



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Submission to the NI Affairs
Committee's Inquiry into the
Government's New Approach to
Addressing the Legacy of the Past in NI**

February 2025

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Summary of Recommendations

- 2.6 The NIHRC recommends that the Committee seeks assurances from the UK Government that it is adopting a human rights-based approach to its consultations on addressing the legacy of the past, which includes the requirement to ensure that participation is effective. This includes clarity on how this is being achieved, such as ensuring that consultees feel that they are being listened to, that their views are being meaningfully considered and that any decisions are communicated within reasonable timeframes, with the opportunity for further discussion where reasonable.**
- 2.9 The NIHRC recommends that the Committee seeks clarity from the UK Government on how it will ensure consideration of Windsor Framework Article 2 and EU minimum standards relating to victims' rights are built into the development and implementation of its legacy proposals to address the needs of victims, survivors and their families.**
- 3.5 The NIHRC welcomes the removal of the conditional immunity scheme, but suggests that the Committee seeks clarity from the UK Government on how immunity in all instances will be prevented and effective and independent criminal investigations into Troubles-related offences ensured.**
- 3.8 The NIHRC recommends that the Committee seeks confirmation from the UK Government on the steps that will be taken to ensure prompt and expeditious determinations of Troubles-related civil cases.**
- 3.10 The NIHRC recommends that the Committee explores with the UK Government its reasons for failing to address within the Remedial Order the clear finding of the Court of Appeal in NI that the Independent Commission for Reconciliation and Information Recovery is incapable of delivering human**

rights compliant investigation into deaths in instances where it is acting in place of a coroner's inquest.

3.13 The NIHRC recommends that the Committee seeks clarity from the UK Government on how it will embed consideration of Windsor Framework Article 2 and the EU Victims' Directive in the development of its broader proposals to repeal and replace the NI Troubles (Legacy and Reconciliation) Act 2023.

4.6 The NIHRC recommends that the Committee explores with the UK Government its reasons for failing to address within the Remedial Order the clear finding of the Court of Appeal in NI that the Independent Commission for Reconciliation and Information Recovery is incapable of delivering human rights compliant investigation into deaths in instances where it is acting in place of a coroner's inquest.

4.13 The NIHRC recommends that the Committee explores with the UK Government introducing a requirement that the Troubles-related investigations body publishes all of its reports, subject only to very limited and precise exception. This includes considering introducing a requirement that all exceptions must be lawful and proportionate and include safeguards that ensure these are not applied arbitrarily and that the commitments aimed at enabling effective public scrutiny are not illusory.

4.16 The NIHRC recommends that the Committee explores with the UK Government how to ensure that the definition of 'close family member' is not too narrow. For example, it should at least extend to grandparents, aunts, uncles, nieces, nephews, or grandchildren.

4.17 The NIHRC recommends that the Committee explores with the UK Government how to ensure that the definition of 'other family member' permits situations in which a non-familial person, with close personal links and who provides care for a victim, can seek remedy on the victim's behalf.

- 4.22 The NIHRC recommends that the Committee seeks clarification from the UK Government on how it will ensure that the right of victims and their family members to receive information about their case will be expressly protected.**
- 4.23 The NIHRC recommends that the Committee explores with the UK Government how it will explicitly guarantee the right of victims and their family members to be heard and to seek a review of a decision not to prosecute.**
- 4.32 The NIHRC recommends that the Committee explores with the UK Government how to ensure that the extent of the Secretary of State's influence and involvement across the Troubles-related investigatory body's operations does not prevent it from being sufficiently independent and impartial, as required by the ECHR.**
- 4.33 The NIHRC recommends that the Committee explores with the UK Government introducing a requirement, like that within Operational Kenova, that Commissioners or staff of the Troubles-related investigatory body are not permitted to be personnel who are serving in or have previously served in the Royal Ulster Constabulary, Police Service of NI, Ministry of Defence or Security Services.**
- 5.4 The NIHRC recommends that the Committee explores with the UK Government how to ensure the Troubles-related investigatory body has the ability to initiate and pursue cases of its own motion.**
- 5.9 The NIHRC recommends that the Committee explores with the UK Government how it will provide a comprehensive mechanism to objectively assess whether investigative obligations have been complied with regarding all Troubles-related offences. Such a mechanism should include a requirement to assess whether previous Troubles-related investigations were effective as required**

by the ECHR. Also, any cases deemed to be non-human rights compliant in whole or in part, that a process is in place whereby these are added to the caseload of the Troubles-related investigatory body.

5.12 The NIHRC recommends that the Committee explores with the UK Government how to ensure individual circumstances of each potential case and broader human rights commitments, including the investigative obligations attached to the right to life and freedom from torture, can be considered and are used to inform the determination of whether a case should be considered by a Troubles-related investigatory body.

5.18 The NIHRC recommends that the Committee explores with the UK Government how to ensure that biometric material linked to Troubles-related investigations are only retained where it is relevant to the work of the investigatory body.

5.27 The NIHRC recommends that the Committee seeks clarification from the UK Government on how it will ensure that victims and their family members will have access to appropriate supports and specialist services.

5.31 The NIHRC recommends that the Committee seeks clarification from the UK Government on how it will ensure that due consideration is afforded to the specific individual needs of victims and family members according to their particular circumstances both in the delivery of support services and the criminal proceedings by putting in place the appropriate safeguards.

5.34 The NIHRC recommends that the Committee seeks clarification from the UK Government on how it will ensure the oversight, monitoring, evaluation and reporting on the services to victims and their families.

5.37 The NIHRC recommends that the Committee seeks clarification from the UK Government how it will provide

for the appropriate training of practitioners and officials likely to come into contact with victims, survivors and their families throughout their journey with an investigatory body.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to section 69(1) of the Northern Ireland Act 1998, is required to keep under review the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). The NIHRC is also required, by section 78A(1) of the Northern Ireland Act 1998, to monitor the implementation of Article 2 of the Windsor Framework.¹ In accordance with these statutory duties, the following submission is made to the House of Commons NI Affairs Committee's inquiry into the UK Government's new approach to addressing the legacy of the past in NI.

2.0 Needs and Trust of Victims, Survivors and Their Families

- 2.1 The NI Affairs Committee poses the question of whether the UK Government's new approach meets the needs of victims, survivors and their families. Also, what steps the UK Government should take to build trust in the Independent Commission for Reconciliation and Information Recovery.
- 2.2 The UK Government has stated on several occasions its commitment to "repeal" and "repeal and replace the Legacy Act".² The Secretary of State for NI also stated that "the approach taken to legacy by the last Government was wrong. It was rejected by the NI political parties, victims' groups, the Irish Government and opposed by the Labour Party when we were in Opposition".³ The Council of Europe Committee of Ministers also expressed "grave

¹ The Windsor Framework was formerly known as the Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement and all references to the Protocol in this document have been updated to reflect this change. See Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework.

² In Belfast, Sir Keir Starmer as leader of the opposition, in its election manifesto, in the Kings' Speech and in UK Parliament Hansard, 'House of Commons Oral Answers to Questions: NI Troubles (Legacy and Reconciliation) Act 2023 – Hilary Benn MP – Volume 752', 24 July 2024; UK Parliament Hansard, 'House of Commons Debate: NI Legacy of the Troubles – Hilary Benn MP – Volume 758', 4 December 2024.

³ UK Parliament Hansard, 'House of Commons Debate: NI Legacy of the Troubles – Hilary Benn MP – Volume 758', 4 December 2024.

concern” at the then UK Government’s general plans for Troubles-related offences, including in particular the 2023 Act.⁴ The NIHRC notes that the UK Government has stated that its rationale for the current proposals includes that does not wish to “repeal the [2023] Act in its entirety without anything to replace it” and a hope to avoid creating a “vacuum”. The NIHRC notes simply that the Legacy Act and its provisions replaced the criminal and civil justice systems, the jurisdiction of the Office of the Police Ombudsman and the Coronial systems that have been in operation. Those systems remain and function for all those cases and claims that were *not* recently prohibited by the 2023 Act. It is the Legacy Act that is the replacement - for the whole package of measures offered in response to ECtHR decisions. There is no vacuum so the NIHRC suggests respectfully that the rationale, should that still be the case, does not sustain the approach. The current approach seems instead to retain and enhance the Independent Commission for Reconciliation and Information Recovery and its functions.⁵ This apparent disconnect between the UK Government’s categorical statements and actual approach has, according to stakeholders who have spoken with the NIHRC, has undermined further the confidence of victims, survivors and their families.

