



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Northern Ireland Human Rights Commission Legacy Note

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Background/Overview

Following several judgments in the Northern Ireland courts, the UK House of Lords, the UK Supreme Court and the European Court of Human Rights (ECtHR), all of which have found that in respect of a number of killings in Northern Ireland in which it was alleged that state agents (including the police) were implicated (either by deed or failure to act), the law required new official investigations complying with the European Convention on Human Rights (ECHR).

In brief,¹ the object and purpose of the ECHR as an instrument for the protection of individual human beings requires that its provisions must be interpreted and applied to make its safeguards practical and effective. Article 2 ECHR protects life. It is "one of the most fundamental provisions of the ECHR... it enshrines one of the basic values of democratic societies making up the Council of Europe. As such its provisions must be strictly construed."² It prevents the taking of life save in very limited circumstances and requires steps to protect life. This apparent burden is complimented by the space and judgement afforded to those operating in pursuit of a legitimate aim. The taking of life under one of the excepted headings may be justified by an honest belief even if that belief turns out to be mistaken so long as it was perceived for good reason to be valid at the time. The ECtHR is conscious not to place too heavy a burden on law enforcement in the exercise of their duty and recognises that detachment from the events under consideration means it cannot substitute its own views for those of an officer forced to act in the heat of the moment to avert an honestly perceived danger to life.³ The application of Article 2 permits a balanced and two-sided approach to any analysis.

In assessing cases, the ECtHR will distinguish between routine police operations and situations of large-scale anti-terrorist operations, and in the latter case has accepted that in situations of acute crisis requiring tailor-made responses, States should be able to rely on solutions that would be appropriate to the circumstances. That being said, it has underlined that, in a lawful security operation which is aimed in the first place, at protecting the lives of people who find themselves in danger of unlawful violence from third parties, the use of lethal force remains governed by the strict rules of absolute necessity within the meaning of Article 2 ECHR. The ECtHR has also considered the breadth of Article 2 which it has held extends to considering, for example, the vetting and training of law enforcement agents on the use of lethal force within human rights standards, the planning of operations in which lethal force

¹ But set out in more detail below.

² See e.g. *McCann v the UK* (1995) ECtHR.

³ See *Huohvanainen v Finland* (2007), Council of Europe, Right to Life, 2024.

may be used, the planning for medical assistance after the event and whether or not the agents were fully equipped for an operation.⁴

In the NI case of *McCann v the UK* (1995), the ECtHR said that an investigation must take into account “not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination.”

To make the Article 2 protection meaningful, there is a procedural obligation which imposes strict requirements on investigations that must follow. This has particular implications for Troubles-related deaths if there is a potential level of state involvement, either due to the death being by the use of lethal force by security forces; where state agents were involved; where there are allegations of collusion with third parties; and those cases which involve past failure to investigate deaths effectively.

The State is obliged to put in place law and practice to enable those investigations to be conducted according to law. Initially, the promise by the UK State (including to the ECtHR in the McKerr cases see below) was to meet its obligations by a package of measures *in addition to* those measures already in place such as, criminal investigations *by* the police; investigations *of* the police by the Police Ombudsman for Northern Ireland; inquests under the coronial system presided over by independent judges; the NI civil court system in which individuals and groups could claim redress and challenge official decisions; Her Majesty’s Inspector of Constabulary; and, the Criminal Cases Review Commission (since 1997).

A number of high-profile inquests, criminal trials, police ombudsman investigations and inquests continued for decades. There were a number of findings of State failure to protect the right to life and failures by the State to investigate those deaths as required by law. Many were still going through the PSNI Legacy Investigation Branch and called-in investigations, the civil and criminal courts, the coronial system and the Police Ombudsman’s office when the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (the Legacy Act) came into force.

The Legacy Act 2023 itself explains its purpose “A Bill to address the legacy of the Northern Ireland Troubles and promote reconciliation by establishing an Independent Commission for Reconciliation and Information Recovery, limiting criminal investigations, legal proceedings, inquests and police complaints, extending the prisoner release scheme and providing for experiences to be recorded and preserved and for events to be studied and memorialised.”

⁴ See e.g. *Nachova v Bulgaria* (2005), The Council of Europe, Right to Life, 2024.

As set out below, the Legacy Act departs from the practice of independent investigations called in by PSNI such as Operation Kenova (investigating amongst other things the actions of a British Army agent) which precluded former RUC/PSNI officers from the investigation teams. Rather, the Legacy Act requires a proportion of Independent Commission for Reconciliation & Information Recovery (ICRIR) officers to have prior NI policing experience. Moreover, the person appointed as the ICRIR Commissioner for Investigations is a former senior RUC & PSNI officer who latterly served as ACC Crime Operations which included ultimate responsibility for Intelligence Branch C3.⁵

From the outset, and throughout, it is reiterated that no criticism is levelled at this particular former officer's appointment (or indeed at any former officer's) or their ability to act in public leadership roles with integrity, compassion, courage and dedication.⁶ The challenge is to the human rights compatibility of such an appointment in this very particular and singular role, which will be the only means by which the State's Article 2 ECHR obligation will be discharged. In this context, it must be recalled that other independent mechanisms have been closed leaving the ICRIR and this leadership role in particular the only means to investigate State involvement cases.

