types of policy objectives listed. Moreover, whilst the DPP must exercise all of his functions reasonably and lawfully, it is inappropriate that he should be required to balance such policy considerations in the exercise of this function and the requirement for him to do so introduces an added layer of complexity to the task and potential avenues for challenge.

43. These provisions are of some complexity and the PPS has not yet engaged with the NIO in detail in relation to all of the points raised above. However, in general

terms, it seems preferable that the power of the DPP to refer a death not be circumscribed in the manner prescribed within the Bill; and that the HIU Director would be required, upon receipt of the referral, to take such steps as are required for him to make the assessment under Schedule 3 paragraph 6 as to whether the evidence is indeed new and of the prescribed investigative value. The HIU Director could be further required to report to the DPP upon the steps that he has taken upon receipt of a referral and the conclusions that he has reached. This would make the position much more analogous to that which currently pertains as a result of the section 35(5) power.

Onward disclosure

44. Schedule 10 permits the HIU to make onward disclosure of sensitive information to the DPP. The only condition placed upon such disclosure is that the HIU first notifies the Secretary of State of the intention to make the onward disclosure and thereafter waits for a period of 10 days before doing so.

45. At present the PPS will receive sensitive information direct from the PSNI and from PONI and also from other intelligence agencies. There is no requirement that prior notification be given to the Secretary of State before sensitive information is shared in this way. The provision of sensitive information to the DPP is regularly required in the course of taking decisions as to prosecution and conducting legacy cases. It is very much part of “normal business”. The PPS sees no reason why any notification by the HIU to the Secretary of State should now be required in relation to the provision of sensitive information to the DPP. There is, quite properly, no power within the draft Bill for the Secretary of State to object to onward disclosure to the DPP and the purpose of such notification is not apparent. Furthermore, it is often necessary for the effective and efficient exercise of prosecutorial functions (including the conduct of proceedings before a Court) that sensitive information be provided to the DPP (and potentially placed before a Judge *ex parte*) as a matter of some urgency. It is therefore inappropriate that there be any mandatory delay between an intention being formed by the HIU to forward sensitive material to the DPP and the actual dissemination being effected.

Conclusion

46. The PPS recognizes the differing views and voices on how best to deal with the past and appreciates the complexity of the issue in ensuring that all perspectives are taken into account. Although a bespoke investigative and information provision process appears necessary to ensure transparency and maintain confidence of bereaved families as far as possible, the prosecutorial decision making process should remain the same as with every other case type. The PPS will undoubtedly become a focal point for attention and likely challenge as it will be this office which will take decisions and seek to explain those to families when, in many cases, the Test for Prosecution will not be met. The Test for Prosecution applied will be the same evidential and public interest analysis as pertains to every decision taken by the PPS, as set out in the Code for Prosecutors. Decisions will be taken without fear, favour or prejudice. The same level of careful prosecutorial analysis, rigour in decision making and sensitive and appropriate treatment of victims' families and witnesses will apply regardless of the background of either the deceased or the reported suspect. This is essential in ensuring that the PPS can properly discharge its statutory functions and its role in maintaining the rule of law. What will no doubt be of particular importance are close working relationships between the DPP and the Director of HIU in ensuring that the needs of all victims are met, and the establishment of clear and transparent protocols for ensuring effective communication and standards of care. The challenge in planning for and implementing a separate PPS legacy function, even when funding is available to do so, should not be underestimated, and substantive progress in this regard cannot be made until there is clarity about the legislative framework.