- 2.3 This is exacerbated by the fact that the UK Government’s plans have already been rejected by most victims and survivors. While some have chosen to engage with the Independent Commission for Reconciliation and Information Recovery,⁶ there is a sustained and well-documented lack of support for the 2023 Act.⁷ This was most recently confirmed following the Court of Appeal in NI’s decision, with many victims and survivors issuing revised calls for the

⁴ CoE, ‘Submission by the CoE Commissioner for Human Rights Under Rule 9.4 of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements in the Cases of McKerr v UK, Finucane v UK, Kelly and Others v UK, Shanaghan v UK, McCaughey and Others v UK’ (CoE, 2022), at para 28; CM/Notes/1443H46-32, ‘CoE Committee of Ministers McKerr Group v UK (Application No 28883/95) Supervision of the Execution of the ECtHR’s Judgments’, 22 September 2022, at para 8; CM/Del/Dec(2023)1459/H46-35, ‘McKerr Group v UK (Application No 28883/95 Supervision of the Execution of the European Court’s Judgments), 9 March 2023, at para 5; CM/ResDH(2023)148, ‘CoE Committee of Ministers Interim Resolution: McKerr and Four Cases Against the UK’, 7 June 2023; CM/Del/Dec(2023)1475/H46-44, ‘CoE Committee of Ministers McKerr Group v UK (Application No 28883/95)’, 21 September 2023, at paras 9-12.

⁵ Enda McClafferty, ‘Troubles legacy body won’t be scrapped – NI secretary’, *BBC News*, 23 September 2024.

⁶ Independent Commission for Reconciliation and Information Recovery, ‘Press Release: Independent Commission for Reconciliation and Information Recovery is focused on delivering “the unvarnished truth” as it enters next phase of its work’, 7 January 2025.

⁷ NI Office, ‘Addressing the Legacy of NI’s Past: Analysis of the Consultation Responses’ (NIO, 2019); NI Affairs Committee, ‘Oral Evidence: Addressing the Legacy of NI’s Past – The UK Government’s Proposals – Oral Evidence’, 7 June 2022; Enda McClafferty, ‘Troubles legacy body won’t be scrapped – NI secretary’, *BBC News*, 23 September 2024.

Independent Commission for Reconciliation and Information Recovery specifically to be “scrapped”.⁸ There should be, as a starting point, a basic and critical acceptance that such measures must build trust in any investigatory body, including the Independent Commission for Reconciliation and Information Recovery, and to ensure that the approach meets the needs of victims, survivors and their families. Individuals who will be most affected have, for the most part, been categorical in their rejection of these proposals.

- 2.4 The current UK Government, as the previous UK Government, has been meeting with victims, survivors and other interested parties as part of a programme of consultation. The openness to engagement by the UK Government is welcomed, however, consultation must be meaningful and its results capable of influencing the outcome. Meaningful consultation, otherwise referred to as effective participation in human rights terms, goes beyond sharing a space, conversing and exchanging information. It requires nurtured two-way communication, transparency, and reasonable timing of information and reasonable access to information. Where views are expressed, while they may not all be implemented, consultees should feel that they are being listened to, that their views are being meaningfully considered and that any decisions are communicated within reasonable timeframes, with the opportunity for further discussion where reasonable.
- 2.5 The Secretary of State for NI has indicated that the draft Stormont House Agreement legislation, the experience from Operation Kenova and discussions with a range of stakeholders on specific measures are to inform the new primary legislation and approach.⁹ The NIHRC welcomes that there appears to be an openness to consider specific measures for inclusion within proposed primary legislation beyond those already identified.¹⁰

2.6 The NIHRC recommends that the Committee seeks assurances from the UK Government that it is adopting a

⁸ Enda McClafferty, ‘Troubles legacy body won’t be scrapped – NI secretary’, *BBC News*, 23 September 2024.

⁹ UK Parliament Hansard, ‘House of Commons Debate: NI Legacy of the Troubles – Hilary Benn MP – Volume 758’, 4 December 2024.

¹⁰ *Ibid.*

human rights-based approach to its consultations on addressing the legacy of the past, which includes the requirement to ensure that participation is effective. This includes clarity on how this is being achieved, such as ensuring that consultees feel that they are being listened to, that their views are being meaningfully considered and that any decisions are communicated within reasonable timeframes, with the opportunity for further discussion where reasonable.

- 2.7 It is important to note that 'addressing the legacy of the past' is a term used to refer to truth recovery measures. The UK Government remains (separately) obliged by Articles 2 and 3 of the ECHR to initiate and conduct effective investigations. Further, it is essential that the UK Government ensures compliance with Windsor Framework Article 2 specifically the EU Victims' Directive¹¹ and the EU Charter of Fundamental Rights in an effort to build trust and confidence in any new legislation or policy that tackles the rights of victims, survivors and their families.
- 2.8 The Court of Appeal in NI confirmed that the rights of victims of crime fall within the scope of the relevant chapter in the Belfast (Good Friday) Agreement and are promoted and given effect by civil rights available to all victims of crime, including Articles 2, 3, 6 and 14 of the ECHR.¹² The Court of Appeal also found that the rights are particularised to some effect and enhanced by the EU Victims' Directive, which is to be interpreted in accordance with the EU Charter of Fundamental Rights and general principles of EU law.¹³ The Court of Appeal rejected the argument that, where an EU Charter right is mirrored in the ECHR, there can be no diminution in rights.¹⁴ It is clear from the Court of Appeal's reasoning that where ECHR rights were mirrored, particularised or enhanced by EU minimum standards, Windsor Framework Article 2 requires that those EU standards are the yardstick by which diminution is

¹¹ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹² *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NICA 59, at paras 115-117.

¹³ *Ibid*, at para 119 and 126.

¹⁴ *Ibid*, at para 160.

measured, noting that a diminution in rights can occur where the available remedies to vindicate the right have been reduced.¹⁵

- 2.9 **The NIHRC recommends that the Committee seeks clarity from the UK Government on how it will ensure consideration of Windsor Framework Article 2 and EU minimum standards relating to victims' rights are built into the development and implementation of its legacy proposals to address the needs of victims, survivors and their families.**

3.0 Proposed Remedial Order

- 3.1 The NI Affairs Committee poses the question of what steps the UK Government can take to facilitate an effective process of reconciliation.
- 3.2 A proposed Remedial Order has been introduced which sets out clear intentions to repeal provisions on the conditional immunity scheme. It also includes provisions to reinstate Troubles-related civil actions. This is in response to judgments by the High Court of Justice in NI and the Court of Appeal in NI.¹⁶
- 3.3 It is the NIHRC's considered view that the proposed Remedial Order addresses most of the issues identified by the High Court and Court of Appeal. It does not, however, address all the issues identified by these courts, nor does it address all of the issues identified more widely by the NIHRC and other human rights bodies.¹⁷ The NIHRC continues to advise that further action is required if Troubles-related investigations are to be ECHR compliant. By way of overview, the following reflects the primary concerns of the NIHRC regarding the Remedial Order.

¹⁵ Ibid, at para 160.

¹⁶ *Re Dillion and Others* [2024] NIKB 11; *In the Matter of an Application by Martina Dillon and Others* [2024] NICA 59.

¹⁷ CoE, 'Submission by the CoE Commissioner for Human Rights Under Rule 9.4 of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements in the Cases of McKerr v UK, Finucane v UK, Kelly and Others v UK, Shanaghan v UK, McCaughey and Others v UK' (CoE, 2022), at para 28; CM/Notes/1443H46-32, 'CoE Committee of Ministers McKerr Group v UK (Application No 28883/95) Supervision of the Execution of the ECtHR's Judgments', 22 September 2022, at para 8; CM/Del/Dec(2023)1459/H46-35, 'McKerr Group v UK (Application No 28883/95 Supervision of the Execution of the European Court's Judgments)', 9 March 2023, at para 5; CM/ResDH(2023)148, 'CoE Committee of Ministers Interim Resolution: McKerr and Four Cases Against the UK', 7 June 2023; CM/Del/Dec(2023)1475/H46-44, 'CoE Committee of Ministers McKerr Group v UK (Application No 28883/95)', 21 September 2023, at paras 9-12.

3.4 The Remedial Order does not amend section 38 of the 2023 Act, which provides that “no criminal investigation of any Troubles-related offence may be continued or begun”. This affects new Troubles-related investigations by the Police Service of NI and the Police Ombudsman for NI and those investigations that were brought to an end on 1 May 2024. The Remedial Order will remove the conditional immunity scheme provided by the 2023 Act, but what will remain is the continued prohibition on criminal investigations by the Police Service of NI, Police Ombudsman for NI and other police services throughout the UK. In other words, immunity will be provided in those cases as a matter of practice. It is also notable that, in instances where the Independent Commission for Reconciliation and Information Recovery may consider criminal cases, it is not able to initiate such actions of its own motion and is reliant on reviews by others.¹⁸ This must be seen in the context that its ability to consider cases with sufficient independence and impartiality is in question.