That means that the only legal route, for cases in which former RUC officers and/or the RUC itself are implicated, will be presided over by a former RUC officer. The statutory function and responsibilities of that role are relevant, see below. If there is a requirement for an effective independent investigation in which the investigator has hierarchical, institutional *and* practical independence from those implicated, and every party to the discussion on legacy agrees that there is, there must be a clearer than present demarcation of independence.

While the Northern Ireland Human Rights Commission (NIHRC) is concerned with the legal import of the Act and the ICRIR, it is relevant to note that Article 2 ECHR has a very practical purpose – to shed light on wrongdoing and to allay concerns should there not have been wrongdoing. It benefits every person and agency that conclusions are beyond question. While some may be content with the current arrangement, many more have voiced their concerns. Those voicing concerns include the international human rights community and many victims, survivors and relatives. Those voices are not confined to one

⁵ Which formerly was known widely as RUC Special Branch.

⁶ The Chief Commissioner, in her former role as Independent Human Rights Advisor to the NI Policing Board, routinely referred to the great honour of service of police officers both now and in the past and their inalienable and equal right to the protection of human rights and equality. Human rights and equality are not enjoyed by treating every person identically regardless of circumstances. There are numerous examples of restrictions in the employment field to persons who do or do not hold certain characteristics or experience.

group or section of the community. They include the families of some police and army service men and women. It is widely accepted that if state actors have themselves been involved in human rights violations, any mechanism which cannot demonstrate sufficient independence will lack credibility. Any such mechanism, even if beyond reproach in its reporting of the facts, will almost certainly be dismissed as a result.

The requirement that investigators have independence from those potentially implicated is part of ensuring an effective investigation. Independence in the strict sense requires demonstration that there is nothing which undermines the capacity of the investigators to conduct an independent investigation. Absence of an actual conflict of interest is undoubtedly an essential element of an investigation but independence in the Article 2 sense is more than that. What is required is a lack of institutional connection and also a practical independence.⁷ Therefore, independence must be demonstrated as a matter of institutional, hierarchical *and* practical independence. As the ECtHR has said “If the investigation appears to be institutionally and hierarchically independent but is not, in fact, independent there is likely be a violation of Article 2”.

When the Act took effect on 1 May 2024, numerous inquests were halted, applications for inquests refused, police and police ombudsman cases and investigations closed. Many people were presented with two options: proceed no further; ask the ICRIR to review their case. Many victims and relatives of deceased victims challenged the Legacy Act in the Northern Ireland courts. The case(s) is still going through the courts.

From its early drafts through to its final draft the Legacy Act has been assessed by the NIHRC. Throughout that time, the NIHRC advised that the Act would be (and then was) incompatible with the Human Rights Act 1998.⁸ In July 2024, the new UK Government made a commitment to “uphold human rights and international law” and expressed how it “values international law because of the security it brings”.⁹ It further committed that the UK “will unequivocally remain a member of the ECHR”.¹⁰ The UK Government committed to “repeal and replace... [the NI Troubles (Legacy and Reconciliation) Act 2023]”.¹¹ That was the political commitment however the NIHRC’s position remains, irrespective of politics. Its position has remained the same despite a change in government.

The Northern Ireland Human Rights Commission (NIHRC)

⁷ *Jordan v United Kingdom* (2003) 37 EHRR 2

⁸ This is set out further.

⁹ Labour Party, ‘Change: Labour Party Manifesto 2024’ (LP, 2024), at 118-119.

¹⁰ Labour Party, ‘Change: Labour Party Manifesto 2024’ (LP, 2024), at 118-119.

¹¹ Labour Party, ‘Change: Labour Party Manifesto 2024’ (LP, 2024), at 113; Prime Minister’s Office, ‘Press Release: The King’s Speech 2024’, 17 July 2024.

The NIHRC was created in 1999 following commitments made in the Belfast (Good Friday) Agreement and in accordance with provisions in the Northern Ireland Act 1998. It was the first National Human Rights Institution in the UK and on the island of Ireland. It was also the first to achieve A status recognition from the United Nations for operating in full compliance with the Paris Principles, which set out the minimum standards that NHRIs must meet in order to be considered credible and to operate effectively. The Paris Principles set a number of criteria including the NIHRC's independence from government, which must be enshrined in legislation or in the Constitution. The NIHRC participates in both the UN and Council of Europe treaty monitoring processes.

The NIHRC has a number of statutory functions of promoting, educating, litigating, reviewing and advising on human rights issues in Northern Ireland. The NIHRC has unique responsibilities for promoting human rights in Northern Ireland. "The Commission shall promote understanding and awareness of the importance of human rights in Northern Ireland..."¹² It provides training programmes and works in partnership with government departments and agencies, and community and voluntary organisations to help better apply human rights in their work. For example, the NIHRC works with the NI Civil Service to increase human rights knowledge and awareness across NI departments and to promote human rights-based approaches to policy.