3.5 The NIHRC welcomes the removal of the conditional immunity scheme, but suggests that the Committee seeks clarity from the UK Government on how immunity in all instances will be prevented and effective and independent criminal investigations into Troubles-related offences ensured.

3.6 Regarding civil cases, there are over 1,000 ongoing legacy civil claims against State agencies.¹⁹ While the proposed Remedial Order will remove the prohibition on Troubles-related civil cases, it does not contain any alternative provisions that will ensure prompt and expeditious determinations of any outstanding claims. The ECtHR has been clear that excessive and unreasonable delays in the examination of a claim may breach an individual’s right to fair trial (Article 6 of the ECHR).²⁰ Additionally, that a “chronic overload... cannot justify an excessive length of proceedings”.²¹ If effective mitigations to address existing delays on Troubles-related civil cases

¹⁸ Section 10, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁹ UK Parliament Hansard, ‘Written Answers: Civil Proceedings and Coroners NI – Baroness Anderson of Stoke-on-Trent – UIN HL2914’, 26 November 2024.

²⁰ *Frydlender v France* (2000) ECHR 353, at para 43; *Von Maltzan and Others v Germany*, at para 132.

²¹ *Probstmeier v Germany* (1997) ECHR 40, at para 64.

are not put in place, there is the risk of further findings of incompatibility in the future. The Remedial Order does not address this.

- 3.7 Article 16(1) of the EU Victims' Directive provides for victims to obtain a decision on compensation by the offender within the course of criminal proceedings.²² The Court of Appeal in NI clarified in *Dillon* that the result of the 2023 Act was that "there is no possibility of victims of Troubles-related offences receiving compensation, either through criminal proceedings or other proceedings, from the offender".²³ The Court of Appeal noted that this meant there was no effective remedy by way of compensation from the offender, since there is no access in practice to a legal means of achieving this.

3.8 The NIHRC recommends that the Committee seeks confirmation from the UK Government on the steps that will be taken to ensure prompt and expeditious determinations of Troubles-related civil cases.

- 3.9 Section 44 of the 2023 Act provides for the prohibition of new inquests and the closure of existing inquests of deaths resulting directly from the Troubles. The Court of Appeal in NI held that the Independent Commission for Reconciliation and Information Recovery was not capable of delivering a human rights compliant investigation into deaths in instances where it was acting 'in place of' a coroner's inquest.²⁴ The Secretary of State for NI made clear his intention to bring forward legislation to reinstate inquests. That is welcomed by the NIHRC. However, there is no clear timeframe for introducing the necessary primary legislation. That could and should be addressed by the Remedial Order.

3.10 The NIHRC recommends that the Committee explores with the UK Government its reasons for failing to address within the Remedial Order the clear finding of the Court of Appeal in NI that the Independent Commission for Reconciliation and

²² Article 26 and Recital 62, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

²³ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NICA 59, at para 133.

²⁴ *Ibid.*

Information Recovery is incapable of delivering human rights compliant investigation into deaths in instances where it is acting in place of a coroner's inquest.

3.11 In addition to finding that the conditional immunity provisions in the NI Troubles (Legacy and Reconciliation) Act 2023 were incompatible with the ECHR, the High Court for Justice in NI also found that the removal of the possibility of prosecution was incompatible with the EU Victims' Directive²⁵ and therefore breaches Windsor Framework Article 2.²⁶ The High Court held that pursuant to Section 7A of the EU (Withdrawal) Act 2018, Windsor Framework Article 2 has primacy over the conflicting provisions of the 2023 Act and therefore those provisions should be disapplied in respect of NI.²⁷ This decision was confirmed in the Court of Appeal in NI.²⁸

3.12 As set out above, the proposed Remedial Order will amend the 2023 Act to remove the conditional immunity provisions.²⁹ This will, therefore, remove the incompatibility with the EU Victims' Directive identified by the court and address the breach of Windsor Framework Article 2. The EU Victims' Directive also provides for additional guarantees to ensure victims receive appropriate information, support and protection and are able to participate in criminal proceedings.

3.13 The NIHRC recommends that the Committee seeks clarity from the UK Government on how it will embed consideration of Windsor Framework Article 2 and the EU Victims' Directive in the development of its broader proposals to repeal and

²⁵ Article 11 of the EU Victims Directive affords victims of crime the right to request a review of a decision not to prosecute. (Directive 2012/29/EU, 'EU Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012). Other EU obligations underpinning the rights of victims include Directive 2011/36/EU 'EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2011/92/EU, 'EU Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011; Directive 2004/80/EC, 'EU Council Directive Relating to the Compensation to Crime Victims', 29 April 2004.

²⁶ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at paras 608 and 710.

²⁷ *Ibid*, at para 710.

²⁸ *In the Matter of an Application by Martina Dillon and Others* [2024] NICA 59, at paras 126, 134-136, 151-156 and 310. The Court of Appeal disagreed with the trial Judge that a breach of an ECHR right was equivalent to a breach of an EU Charter right and would therefore breach Windsor Framework Article 2 at para 137. The Court of Appeal found that the disapplication of Sections 8 and 43(1) of the NI Troubles (Legacy and Reconciliation) Act 2023 was based on EU Charter rights alone and could not stand at para 161.

²⁹ Clauses 2(5)(a), 2(12), 2(20) and 2(21)(a) of the proposed Remedial Order. See NI Office, 'A Proposal for a Remedial Order to Amend the NI Troubles (Legacy and Reconciliation) Act 2023' (NIO, 2024).

replace the NI Troubles (Legacy and Reconciliation) Act 2023.

4.0 Proposed Primary Legislation

- 4.1 The NI Affairs Committee invites views on how the UK Government could enhance the approach to Troubles-related offences. The UK Government intends to introduce primary legislation, with a commitment to cover reinstating inquests, to expand disclosure and to enhance the independence of the Independent Commission for Reconciliation and Information Recovery. Each of these are addressed in turn below, however the overarching view of the NIHRC remains that, while change is welcomed, the UK Government's current approach will not ensure human rights compliant investigatory mechanism for Troubles-related offences.
- 4.2 The NIHRC, in its advice to the UK Parliament and NI Office, advised that the then NI Troubles (Legacy and Reconciliation) Bill rendered the Independent Commission for Reconciliation and Information Recovery incapable of discharging the State's obligation under Articles 2 and 3 of the ECHR.³⁰ The investigations by the Independent Commission for Reconciliation and Information Recovery would not be effective investigations as required by ECHR jurisprudence, particularly, but not limited to, the requirement for independence. The NIHRC also raised concerns about compliance with minimum standards in the EU Victims' Directive, the EU Charter on Fundamental Rights and Windsor Framework Article 2. The NIHRC's advice on the then Bill was dismissed.
- 4.3 Since the enactment of the legislation the NIHRC has continued to raise significant concerns about the 2023 Act. The NIHRC intervened in the proceedings before the High Court of Justice in NI and on appeal to the Court of Appeal in NI. The NIHRC's submissions to the domestic courts can be provided, if considered helpful. The concern

³⁰ NI Human Rights Commission, 'Advice on NI Troubles (Legacy and Reconciliation) Bill' (NIHRC, 2022); NI Human Rights Commission, 'Supplementary Briefing: UK Government's Additional Proposed Amendments to NI Troubles (Legacy and Reconciliation) Bill' (NIHRC, 2023); Letter from the NI Human Rights Commission to Chair of the House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol, Lord Jay, 30 January 2023; NI Human Rights Commission, 'Rule 9 Submission to the CoE Committee for Ministers in Relation to the Supervision of the Cases Concerning the Actions of the Security Forces in NI: NI Troubles (Legacy and Reconciliation) Act 2023' (NIHRC, 2024).

of the NIHRC was alleviated in part by the subsequent judgments, but not completely. A significant concern remains as to the independence of the Independent Commission for Reconciliation and Information Recovery to conduct an investigation that is compliant with Articles 2 and 3 of the ECHR. For the avoidance of doubt, the NIHRC remains of the view that the Independent Commission for Reconciliation and Information Recovery is not sufficiently independent or impartial. This was not adequately addressed by the High Court or Court of Appeal. It was left to individual applicants to test this element of compliance in individual cases. The NIHRC does not accept that to be an appropriate response to the State's failure to secure of its own volition adequate measures to ensure effectiveness.

Inquests

- 4.4 The NI Affairs Committee poses the question of what steps the UK Government should take to enable the restoration of effective Troubles-related inquests. It is the UK Government's intention to include provisions within the proposed primary legislation that restores "inquests, starting with those that were previously halted by the" 2023 Act.³¹
- 4.5 Section 44 of the 2023 Act provides for the prohibition of new inquests and the closure of existing inquests of deaths resulting directly from the Troubles. The Court of Appeal in NI held that the Independent Commission for Reconciliation and Information Recovery was not capable of delivering a human rights compliant investigation into deaths in instances where it was acting 'in place of' a coroner's inquest.³² The Secretary of State for NI made clear his intention to bring forward legislation to reinstate inquests. That is welcomed by the NIHRC. However, there is no clear timeframe for introducing the necessary primary legislation. That could and should be addressed by the Remedial Order.

³¹ UK Parliament Hansard, 'House of Commons Debate: NI Legacy of the Troubles – Hilary Benn MP – Volume 758', 4 December 2024.

³² *In the Matter of an Application by Martina Dillon and Others* [2024] NICA 59.

- 4.6 The NIHRC recommends that the Committee explores with the UK Government its reasons for failing to address within the Remedial Order the clear finding of the Court of Appeal in NI that the Independent Commission for Reconciliation and Information Recovery is incapable of delivering human rights compliant investigation into deaths in instances where it is acting in place of a coroner's inquest.**

Public Scrutiny

- 4.7 The NI Affairs Committee poses the questions of what steps the UK Government should take to ensure the Independent Commission for Reconciliation and Information Recovery has a credible approach to information disclosure and to enable it to hold effective public hearings. The NI Affairs Committee has also queried what steps the UK Government should take to allow for effective and appropriate next of kin participation in cases.
- 4.8 The UK Government intends to "amend the disclosure regime so that it is fair, transparent, and – crucially – allows for the greatest possible disclosure of information following very closely the model for statutory inquiries and other established processes".³³ There is an intention to "ensure that in specific circumstances – namely in cases that are unable to proceed as an inquest – the Independent Commission is able to hold public hearings, take sworn evidence from individuals, and ensure families have effective representation".³⁴ The detail on how it specifically intends to achieve this is currently lacking.
- 4.9 The UK Government's intentions reflect the findings of incompatibility by the Court of Appeal in NI.³⁵ These require specific, detailed consideration to ensure that these aspects are fully addressed. However, there are some additional concerns that the NIHRC has regarding public scrutiny.

³³ UK Parliament Hansard, 'House of Commons Debate: NI Legacy of the Troubles – Hilary Benn MP – Volume 758', 4 December 2024.

³⁴ Ibid.

³⁵ *In the Matter of an Application by Martina Dillon and Others* [2024] NICA 59.

- 4.10 The 2023 Act provides that a draft review report must be given to an interested person (e.g. an individual mentioned in the report, the person who requested the review, or a family member) and that person will have the chance to make representations on the report.³⁶ The same does not apply to the historical record.
- 4.11 Importantly, the 2023 Act provides that the Independent Commission for Reconciliation and Information Recovery “may”, not ‘must’, publish the final report of any review, thus limiting the opportunity for public scrutiny.³⁷ In contrast, the 2023 Act provides that the Independent Commission for Reconciliation and Information Recovery “must publish the historical record”.³⁸ However, even this provision is not absolute. The 2023 Act provides that disclosures or any actions by the Independent Commission for Reconciliation and Information Recovery are subject to certain conditions. For example, the Commissioner for Investigations can be notified by the Secretary of State that an action or disclosure is prohibited as it would threaten life or national security, or have a prejudicial effect on criminal proceedings.³⁹ In determining if a disclosure takes place, including in Independent Commission for Reconciliation and Information Recovery reports, consideration should also be given to whether the disclosure contains sensitive evidence or protected international information, is in the public interest or is subject to data protection legislation.⁴⁰ The NIHRC suggests that this is too broadly defined and goes beyond what is appropriate to protect national security.
- 4.12 The 2023 Act provides that if a report does not include specific information, it must contain a statement that the Secretary of State decided to prohibit disclosure and why this was the case.⁴¹ The 2023 Act further provides that the Secretary of State’s decision can be appealed.⁴² This only applies however to published reports. The 2023 Act does not propose expressly requiring that reasons be provided nor that there is a right of appeal if the final report of a review is not published.

³⁶ Section 16, NI Troubles (Legacy and Reconciliation) Act 2023.

³⁷ Section 17(3), NI Troubles (Legacy and Reconciliation) Act 2023.

³⁸ Section 29(1), NI Troubles (Legacy and Reconciliation) Act 2023.

³⁹ Sections 4(1), 16(7), 29(2), 29(3), 30(2) and 30(3), NI Troubles (Legacy and Reconciliation) Act 2023.

⁴⁰ Sections 4(1), 16(7), 29(2), 29(3), 30(2) and 30(3), NI Troubles (Legacy and Reconciliation) Act 2023.

⁴¹ Paragraph 4 of Schedule 5, NI Troubles (Legacy and Reconciliation) Act 2023.

⁴² Paragraphs 4 9-11 of Schedule 5, NI Troubles (Legacy and Reconciliation) Act 2023.

4.13 The NIHRC recommends that the Committee explores with the UK Government introducing a requirement that the Troubles-related investigations body publishes all of its reports, subject only to very limited and precise exception. This includes considering introducing a requirement that all exceptions must be lawful and proportionate and include safeguards that ensure these are not applied arbitrarily and that the commitments aimed at enabling effective public scrutiny are not illusory.

4.14 The 2023 Act creates a two-tiered approach to enabling family members to request a review and who is directly provided with the final report.⁴³ A ‘close family member’ has precedence over ‘other family members’.⁴⁴ This is not dissimilar to the ECtHR’s definition of next of kin, but the 2023 Act’s interpretation of a close family member is narrower.⁴⁵ The 2023 Act limits a close family member to a victim’s spouse, civil partner, cohabitee, child, parent, brother, sister, step-child, step-parent, half-brother, half-sister, step-brother or step-sister.⁴⁶ In right to life cases, the ECtHR has accepted married partners,⁴⁷ unmarried partners,⁴⁸ parents,⁴⁹ siblings,⁵⁰ children,⁵¹ and nephews.⁵² The ECtHR has also indicated that nieces, aunts, uncles and grandparents could be categorised as a close family member.

4.15 In recent years, the ECtHR has included a person with “close personal links” and who “provides care”⁵³ for a victim that “has no capacity of discernment” to take an action.⁵⁴

4.16 The NIHRC recommends that the Committee explores with the UK Government how to ensure that the definition of

⁴³ Sections 17 and 18, NI Troubles (Legacy and Reconciliation) Act 2023.

⁴⁴ Sections 9(1), 9(2) and Schedule 3, NI Troubles (Legacy and Reconciliation) Act 2023.

⁴⁵ *McKerr v UK* (2001) ECHR 329; *Hugh Jordan v UK* (2001) ECHR 327; *Gül v Turkey*, Application No 22676/93, 14 December 2000; *Ogur v Turkey* (1999) ECHR 30; *Gülec v Turkey*, Application No 21593/93, 27 July 1998; *McCann v UK* (1995) 21 EHRR 97.

⁴⁶ Paragraph 1(2) of Schedule 3, NI Troubles (Legacy and Reconciliation) Act 2023.

⁴⁷ *McCann v UK* (1995) 21 EHRR 97; *Salman v Turkey* (2000) ECHR 357.

⁴⁸ *Velikova v Bulgaria* (2000) ECHR 198.

⁴⁹ *Ramsahai and Others v the Netherlands* (2007) ECHR 393; *Giuliani and Gaggio v Italy* (2011) ECHR 513.

⁵⁰ *Andronicou and Constantinou v Cyprus*, Application No 86-1996-705-897, Judgment of 9 October 1997.

⁵¹ *McKerr v UK* (2001) ECHR 329.

⁵² *Yasa v Turkey* (1998) ECHR 83.

⁵³ *Guberina v Croatia* (2016) ECHR 287, at paras 77-79.

⁵⁴ *Belli and Arquier-Martinez v Switzerland* (2018) ECHR 1012, at para 97.

'close family member' is not too narrow. For example, it should at least extend to grandparents, aunts, uncles, nieces, nephews, or grandchildren.

4.17 The NIHRC recommends that the Committee explores with the UK Government how to ensure that the definition of 'other family member' permits situations in which a non-familial person, with close personal links and who provides care for a victim, can seek remedy on the victim's behalf.