The House of Lords held, in *Re Northern Ireland Human Rights Commission* [2005] that, incidental to its general powers to promote the understanding of human rights law and practice and to review their adequacy and effectiveness, the Commission has the capacity to make submissions on human rights law and practice applicable in Northern Ireland.¹³ Moreover, the NIHRC "shall keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights".¹⁴ The NIHRC "must monitor the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland [now the Windsor Framework] in the EU withdrawal agreement (rights of individuals)".¹⁵ The NIHRC has statutory power to bring or intervene in cases concerning breaches of the Human Rights Act and/or the Windsor Framework. For the purposes of this paper, the Windsor Framework element is not included.

Since its formation over 25 years ago, the NIHRC has discharged its functions by exercising all of its powers. Over those years the NIHRC (and human rights themselves) have attracted debate, support and disagreement. The NIHRC has challenged the government in Westminster,

¹² Section 69(6) NI Act 1998.

¹³ [2005] UKHL 25.

¹⁴ At s. 69(1).

¹⁵ Under s. 78A(1).

the devolved administration in Stormont, public authorities and the private and commercial sectors for their performance in fulfilling their human rights obligations. The NIHRC has also advised the foregoing to enable them to implement policy in a lawful manner. It has trained various public authorities and is privileged to have worked with a range of partners and stakeholders, including the police. The NIHRC has assisted individual police officers in the protection of their human rights.

NIHRC internal governance

By the Code of Conduct, The Chief Commissioner is the only full-time public appointment and is “the official spokesperson for the Commission.” That means the Chief Commissioner alone acts as the spokesperson unless she delegates that function. The NIHRC operates by collective responsibility. The Code of Conduct states “Commissioners have collective responsibility for decisions of the Commission and any public statement arising from these decisions. At times, this may result in having to support Commission decisions that may be contrary to individual positions. The Commission seeks to debate issues to achieve consensus on major decisions. The Commission should strive through discussion to reach consensus. However, where this is not possible, collective decisions will be based on a simple majority vote, with the Chief Commissioner as chair holding a casting vote... Where a Commissioner has a strong objection to a decision, at their request, her/his dissent may be recorded in the minutes. Where a Commissioner feels strongly about an issue and/or a public statement arising from it, she/he should seek to resolve this in good faith with the Chief Commissioner. If the issue is not resolved, the Commissioner should in line with her/his corporate governance responsibilities, avoid speaking publicly against the Commission.”

It goes on “A matter that has been agreed at an ordinary or special meeting of the Commission may not be re-opened at a subsequent meeting within three months unless the majority of Commissioners agree to do so. If a Commissioner resigns as a result of a disagreement with Commission policy, she/he may state the basis for the resignation, but will be expected to maintain confidentiality regarding the discussions around the issue of resignation...the common law requires that members of public bodies (that is, Commissioners) should not participate in the discussion or determination of matters in which they have a direct pecuniary interest; and that when an interest is not of a direct pecuniary kind, members should consider whether participation in the discussion or determination of a matter would suggest a real danger of bias. This should be interpreted in the sense that Commissioners might either unwittingly or otherwise unfairly regard with favour or disfavour, the case of a party to the matter under consideration. In considering whether a real danger of bias exists in relation to a particular decision, Commissioners should assess whether they, a close family member, a person living in the same household as the Commissioner, or a firm,

business or organisation with which the Commissioner is connected are likely to be affected more than the generality of those affected by the decision in question.”

It elaborates that “The Chief Commissioner is the official media spokesperson for the Commission. In the absence of the Chief Commissioner, her/his designate is authorised to act as spokesperson for the Commission within agreed policy positions. All communications by Commissioners on behalf of the Commission with the media should be agreed with the Chief Commissioner or, in her/his absence, the Chief Executive or the Director of Communications and Education. Commissioners require the express permission of the Chief Commissioner to represent the Commission in dealings with outside individuals or bodies and must report back to the Commission on all such dealings. When Commissioners are asked by the media to participate in a personal or professional capacity, they should make it clear that they are not commenting on behalf of the Commission and that the public comment cannot be seen as compromising their ability to carry out their role within the Commission in an unbiased and apolitical manner. This applies equally, where Commissioners are invited in a personal or professional capacity to participate in a conference, seminar, meeting or other external event. ”

The position agreed and put, for example, by the NIHRC in the legacy case, the *Dillon* case, can be summarised from written submissions “the NIHRC considers that the Legacy Act will result in serious and widespread violations of the ECHR and the UK’s obligations under the Windsor Framework. The fundamental purpose of the Act is to bring an end to a wide variety of legal proceedings which the Government considers “create obstacles to achieving wider reconciliation” following the period the Act defined as “the Troubles”.