4.18 The 2023 Act provides some provision for information to family members in the conduct of reviews, however this is limited.⁵⁵ The UN Revised Minnesota Protocol on the Investigation of Potentially Unlawful Death provides that "a specific and suitably trained and experienced family liaison expert should be appointed to offer the family of the deceased information and support as well as to collect information".⁵⁶ This includes meeting the family "at the earliest opportunity", providing "regular updates about the investigation, its progress and results, and should address any concerns the family may have as the investigation progresses".⁵⁷ Specific provision for liaison officers and clarity of their roles is missing from the 2023 Act.

4.19 The EU Victims' Directive provides for minimum standards which should be observed to ensure victims are able to participate in criminal proceedings. The EU Directive is clear that family members of victims are also harmed as a result of crime and should also benefit from the protection under the Directive.⁵⁸ For the purposes of the EU Victims' Directive, criminal proceedings include situations where authorities initiate criminal proceedings and should include the moment when a complaint is made".⁵⁹

4.20 Article 6 of the EU Victims' Directive provides a right to a victim of a criminal offence to receive information regarding any decision not to proceed with or to end an investigation or not to prosecute the

⁵⁵ Sections 9-18, NI Troubles (Legacy and Reconciliation) Act 2023.

⁵⁶ UN Revised Minnesota Protocol on the Investigation of Potentially Unlawful Death 2016, at para 67.

⁵⁷ Ibid.

⁵⁸ Recital 19, Directive 2012/29/EU, 'Directive of European Parliament and the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

⁵⁹ Recital 22, Directive 2012/29/EU, 'Directive of European Parliament and the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

offender.⁶⁰ The right also extends to information enabling the victim to know details of the criminal proceedings.⁶¹ Article 10 of the EU Victims' Directive requires States to ensure that victims may be heard and provide evidence during criminal proceedings. When providing information, "sufficient detail should be given to ensure that victims are treated in a respectful manner and to enable them to make informed decisions about their participation in proceedings" and that "information allowing the victim to know about the current status of any proceedings is particularly important".⁶²

4.21 Decisions ending criminal proceedings include where a prosecutor decides to withdraw charges or discontinue proceedings.⁶³ Article 11 of the EU Victims' Directive provides that victims are entitled to request a review of a decision not to prosecute. The Court of Appeal in NI confirmed that given the wide scope of 'decisions not to prosecute' which should be reviewable, the right to request a review should apply to decisions of Independent Commission for Reconciliation and Information Recovery which amount to 'no prosecution' decisions.⁶⁴

4.22 The NIHRC recommends that the Committee seeks clarification from the UK Government on how it will ensure that the right of victims and their family members to receive information about their case will be expressly protected.

4.23 The NIHRC recommends that the Committee explores with the UK Government how it will explicitly guarantee the right of victims and their family members to be heard and to seek a review of a decision not to prosecute.

⁶⁰ Article 6(1)(a), Directive 2012/29/EU, 'Directive of European Parliament and the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

⁶¹ Article 6(2)(b), Directive 2012/29/EU, 'Directive of European Parliament and the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

⁶² Recital 26, Directive 2012/29/EU, 'Directive of European Parliament and the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

⁶³ Recital 44, Directive 2012/29/EU, 'Directive of European Parliament and the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

⁶⁴ *In the Matter of an Application by Martina Dillon and Others* [2024] NICA 59, at 131.

Independence and Impartiality

- 4.24 The NI Affairs Committee poses the question of what steps the UK Government should take to reform and strengthen the Independent Commission for Reconciliation and Information Recovery's independence, powers and accountability. The UK Government intends to "make further changes to reform and strengthen the Commission's independence, powers and accountability".⁶⁵ However, detail on how it specifically intends to achieve this is currently lacking.
- 4.25 The NIHRC advises that the 2023 Act prevents the Independent Commission for Reconciliation and Information Recovery from being sufficiently independent in all aspects: hierarchically, operationally and practically. By way of example, the Secretary of State: appoints Commissioners,⁶⁶ determines the number of Commissioners,⁶⁷ issues guidance and mandatory regulations,⁶⁸ proposes cases for review,⁶⁹ regulates information management,⁷⁰ regulates the handling of biometric material,⁷¹ determines resources⁷² and reviews the performance of the Independent Commission for Reconciliation and Information Recovery.⁷³
- 4.26 Critically, the 2023 Act provides that the Independent Commission for Reconciliation and Information Recovery's work can be concluded, or shut down, when the "Secretary of State is satisfied that *the need* for Independent Commission for Reconciliation and Information Recovery" to exercise its functions "has ceased".⁷⁴ This is likely to mean that the Secretary of State can prevent the Independent Commission for Reconciliation and Information Recovery from completing its work. The High Court of Justice in NI was content that the requirement for Parliamentary approval

⁶⁵ UK Parliament Hansard, 'House of Commons Debate: NI Legacy of the Troubles – Hilary Benn MP – Volume 758', 4 December 2024.

⁶⁶ Paragraph 8(1) of Schedule 1, NI Troubles (Legacy and Reconciliation) Act 2023.

⁶⁷ Paragraph 7 of Schedule 1, NI Troubles (Legacy and Reconciliation) Act 2023.

⁶⁸ Sections 33, 34(1), 35(1), 37(1), 56(1), 58(1), Paragraph 2(4) of Schedule 5 and Paragraph 2(6) of Schedule 13, NI Troubles (Legacy and Reconciliation) Act 2023.

⁶⁹ Sections 9(3) and 10(2), NI Troubles (Legacy and Reconciliation) Act 2023.

⁷⁰ Section 34(1), NI Troubles (Legacy and Reconciliation) Act 2023.

⁷¹ Section 35, NI Troubles (Legacy and Reconciliation) Act 2023.

⁷² Section 2(11), NI Troubles (Legacy and Reconciliation) Act 2023.

⁷³ Section 36, NI Troubles (Legacy and Reconciliation) Act 2023.

⁷⁴ Section 37(1), NI Troubles (Legacy and Reconciliation) Act 2023.

through the Affirmative Procedure was a sufficient safeguard.⁷⁵ The NIHRC disagrees. In any event, this should not be considered in isolation. While the NIHRC accepts that the Secretary of State will require high-level involvement in setting up and maintaining the Independent Commission for Reconciliation and Information Recovery, the extent of the Secretary of State's involvement in operations and monitoring in the 2023 Act goes significantly beyond that and undermines the impartiality and independence of the Independent Commission for Reconciliation and Information Recovery.

4.27 The previous UK Government explained that the 2023 Act, by limiting Commissioners' term of appointment to five years and enabling the appointment of up to five,⁷⁶ was intended to ensure that the Independent Commission for Reconciliation and Information Recovery has an appropriate range of skills, experience and independent scrutiny.⁷⁷ Also, that the Independent Commission for Reconciliation and Information Recovery maintains a form of continuity while also obtaining fresh perspective, impetus, views and specialist expertise.⁷⁸ Despite that, the 2023 Act expressly provides that the Secretary of State may limit the number of Commissioners to as few as one, in addition to the Chief Commissioner and Commissioner for Investigations.⁷⁹ It is also notable that the 2023 Act does not place any restriction on the nature nor identity of Commissioners. This is particularly important given the need for independence and impartiality. This contrasts starkly with Operation Kenova where, for example, "personnel who are serving or have previously served in the Royal Ulster Constabulary, Police Service of NI, Ministry of Defence or Security Services" were prohibited from being appointed to that investigation.⁸⁰

4.28 *McKerr v UK* (2001) has made it clear that the persons responsible for and carrying out investigations must be "independent from those implicated in the events... means not only that there should be no

⁷⁵ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 265.

⁷⁶ Section 2(3)(c) and Paragraph 7 of Schedule 1, NI Troubles (Legacy and Reconciliation) Act 2023.

⁷⁷ UK Parliament Hansard, 'House of Lords: NI Troubles (Legacy and Reconciliation) Bill – Lord Caine - Volume 831', 21 June 2023.

⁷⁸ *Ibid.*

⁷⁹ Section 2(3)(c) and Paragraph 7 of Schedule 1, NI Troubles (Legacy and Reconciliation) Act 2023.

⁸⁰ Operation Kenova, 'ECHR: Fundamental Freedoms Compliance – Version 3' (OK, Date Unknown), at 9.

hierarchical or institutional connection but also clear independence”.⁸¹ In *Armani da Silva v the UK* (2016), the ECtHR elaborated that “what is at stake here is nothing less than public confidence in the State’s monopoly on the use of force”.⁸² The ECtHR has found that independence and impartiality is lacking in investigations where the investigators are potential suspects,⁸³ or are direct colleagues of the persons subject to investigation, or likely to be so.⁸⁴ Thus in this context, the ECtHR’s jurisprudence is clear that a mere declaration of a conflict of interest is insufficient for ensuring independence and impartiality.

4.29 The 2023 Act does allow for delegation of the Independent Commission for Reconciliation and Information Recovery’s functions.⁸⁵ However, considering the Commissioner for Investigations as an example, this role has significant decision-making power within the Independent Commission for Reconciliation and Information Recovery. The Commissioner for Investigations: has responsibility for specifying the terms of disclosure to the Independent Commission for Reconciliation and Information Recovery;⁸⁶ determines the operational powers of the Independent Commission for Reconciliation and Information Recovery officers (including whether they are provided with powers and privileges of a constable and whether to use these);⁸⁷ determines whether it is appropriate for a non-close family member to make a request for review;⁸⁸ determines how reviews are requested, whether they satisfy requirements, and whether they are dealt with;⁸⁹ and determines whether reviews linked to immunity decisions take place.⁹⁰ It would seem impractical for the Commissioner for Investigations to be removed entirely from this role, as and when required. Depending on the previous professional experience of the Commissioner for Investigations in post, practically, this could be often.

⁸¹ *McKerr v UK* (2001) ECHR 329, at para 112.

⁸² *Armani da Silva v UK* (2016) ECHR 314, at para 232.

⁸³ *Bektaş and Özalp v Turkey* (2010) ECHR 617, at para 66; *Orhan v. Turkey* (2002) ECHR 497, at para 342.

⁸⁴ *Ramsahai and Others v Netherlands* (2007) ECHR 393, at para 335-341; *Emars v Latvia* (2014) ECHR 1302, at para 85 and 95.

⁸⁵ Paragraph 4, Schedule 1, NI Troubles (Legacy and Reconciliation) Act 2023.

⁸⁶ Section 5, NI Troubles (Legacy and Reconciliation) Act 2023.

⁸⁷ Section 6, NI Troubles (Legacy and Reconciliation) Act 2023.

⁸⁸ Section 9(7), NI Troubles (Legacy and Reconciliation) Act 2023.

⁸⁹ Section 11, NI Troubles (Legacy and Reconciliation) Act 2023.

⁹⁰ Section 12, NI Troubles (Legacy and Reconciliation) Act 2023.

4.30 Thus, while it may be required that the Commissioner for Investigations complies with the Human Rights Act 1998,⁹¹ this does not provide sufficient protection of independence and impartiality. This is particularly so given the provisions of the 2023 Act (primary legislation), which clearly dictate a departure from the Human Rights Act 1998.

4.31 The NIHRC suggests that a proper requirement for independence and impartiality in the appointment of Commissioners would at least exclude any person who had served with the Royal Ulster Constabulary, the Security Services or the British Army. There is such obvious conflict that such appointments are incapable of mitigation by way of recusal or declaration. Even if such appointments were capable in particular cases of being hierarchically independent, they must also be practically independent. No person who has served with those organisations against which credible allegations are made can satisfy the requirement for practical independence and impartiality.

4.32 The NIHRC recommends that the Committee explores with the UK Government how to ensure that the extent of the Secretary of State's influence and involvement across the Troubles-related investigatory body's operations does not prevent it from being sufficiently independent and impartial, as required by the ECHR.

4.33 The NIHRC recommends that the Committee explores with the UK Government introducing a requirement, like that within Operational Kenova, that Commissioners or staff of the Troubles-related investigatory body are not permitted to be personnel who are serving in or have previously served in the Royal Ulster Constabulary, Police Service of NI, Ministry of Defence or Security Services.

⁹¹ Section 13(1), NI Troubles (Legacy and Reconciliation) Act 2023.

5.0 Other Issues

- 5.1 There are several other issues which cause the NIHRC concern that are not covered by the proposed Remedial Order or the UK Government's current proposals for primary legislation.⁹² These are set out below.

Own Motion Cases

- 5.2 Within the 2023 Act, relatives of a victim and a range of State actors can request that the Independent Commission for Reconciliation and Information Recovery conducts a review into a particular death. This includes the Secretary of State, a coroner, the Attorney General for NI.⁹³ While it is right that there is a space in which to request investigations and to seek answers to specific questions, particularly for victims' relatives, investigations must be of a State's own motion and a process must be in place to ensure that a thorough investigation is undertaken into a suspected violation of Articles 2 or 3 of the ECHR.⁹⁴ However, the 2023 Act does not enable the Independent Commission for Reconciliation and Information Recovery to initiate its own investigations, it can only decide which investigations to take forward where an external request is made. The Independent Commission for Reconciliation and Information Recovery is developing Enhanced Inquisitorial Proceedings, nevertheless such proceedings can only be initiated where a review has been requested and the Independent Commission for Reconciliation and Information Recovery has decided to undertake the review.
- 5.3 Additionally, where Troubles-related investigations were ongoing or listed to be investigated by the Police Service of NI and the Police Ombudsman for NI, these investigations are unable to continue under the police or Police Ombudsman after 1 May 2024. These investigations were not automatically transferred under the 2023 Act, nor does the Independent Commission for Reconciliation and

⁹² UK Parliament Hansard, 'House of Commons Debate: NI Legacy of the Troubles – Hilary Benn MP – Volume 758', 4 December 2024.

⁹³ Section 9, NI Troubles (Legacy and Reconciliation) Act 2023.

⁹⁴ *McCann v UK* (1995) 21 EHRR 97, at para 173; *McKerr v UK* (2001) ECHR 329, at para 111; *Hugh Jordan v UK* (2001) ECHR 327, at para 105.

Information Recovery have the power to initiate transferring these cases to its own caseload. This was raised as a concern by the High Court of Justice in NI.⁹⁵ Instead, the Independent Commission for Reconciliation and Information Recovery must wait and see if corresponding individual requests are made by a relative or other State actor.⁹⁶ Even if such a request is made, it is the Independent Commission for Reconciliation and Information Recovery's discretion as to whether these investigations are continued to completion.⁹⁷

5.4 The NIHRC recommends that the Committee explores with the UK Government how to ensure the Troubles-related investigatory body has the ability to initiate and pursue cases of its own motion.

Thorough Investigations

5.5 It is important that the investigatory body for Troubles-related offences is empowered to investigate all deaths which have not received an effective investigation in full compliance with human rights standards, including Articles 2 and 3 of the ECHR. This includes those deaths which have been the subject of previous initiatives.⁹⁸

5.6 The 2023 Act provides that the Independent Commission for Reconciliation and Information Recovery "must take into account" a review or investigation that has already been carried out and "in particular, must ensure that the Independent Commission for Reconciliation and Information Recovery does not do anything which duplicates any aspect of that review unless, in the Independent Commission for Reconciliation and Information Recovery's view, the duplication is necessary".⁹⁹ The 2023 Act does not propose that the Independent Commission for Reconciliation and Information Recovery considers whether all previous investigations into Troubles-related offences were or were not human rights compliant.

⁹⁵ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 365.

⁹⁶ Section 9, NI Troubles (Legacy and Reconciliation) Act 2023.

⁹⁷ Section 11, NI Troubles (Legacy and Reconciliation) Act 2023.

⁹⁸ Her Majesty's Inspectorate of Constabulary, 'Inspection of the Police Service NI Historical Enquiries Team' (HMIC, 2013), at 28; CM/Notes/1436/H46-35, 'CoE Committee of Ministers Decision on McKerr Group v UK (Application No 28883/95), 10 June 2022, at para 4.

⁹⁹ Section 13(8), NI Troubles (Legacy and Reconciliation) Act 2023.

- 5.7 The shortcomings exposed in case law from the ECtHR¹⁰⁰ and by the CoE Committee of Ministers¹⁰¹ regarding previous investigatory initiatives make it clear that, in many circumstances, previous Troubles-related investigations were not human rights compliant. There are many cases that are deemed closed that require reconsideration. There are also many Troubles-related offences that have not been subject to any substantive form of investigation and require at least a basic analysis to see if this can be remedied.
- 5.8 It is also important to note that the Independent Commission for Reconciliation and Information Recovery must publish a historical record of all remaining deaths that occurred during the Troubles (i.e. Troubles-related deaths that are not subject to a review).¹⁰² A historical record does not equate to a human rights compliant investigation.
- 5.9 **The NIHRC recommends that the Committee explores with the UK Government how it will provide a comprehensive mechanism to objectively assess whether investigative obligations have been complied with regarding all Troubles-related offences. Such a mechanism should include a requirement to assess whether previous Troubles-related investigations were effective as required by the ECHR. Also, any cases deemed to be non-human rights compliant in whole or in part, that a process is in place whereby these are added to the caseload of the Troubles-related investigatory body.**

Definition of Offences

- 5.10 The 2023 Act recognises as a direct victim for the purposes of the Independent Commission for Reconciliation and Information Recovery's work someone who has died or someone who has suffered very specific serious physical or mental harm due to a

¹⁰⁰ *McKerr v UK* (2001) ECHR 329; *Kelly and Others v UK* (2001) ECHR 328; *Shanaghan v UK* (2001) ECHR 330.