It continued “By design, the alternative body established under the Act for reviewing certain limited categories of Troubles-related conduct, the Independent Commission for Reconciliation and Information Recovery (“the ICRIIR”), provides far less by way of transparent, rigorous and comprehensive investigation, available for scrutiny by victims, next-of-kin and the public at large. In truth, the legal machinery which pre-dated the Act, despite its imperfections, provided vital architecture for the realisation of rights under the ECHR as well as under European Union law which continues to bind the UK by virtue of the Windsor Framework. The elimination of those important avenues of legal redress compromises — so far as to extinguish — the right to a robust investigation of unlawful deaths and serious ill-treatment with appropriate victim participation and the right to access to a court... even aside from the immunity regime, the Legacy Act drastically curtails the usual avenues for investigations and prosecutions under the criminal justice system in a way that is

inconsistent with Articles 2 and 3 ECHR... the ICRIR does not have the robust independence required for an ECHR-compliant investigation”.

Relevant ECHR law

The form of investigation required for the purposes of Article 2 ECHR is not set in stone, but it must, at a minimum, satisfy a number of criteria. It will vary depending on the circumstances, not least with a higher level of independence and scrutiny required where it may involve actions of the State. In the current context the following is a summary of the most relevant:

The State must act of its own motion and not wait for the next of kin. For example, in the context of killings allegedly perpetrated by or in collusion with State agents, civil proceedings initiated by the next of kin and which do not involve the identification and punishment of any alleged perpetrator, cannot be taken into account in the assessment of the State’s compliance with Article 2. That is because civil remedies cannot satisfy in the case of homicide in the case of State agents because the circumstances of the death are largely confined within the knowledge of State officials so that bringing proceedings will be conditioned by an adequate official investigation;¹⁶

The investigation must be subject to public scrutiny the degree of which depends on the circumstances of the individual case. Where a death may have been inflicted at the hands of a State agent particularly stringent scrutiny is required;¹⁷

The investigation must be independent with those carrying out the investigation independent from those who are or may be implicated in the events. The assessment of independence must be “a concrete examination of the independence of the investigation in its entirety, rather than an abstract assessment.”¹⁸ Note this includes in relation to the wider circumstances (such as the training, planning and equipping). There must be “not only hierarchical and institutional independence but also a practical independence. What is at stake here is nothing less than public confidence in the State’s monopoly on the use of force.”¹⁹

In the group of cases known as the *McKerr* cases, the European Court of Human Rights considered a number of cases in which Article 2 ECHR compliance was alleged (and found) to be deficient in a number of investigations involving deaths at the hands of RUC officers.²⁰ The cases

¹⁶ *Jordan v the UK* (2001).

¹⁷ *Armani Da Silva v the UK* (2016) *Velikova v Bulgaria* (2000).

¹⁸ Council of Europe, *Right to Life*, 2004.

¹⁹ *Ibid.* para 232.

²⁰ The cases were *McKerr*, *Jordan*, *Kelly*, *Shanaghan*

were heard together. The lead case arose out of an incident in which Mr. Gervaise McKerr was killed along with two passengers, in November 1982. While the wider facts of the killing remained in dispute before the ECtHR, it was recorded that he and the occupants of his car were unarmed but shot (with at least 109 rounds) by a mobile support unit of the RUC. There were several reviews including by Mr Stalker and then Mr Sampson. There was a criminal trial of three RUC officers before a Judge sitting without a jury, which resulted in the Judge acquitting the officers with "no case to answer" before hearing their evidence. The applicant challenged the adequacy of the investigations and that criminal trial.

The NIHRC intervened in the cases before the ECtHR.

It is recorded "The Northern Ireland Human Rights Commission, acting as intervenor, made submissions outlining the relevant international standards concerning the right to life ...They submit that the State must carry out an effective official investigation when an agent of the State is involved or implicated in the use of lethal force. Internal accountability procedures must satisfy the standards of effectiveness, independence, transparency and promptness, and facilitate punitive sanction. It is however, in their view, not sufficient for a State to declare that while certain mechanisms are inadequate, a number of such mechanisms regarded cumulatively can provide the necessary protection. They submit that the investigative mechanisms relied on in this case, singly or combined, fail to do so. They refer, *inter alia*, to the problematic role of the RUC in Northern Ireland, the serious deficiencies in mechanisms of police accountability, the limited scope of and delays in inquests, and the lack of compellability of the members of the security forces who have used lethal force to appear at inquests..."

The ECtHR found there to have been a breach of Article 2 ECHR and identified a number of shortcomings including in respect of the independence of the officers investigating the incident, insufficient public scrutiny of the investigation, and insufficient sharing of information with the family. The ECtHR observed "the lack of independence of the RUC investigation, and the lack of transparency regarding the subsequent inquiry into the alleged police obstruction in that investigation, may be regarded as being at the heart of the problems in the procedures that followed... the shortcomings in transparency and effectiveness identified above run counter to the purpose identified by the domestic courts of allaying suspicions and rumour. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. A lack of such procedures will only add fuel to fears of sinister motivations..."