¹⁰¹ CM/ResDH(2020)367, 'CoE Committee of Ministers Execution of the Judgments of the European Court of Human Rights: McKerr and Other Seven Cases Against the UK', 3 December 2020.

¹⁰² Section 28, NI Troubles (Legacy and Reconciliation) Act 2023.

Troubles-related offence.¹⁰³ The 2023 Act provides that it is only individuals whose cases fall within these two categories that the Independent Commission for Reconciliation and Information Recovery will consider for review. The historical record is limited further under the 2023 Act. The 2023 Act provides that the Independent Commission for Reconciliation and Information Recovery is only able to create a historical record for Troubles-related deaths; its mandate does not include creating a historical record for serious physical or mental harm,¹⁰⁴ with no alternative mechanism available for such cases.

5.11 A prescriptive list limited to extreme injuries and that does not accommodate rehabilitative injuries, as provided for within the 2023 Act, is unlikely to be human rights compliant. Not least because it ignores the absolute nature of the right to freedom from torture.¹⁰⁵ ECtHR jurisprudence makes clear that each potential case should be assessed on its own circumstances,¹⁰⁶ not determined by a rigid list of extreme outcomes. It is also a notable departure from the Victims and Survivors (NI) Order 2006, which broadly defines a victim and survivor as “someone who has been physically or psychologically injured as a result of or in consequence of a conflict-related incident”, “someone who provides substantial amount of care on a regular basis for” such an individual, or “someone who has been bereaved as a result of or in consequence of a conflict-related incident”.¹⁰⁷

5.12 **The NIHRC recommends that the Committee explores with the UK Government how to ensure individual circumstances of each potential case and broader human rights commitments, including the investigative obligations attached to the right to life and freedom from torture, can be considered and are used to inform the determination of whether a case should be considered by a Troubles-related investigatory body.**

¹⁰³ Sections 1(6), 9 and 10, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁰⁴ Sections 28 and 29, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁰⁵ Article 15(2), ECHR.

¹⁰⁶ *Mursic v Croatia* (2016) ECHR 927, at para 97.

¹⁰⁷ Article 3, Victims and Survivors (NI) Order 2006.

Biometric Data Retention

- 5.13 The 2023 Act requires that retention of biometric data and material must be subject to periodic review and that the material will be destroyed within a reasonable period after the conclusion of the Independent Commission for Reconciliation and Information Recovery's work.¹⁰⁸ The Independent Commission for Reconciliation and Information Recovery can use the evidence,¹⁰⁹ but it is not expressly stated that retained biometric data must be relevant to the Independent Commission for Reconciliation and Information Recovery's work. This is unlikely to be a proportionate approach, as required by Article 8 of the ECHR (right to a private life).¹¹⁰
- 5.14 The NIHRC considers that EU data protection law falls in scope of Windsor Framework Article 2.¹¹¹ This rests on analysis of the Belfast (Good Friday) Agreement 1998, including the commitment to civil rights and incorporation of the ECHR. The Court of Appeal in NI has confirmed that the relevant chapter of the 1998 Agreement was intended to extend further than the rights specifically listed and encompassed a "broad suite of rights".¹¹² The NIHRC considers that the full range of rights in the ECHR, to the extent that they are underpinned by EU law in force in NI on or before 31 December 2020, fall within the scope of the non-diminution commitment in Windsor Framework Article 2.¹¹³
- 5.15 The ECtHR has recognised that the protection of personal data is a fundamental human right and a key component of the right to privacy, enshrined in Article 8 of the ECHR.¹¹⁴ Furthermore, the right to data protection is enshrined in Article 7 and Article 8 of the EU Charter of Fundamental Rights. In relation to biometric data, the

¹⁰⁸ Section 35(2), NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁰⁹ Section 35(1)(d), NI Troubles (Legacy and Reconciliation) Act 2023.

¹¹⁰ *Mozer v Republic of Moldova and Russia* (2016) ECHR 213, at para 194. See also *Gaughran v UK* (2020) ECHR 144; *S and Marper v UK* (2008) ECHR 1581.

¹¹¹ NI Human Rights Commission and Equality Commission NI, 'Annual Report of the NI Human Rights Commission and the Equality Commission for NI on the Implementation of Article 2 of the Windsor Framework 2022–2023' (NIHRC and ECNI, 2023), at para 4.84.

¹¹² *Ibid*, at para 115; *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 540.

¹¹³ NI Human Rights Commission, 'Briefing on the Data Protection and Digital Information Bill' (NIHRC, 2024).

¹¹⁴ *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (2015) ECHR 713, at para 137.

key EU laws are the EU General Data Protection Regulation (GDPR)¹¹⁵ and the EU Law Enforcement Directive.¹¹⁶

5.16 Independent research on the interaction between the EU Charter of Fundamental Rights and the NI legal framework commissioned by the NIHRC, notes that, unlike in a common law system, CJEU case law is understood to clarify existing EU law (primary or secondary) rather than creating new law or positively extending it in any novel way.¹¹⁷ Lock, Frantziou and Deb conclude that “the pre-Brexit EU law which is engaged by the wider non-diminution guarantee may be required to be given legal effect in NI in accordance with post-Brexit CJEU case law concerning such EU law”.¹¹⁸

5.17 In January 2024, the CJEU summarised the EU framework for the lawful processing of biometric data and established a general framework under the EU Law Enforcement Directive “to ensure, inter alia, that the storage of personal data and, more specifically, the period of storage, are limited to what is necessary for the purposes for which those data are stored”.¹¹⁹ Member States should ensure that the personal data collected must be adequate, relevant and not excessive in relation to the purposes for which it is processed.¹²⁰

5.18 The NIHRC recommends that the Committee explores with the UK Government how to ensure that biometric material linked to Troubles-related investigations are only retained where it is relevant to the work of the investigatory body.

¹¹⁵ Regulation 2016/679/EU, ‘Regulation of the European Parliament and Council on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data’ (EU GDPR), 27 April 2016.

¹¹⁶ Directive 2016/680/EU, ‘Directive of the European Parliament and of the Council on the Protection of Natural Persons with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and on the Free Movement of Such Data’, 27 April 2016.

¹¹⁷ Tobias Lock et al, ‘The Interaction between the EU Charter of Fundamental Rights and general principles with the Windsor Framework’ (NIHRC, 2024), at 55.

¹¹⁸ Ibid, at 65.

¹¹⁹ Ibid, at para 52.

¹²⁰ *Direktor na Glavna direktsia „Natsionalna politisia” pri MVR – Sofia* [2024], Case C-118/22, 30 January 2024, at para 41.

Victim-centred Approach

5.19 Through the NIHRC's engagement with Troubles-related victims and survivors the message is clear – victims and survivors should be involved at the heart of any investigatory body and this should be in the vein of “dealing ‘with’, not ‘to’ victims and survivors”.¹²¹ This is supported by a range of human rights standards, as explored below.

5.20 Before considering the detail, it is worth noting that the Court of Appeal in NI considered that a number of provisions of the EU Victims' Directive had direct effect, noting that the Victim Charter in NI implemented the directive in NI law.¹²² The Court of Appeal found that the rights in the EU Directive, specifically Articles 11 and 16(1), satisfy the conditions for direct effect and formed part of national law prior to Brexit on that independent basis.¹²³

Specialised support services

5.21 There are several human rights standards which have confirmed that best practice requires comprehensive provision of specialist support services for victims of violence.¹²⁴ This includes ensuring that specialist support services are fully accessible and consider specific needs, including providing for reasonable accommodation where required.¹²⁵

5.22 The EU Victims' Directive lays down minimum standards on victims' rights and support and protection for victims of crime.¹²⁶ The EU Directive sets out a number of rights including the right to be understood and to interpretation (Articles 3 and 7); the right to

¹²¹ Meeting between NI Human Rights Commission and Troubles-related victims and survivors, 21 January 2025.