In *Brecknell v UK* (2008), Mrs Brecknell alleged that there had been no adequate investigation into allegations of collusion and/or involvement by security forces in the killing of her husband Mr Trevor Brecknell who had been shot (along with two other men) at Donnelly's Bar. The murders were claimed by the Red Hand Commandos, an illegal loyalist paramilitary organisation. The Government stated that despite the efforts of the police it was not possible to identify any particular suspect. In 1976 an inquest was held into the deaths of the three deceased persons. These murders formed part of a series of murders that later became known as the Glennane Gang murders. A number of RUC officers and UDR officers were implicated in the gang's murders. There was a review/reinvestigation by the PSNI of the murders following evidence put by journalists.

Amongst other issues, it was contended before the Court that because it was the PSNI that had conducted the investigation into the allegations implicating RUC officers, those investigations had not complied with Article 2 ECHR. Mrs Brecknell also pointed out that the PSNI did not come into existence until November 2001 and in any event was largely a continuation of the former organisation without hierarchical or practical independence. "...the Court noted that events or circumstances may arise which cast doubt on the effectiveness of the original investigation and trial or which raise new or wider issues and an obligation may therefore arise for further investigations to be pursued. It considered that the nature and extent of any subsequent investigation required by the procedural obligation would inevitably depend on the circumstances of each particular case and might well differ from that to be expected immediately after a suspicious or violent death has occurred."

"The Court would, however, draw attention to the following considerations. It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Nonetheless, given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further."

"...the Court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation."

"...The extent to which the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny apply will again depend on the particular circumstances of the

case, and may well be influenced by the passage of time as stated above. Where the assertion or new evidence tends to indicate police or security force collusion in an unlawful death, the criterion of independence will, generally, remain unchanged."

Under the heading Independence "The Court would observe that the initial inquiries were carried out by the RUC, which was itself implicated... They cannot be regarded as disclosing the requisite independence... This must be regarded as tainting the early stage of the enquiries. The Court recalls that the PSNI took over from the RUC in November 2001. It is satisfied that the PSNI was institutionally distinct from its predecessor even if, necessarily, it inherited officers and resources. It observes that the applicant has not expressed any doubts about the independence of the teams which took over from 2004 (the SCRT and HET). However this does not in the circumstances detract from the fact that for a considerable period the case lay under the responsibility and control of the RUC. In this respect, therefore, there has been a failure to comply with the requirements of Article 2 of the Convention."

In another case, *Ramasahai v the Netherlands* (2007), it is noted that "The Chief Public Prosecutor, who bears the ultimate responsibility for the investigation and the decision whether to bring a prosecution, is required to ensure that the investigation is not under any circumstances supervised by a public prosecutor who maintains close links with the police unit to which any police officers concerned belong; every appearance of a lack of independence is to be avoided."

It continued "The Chamber accepted that the National Police Internal Investigations Department, a nationwide service with its own chain of command and answerable to the country's highest prosecuting authority, the Procurators General, had sufficient independence for the purposes of Article 2 of the Convention. It found, however, that essential parts of the investigation had been carried out by the same force, acting under its own chain of command...considering also that supervision even by an independent body was not sufficient to ensure full independence of the investigation, the Chamber held that there had been a violation of Article 2 in its procedural aspect."

"...The Court has had occasion to find a violation of Article 2 in its procedural aspect in that an investigation into a death in circumstances engaging the responsibility of a public authority was carried out by direct colleagues of the persons allegedly involved... Supervision by another authority, however independent, has been found not to be a sufficient safeguard for the independence of the investigation (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 120, 4 May 2001, and *McKerr v. the United Kingdom*, no. 28883/95, § 128, ECHR 2001-III)."

"...The police investigation was carried out under the supervision of an Amsterdam public prosecutor ...In the Netherlands the Public Prosecution Service, although it does not enjoy full judicial independence, has a hierarchy of its own, separate from the police, and in operational matters of criminal law and the administration of justice the police are under its orders...Public prosecutors inevitably rely on the police for information and support. This does not in itself suffice to conclude that they lack sufficient independence *vis-à-vis* the police. Problems may arise, however, if a public prosecutor has a close working relationship with a particular police force."

In *Tunç v Turkey* (2015), "...it is a matter of established case-law that, in cases where it is alleged that death was intentionally inflicted or occurred following an assault or ill-treatment, an award of compensation cannot absolve the Contracting States from their obligation to conduct an investigation capable of leading to the identification and punishment of those responsible... This is so because, if the authorities could confine their reaction to incidents of wilful ill-treatment by, *inter alia*, State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the legal prohibition on taking life, despite its fundamental importance, would be ineffective in practice."

The court repeated "the persons responsible for the investigations should be independent of anyone implicated or likely to be implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence... Article 2 does not require that the persons and bodies responsible for the investigation enjoy absolute independence, but rather that they are sufficiently independent of the persons and structures whose responsibility is likely to be engaged... The adequacy of the degree of independence is assessed in the light of all the circumstances, which are necessarily specific to each case. Where the statutory or institutional independence is open to question, such a situation, although not decisive, will call for a stricter scrutiny on the part of the Court of whether the investigation has been carried out in an independent manner. Where an issue arises concerning the independence and impartiality of an investigation, the correct approach consists in examining whether and to what extent the disputed circumstance has compromised the investigation's effectiveness and its ability to shed light on the circumstances of the death and to punish those responsible."

The court concluded that "While accepting that it cannot be considered in the present case that the entities which played a role in the investigation enjoyed full statutory independence, the Court finds, taking account, on the one hand, of the absence of direct hierarchical, institutional or other

ties between those entities and the main potential suspect and, on the other, of the specific conduct of those entities, which does not reflect a lack of independence or impartiality in the handling of the investigation, that the investigation was sufficiently independent within the meaning of Article 2 of the Convention... In this regard, it stresses that Cihan Tunc's death did not occur in circumstances which might, *a priori*, give rise to suspicions against the security forces as an institution, as for instance in the case of deaths arising from clashes involving the use of force in demonstrations, police and military operations or in cases of violent deaths during police custody."

In the case of *Da Silva v the UK* (2016), the cousin of Jean Charles de Menezes who was shot and killed by the Metropolitan Police Service following the 7/7 terrorist attacks on London Transport.²¹ There were investigations and an Inquest into the death. Ms Da Silva challenged solely the fact that no individual police officer was prosecuted. The Equality and Human Rights Commission (for England and Wales) intervened and argued that the definition of self-defence was too wide, that the threshold evidential test was too high and therefore the law was inadequate to secure full accountability in killings by state agents and was therefore incompatible with Article 2 ECHR.

The ECtHR considered the application and made a number of observations of a general nature such as "A general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, taken in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State (see *McCann and Others*, cited above, § 161). The State must therefore ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished."

"...For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events... This means not only a lack of hierarchical or institutional connection but also a practical independence... What is at stake here is nothing less than public confidence in the State's monopoly on the use of force."

²¹ 30 March 2016, Grand Chamber ECtHR, Application No. 5878/08.

"... In particular, the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements... Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. The nature and degree of scrutiny must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work... Where a suspicious death has been inflicted at the hands of a State agent, particularly stringent scrutiny must be applied by the relevant domestic authorities to the ensuing investigation."

"...Where the official investigation leads to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect the right to life through the law. In this regard, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished."

In 2017, the UK Supreme Court heard the appeal brought by Mrs Geraldine Finucane into the failure to investigate the murder of her husband Patrick Finucane in 1989. The UKSC said this "Mrs Finucane and her children have waged a relentless campaign since Patrick's killing to have a proper investigation conducted into the circumstances in which he was murdered. It became clear at an early stage that those responsible were *soi-disant* loyalists. Before long, it also emerged that there was collusion between Mr Finucane's murderers and members of the security forces. Various investigations about the murder and the nature of the collusion have been conducted. None of these has uncovered the identity of those members of the security services who engaged in the collusion nor the precise nature of the assistance which they gave to the murderers.

The UKSC referred to the RUC investigation, the inquest and the inquiry by John Stevens (deputy chief constable of Cambridgeshire, later Sir John, and yet later Lord Stevens) who was appointed by the chief constable of the RUC to investigate allegations of collusion between the security forces and loyalist paramilitaries. Stevens did not specifically examine the murder of Patrick Finucane but did identify state agent Brian Nelson. Sir John Stevens reported to the chief constable in April 1990. Ultimately there were two more inquiries by Stevens, one by Anthony Langdon and one by Sir Desmond de Silva. The PSNI then commenced a new review of the de Silva material.

The UKSC noted "It has later been established that Sir John Stevens was seriously obstructed in his investigations. Instructions were given to deny him access to intelligence information. Material about advance warnings

to UDA members in relation to pending arrests was deliberately withheld.” It also looked at the result of the de Silva inquiry. The UKSC observed “Being capable of identifying those responsible must involve having the means to identify those implicated in the death. It should also include the will and the opportunity to expose them. The important issue in this case is whether Sir Desmond de Silva’s review had these critical attributes. Much of what he says in his conclusions is qualified or expressed in terms of generality. For instance, he said that the RUC, the security service and the secret intelligence service failed to warn Patrick Finucane of known and imminent threats to his life in 1981 and 1985. Those officers who were in a position to give that warning (and whose plain duty it was to do so) are not identified. The circumstances in which they failed in their duty are not explained.”

It went on “Sir Desmond concluded that one or more officers in the RUC probably did propose Mr Finucane as a target for loyalist terrorists in December 1988.... No officers have been identified. If it is true that they did propose Mr Finucane as a target, this was a serious criminal offence. It bears directly on the proper investigation of his murder. But, at present, the issue remains entirely unresolved.”