¹²² *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NICA 59, at para 123. See Department of Justice, 'Explanatory Memorandum to the Victim Charter (Justice Act (NI) 2015) Order (NI) 2015 SR 2015 No. 370' (DOJ, 2015), at para 2.1.

¹²³ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NICA 59, at para 125.

¹²⁴ CEDAW/C/GC/35, 'UN CEDAW Committee General Recommendation No 35: Gender-based Violence Against Women', 14 July 2017; Article 22(1), CoE Istanbul Convention 2011; A/RES/40/34, 'United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', 29 November 1985; UN Istanbul Protocol Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment 2022, at para 215.

¹²⁵ Articles 5 and 9, UN Convention on the Rights of Persons with Disabilities 2006; A/RES/40/34, 'United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', 29 November 1985, at paras 3 and 17; UN Istanbul Protocol Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment 2022, at para 215.

¹²⁶ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

information (Articles 4 and 6); the right to access victim support services free of charge and what details about what those services should provide (Articles 8 and 9); the right to be heard (Article 10); the right to review of a decision not to prosecute (Article 11); and the rights of victims with specific protection needs to recognition and protection (Articles 18-24). Some further detail will be presented below.

- 5.23 The EU Victims' Directive requires that victims are "recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner".¹²⁷ Recital 9 provides further clarification on the prohibition of discrimination based on an array of grounds, ranging from race and ethnicity to gender identity, sexual orientation, and residence status.¹²⁸ This encompasses interactions with victim support services, restorative justice services, and competent authorities within criminal proceedings.
- 5.24 Importantly, a person's status as a victim is not dependent on whether an offender is identified, apprehended, prosecuted or convicted.¹²⁹ Further, the EU Victims Directive provides that victims of crime should be "provided with sufficient access to justice".¹³⁰
- 5.25 The EU Victims Directive requires States to provide access to support services that are specialised and free of charge,¹³¹ ensuring that victims are provided with "information, advice and support relevant to [their] rights".¹³²
- 5.26 The EU Directive encourages ongoing monitoring and evaluation with victims, survivors and representative organisations in terms of the impact and effectiveness of any new policy that deal with victims, survivors and their families.¹³³ More specifically, the EU

¹²⁷ Article 1, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹²⁸ Recital 9, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

¹²⁹ Recital 19, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹³⁰ Recital 9, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹³¹ Article 8, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹³² Article 9(1), Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹³³ Article 26 and Recital 62, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

Directive recognises that the coordination of public services is essential for victims of crime to receive the proper degree of assistance, support and protection.¹³⁴

5.27 The NIHRC recommends that the Committee seeks clarification from the UK Government on how it will ensure that victims and their family members will have access to appropriate supports and specialist services.

Specific protection needs

5.28 The Minnesota Protocol is clear that “appropriate measures should be taken to ensure... [family members’] safety, physical and psychological well-being and privacy”.¹³⁵

5.29 The EU Victims’ Directive requires that victims and their family members are protected in the operation of the criminal justice system and that individual assessment is necessary to identify victims’ needs during their involvement in criminal proceedings.¹³⁶ Particular attention should be paid to victims who have suffered considerable harm due to the severity of the crime, noting that victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.¹³⁷

5.30 If a victim is assessed as having specific needs, the EU Victims’ Directive provides for special measures to be made available,¹³⁸ especially the specific needs of victims who are at a high risk of secondary and repeat victimisation, of intimidation and of retaliation.¹³⁹ The EU Victims’ Directive includes a requirement to

¹³⁴ Recital 62, Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime’, 25 October 2012.

¹³⁵ UN Revised Minnesota Protocol on the Investigation of Potentially Unlawful Death 2016, at para 36. See also the UN Istanbul Protocol Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002, at para 197.

¹³⁶ Article 22, Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime’, 25 October 2012.

¹³⁷ Article 22(3), Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime’, 25 October 2012.

¹³⁸ Article 23, Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime’, 25 October 2012.

¹³⁹ Recital 57, Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime’, 25 October 2012.

protect the dignity of victims and families and to ensure that measures are available to protect victims and their families against emotional or psychological harm. Importantly, support services should include advice on risk and prevention and ensure provision of interim shelter and accommodation, where necessary.¹⁴⁰ The EU Victims' Directive sets out specific provisions to safeguard the rights of child victims during criminal proceedings specifically the presumption of vulnerability to secondary and repeat victimisation, to intimidation and to retaliation and the need for individual assessment.¹⁴¹

5.31 The NIHRC recommends that the Committee seeks clarification from the UK Government on how it will ensure that due consideration is afforded to the specific individual needs of victims and family members according to their particular circumstances both in the delivery of support services and the criminal proceedings by putting in place the appropriate safeguards.

Data Collection

5.32 Effective monitoring is essential to ensuring human rights compliance and is a recurring requirement of human rights standards.¹⁴² For monitoring to be effective it "should assess both the steps taken and the results achieved" and "national strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of the prohibited grounds of discrimination".¹⁴³ Comprehensive monitoring requires a State to "establish and/or strengthen effective national machinery, institutions and procedures, at a high level of Government, and with adequate resources, commitment and authority".¹⁴⁴

¹⁴⁰ Article 9, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹⁴¹ Article 24, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹⁴² E/C.12/GC/20, 'UN ICESCR Committee General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights', 2 July 2009, at para 41; 'UN CEDAW Committee General Comment No 6: Effective National Machinery and Publicity', 1988, at para 1(b); CRC/GC/2003/5, 'UN CRC Committee General Comment No 5: General Measures of Implementation of the UN CRC', 27 November 2003, at para 45.

¹⁴³ E/C.12/GC/20, 'UN ICESCR Committee General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights', 2 July 2009, at para 41.

¹⁴⁴ 'UN CEDAW Committee General Comment No 6: Effective National Machinery and Publicity', 1988, at para 1(b).

- 5.33 The EU Victims' Directive recognises that the collection of systematic and adequate statistical data is an essential component of effective policymaking, particularly in respect of victims' rights.¹⁴⁵ Such data should include data recorded by law enforcement agencies, the courts, administrative data compiled by healthcare and social welfare service and other organisation working with victims of crimes.¹⁴⁶
- 5.34 **The NIHRC recommends that the Committee seeks clarification from the UK Government on how it will ensure the oversight, monitoring, evaluation and reporting on the services to victims and their families.**

Training of Practitioners

- 5.35 The UN General Assembly calls for "systematic training" for law enforcement officials, the judiciary and other relevant personnel.¹⁴⁷ Best practice indicates that training should incorporate specific considerations, such as a gender-sensitivity and cultural awareness.¹⁴⁸ It should also consider other aspects such as understanding trauma and its effects, power dynamics, non-discrimination and bias, diverse forms of violence, and intersectional discrimination. It should also provide adequate ways to address and eliminate factors that re-victimise or re-traumatise and weaken confidence in the investigatory body.¹⁴⁹
- 5.36 Further, EU Victims' Directive require, as a minimum, that all relevant officials likely to come into contact with a victim, such as police officers and court staff, receive both general and specialist training that would allow practitioner in contact with victims "to

¹⁴⁵ Recital 62, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹⁴⁶ Recital 64, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹⁴⁷ A/RES/65/208, 'UN General Assembly Resolution on Extrajudicial, Summary or Arbitrary Executions,' 21 December 2010, para 35.

¹⁴⁸ CEDAW/C/GC/35, 'UN CEDAW Committee: General Recommendation No 35: Gender-based Violence against Women, Updating General Recommendation No 19', 14 July 2017, at para 24(b); CERD/C/GC/36, 'UN CERD Committee General Recommendation No 36: Preventing and Combating Racial Profiling by Law Enforcement Officials', 17 December 2020, at para 42.

¹⁴⁹ CEDAW/C/GC/35, 'UN CEDAW Committee General Recommendation No 35: Gender-based Violence against Women, Updating General Recommendation No 19', 14 July 2017, at para 24(b).

recognise victims and to treat them in a respectful, professional and non-discriminatory manner".¹⁵⁰

5.37 The NIHRC recommends that the Committee seeks clarification from the UK Government how it will provide for the appropriate training of practitioners and officials likely to come into contact with victims, survivors and their families throughout their journey with an investigatory body.

¹⁵⁰ Article 25 and Recital 61, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

Contact us

For queries: Colin.Caughey@nihrc.org and
Eilis.Haughey@nihrc.org

www.nihrc.org | info@nihrc.org | +44 (0)28 9024 3987
4th Floor, Alfred House, 19-21 Alfred Street, Belfast, BT2 8ED