“...In deciding whether an article 2 compliant inquiry into Mr Finucane’s death has taken place, it is important to start with a clear understanding of the limits of Sir Desmond de Silva’s review. His was not an in-depth, probing investigation with all the tools that would normally be available to someone tasked with uncovering the truth of what had actually happened. Sir Desmond did not have power to compel the attendance of witnesses. Those who did meet him were not subject to testing by way of challenging probes as to the veracity and accuracy of their evidence. A potentially critical witness was excused attendance for questioning by Sir Desmond. All of these features attest to the shortcomings of Sir Desmond’s review as an effective article 2 compliant inquiry. This is not to criticise the thoroughness or rigour of Sir Desmond’s review. To the contrary, it is clear that it was conducted with commendable scrupulousness. But the very care with which he carried out his review and the tentative and qualified way in which he has felt it necessary to express many of his critical findings bear witness to the inability of his review to deliver an article 2 compliant inquiry.”

The UKSC provided this very important explanation “An article 2 compliant inquiry involves providing the means where, if they can be, suspects are identified, and, if possible, brought to account. It should also provide the opportunity to recognise, if possible, the lessons to be learned so that a similar event can be avoided in the future.”

Independence and Impartiality of Investigations Generally

It has long been established that those responsible for investigating the truth of any situation where harm has been caused, should not be connected to those who are potentially implicated in that situation or in the harm that was caused as a result. That is a principle that stretches back centuries and applies across a wide range of professions. Whenever there is a call for the truth of what happened, the trust and confidence in the investigation process and outcome has often stood or fallen on two fundamental principles: impartiality and objectivity. Impartiality and objectivity are necessary for the fact of independence and the perception of it. If either is lacking, there will be mistrust in the conclusions reached. It has been widely recognised that that assists nobody – not the person suffering harm or the alleged perpetrator.

To be independent, an investigation must be set up to demonstrate impartiality and objectivity. That means in respect of both the investigative process and the structure of the investigation. It is self-evident that those charged with carrying out an independent investigation (when an independent investigation is called for), must demonstrate that they themselves are impartial and objective in fact and by perception.²² That means, obviously, approaching the investigation with an open mind, but it is more than that. The investigator must demonstrate that they have no personal or professional interest in certain findings or in any particular outcome. The investigator must be free and able to operate without influence or bias. Any relationship with the persons or organisation involved, the potential influence from hierarchical dynamics and external pressures can all undermine that freedom, or at the very least the trust others might enjoy in that investigation.

An independent investigation is one that assesses evidence without fear or favour, without the pressure or influence of historical connections and without any personal belief that may affect their assessment. Any such influence – real or perceived – undermines the credibility of the investigation and its outcome.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) published the Istanbul Protocol (updated) which is used worldwide in medico-legal, policing and other contexts. It is used to guide the investigation and documentation of torture and ill-treatment, protection of victims and advocacy work of civil society on behalf of victims. It is drawn from experts from over 180 countries. On the issue of independent and effective investigations it provides "States should establish, preferably on a statutory basis, mechanisms with full investigatory powers that are institutionally and functionally independent... to ensure impartiality... Investigations must be carried out

²² In many of the incidents captured by the Legacy Act, it is accepted by government that an independent investigation is required by law as per the Human Rights Act and the ECHR Articles 2 and 3.

in an impartial manner, taking into account potential conflicts of interest, hierarchical relationships with potential suspects and the specific conduct of investigators... The investigators, who should be independent of the suspected perpetrators and the agency that they serve, must be competent and impartial.”²³

An independent investigation is often the first thing called for by victims, survivors, their family members and by society when something goes wrong. There have been numerous independent investigations into the provision of medical care, following workplace incidents or accidents, following allegations of military failure at home or abroad, following data leaks, following national security incidents.

In the UK there have been independent investigations into a number of human rights violations including by way of example the Undercover Policing Inquiry which is considering 14 years of undercover policing activity by the Met Police’s Special Demonstration Squad (formerly the Special Operation squad) and the national public order intelligence squad. that was chaired initially by Sir Christopher Pitchford KC and now by Sir John Mitting KC (retired senior judges). The inquiry makes clear that it is “independent of government and the bodies it is investigating. The inquiry is supported by legal representatives, civil servants and contractors.”²⁴

In Northern Ireland, there have been a number of independent investigations of violations of human rights by child abuse in religious institutional settings. The inquiry into hyponatraemia-related deaths was established in 2004 by the Minister with responsibility for health under Chairman John O’Hara QC (now Mr Justice O’Hara KC). The inquiry team comprised legal and medical experts with no connection to those implicated. In his opening statement the Chairman refers to the questions asked about independence and says “I know that some concern has already been expressed that the Inquiry is not being conducted by someone from outside Northern Ireland. I want to emphasise my own independence from the Department and from those individuals and public bodies whose conduct will be examined.”²⁵

The Omagh Bomb Inquiry has now been established and is chaired by the Rt Hon Lord Turnbull (former senior Judge in Scotland). Its terms of reference are to investigate whether the car bomb detonated in Omagh, County Tyrone on 15th August 1998 in which 29 people and two unborn

²³ Istanbul Protocol Professional Training Series No. 8/Rev.2, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, OHCHR, 2001 updated 2022.

²⁴ Undercover Policing Inquiry, established 2015 by the Home Secretary, www.ucpi.org.uk.

²⁵ Chairman’s Statement John O’Hara QC, 18 November 2004, Public Safety to conduct this Inquiry into the events surrounding and following the deaths of the three young children, Adam Strain, Lucy Crawford and Raychel Ferguson.

children were killed could have been prevented by UK state authorities.²⁶ It was considered necessary for the Inquiry to state “The Chairman and the Inquiry team operate independently from the Government, and from Core Participants and other organisations involved in the Inquiry.”

The NIAC produced its report in which it said “we believe that further investigation is required into what Special Branch gave to the investigation team, when it was given, and what information was withheld and why. We believe that the public interest would be served by revealing to the greatest possible extent why information that might have led to arrests in a mass murder case was not used.” Having considered that report the Chief Constable of the PSNI wrote to the Police Ombudsman observing that, “various matters are raised in respect of how RUC Special Branch handled intelligence and its relationship with GCHQ. These raise further serious issues of public confidence in the police.” The High Court, in 2021, had directed that an Article 2 compliant investigation should be carried out in Northern Ireland to examine the grounds identified including “failure of the authorities to act against those dissident republican terrorists, north and south of the border, who had been involved in acts of terrorism in the months leading up to the Omagh bombing...”²⁷

Independence in Police Cases – Specifically

In Northern Ireland, the Office of the Police Ombudsman for Northern Ireland (PONI) was established as part of the major policing reform process which included restructuring of the Royal Ulster Constabulary as the PSNI.

Dr. Maurice Hayes, commissioned to report on the police complaints handling system in the run up to the Belfast Agreement 1998, said “The overwhelming message I got from nearly all sides and from all political parties was the need for the investigation to be independent and to be seen to be independent.” Thereafter, the Independent Commission on Policing in Northern Ireland (known as the Patten Commission) recommended a fully independent Police Ombudsman for Northern Ireland. The Patten Commission noted “Accountability places limitations on the power of the police, but it should also give that power legitimacy and ensure its effective use in the service of the community.”²⁸ The Commission went on “An efficient and well-regarded system for dealing speedily, effectively, openly and fairly with complaints about the

²⁶ On 16 March 2010, the Northern Ireland Affairs Committee published a report titled, ‘The Omagh Bombing: some remaining questions

²⁷ Re Gallagher [2021] NIQB Horner J.

²⁸ See Report at paragraph 1.13.

behaviour of police officers protects them from malicious complaints and should reassure and protect the public.”²⁹

They added “We also note that Sir William MacPherson recommended independent investigation of serious complaints against the police, in his report of the Stephen Lawrence inquiry... this Commission as a whole aligns itself fully with Dr Hayes’ recommendations and believes that a fully independent Ombudsman operating as he envisaged in his report should be a most effective mechanism for holding the police accountable to the law.”³⁰ Referring to the need for its own independence the Patten Commission said “As a Commission that is both totally independent and mindful of the importance to its credibility of demonstrating this independence, we publish these proposals in the strong belief that they offer the people of Northern Ireland the chance of establishing an effective and widely accepted police service for which they are themselves responsible. We are not parties to the present political discussions, but we hope that those who are will see this report as a contribution to the restoration of peace and local democratic arrangements in Northern Ireland.”³¹

The Police Ombudsman of NI has published a statement of values which includes a commitment to complete impartiality. The first Ombudsman “took the view that the key to the success of the new Office would be its independence and the public and police perception of that independence.” She observed, reflecting after her years of service, “the independence of our investigations was crucial, not just to the member of the public who had made the complaint but to the police officer who was subject to that complaint. But I quickly realised that it was not enough to talk in abstract terms about independence; I was going to have to demonstrate it if we were to win confidence.”³²

An early investigation by the new office, was into the policing around the Omagh Bomb (August 1998), which found failures to disseminate intelligence held by RUC Special Branch both before and after the bombing. It also noted “at a senior management level within the police, the response to the Police Ombudsman enquiry had been defensive and at times uncooperative.”³³ Recommendations were made, which were complied with by the PSNI, including a new investigation into the bombing, an independent review into terrorist related murder enquiries and a review into the role and function of Special Branch.

²⁹ Ibid. para 5.17.

³⁰ Ibid. para 6.40.

³¹ Ibid. para 1.2.

³² 20 years of dealing with complaints about the conduct of police officers in Northern Ireland, Police Ombudsman NI.

³³ December 12, 2001, public statement PONI.

In 2007, the Police Ombudsman released findings into the murder of Raymond McCord Junior (November 1997). To give a sense of what is involved in that investigation, “more than 100 serving and retired police officers were interviewed (24 under caution). Thousands of police documents, including intelligence material, were seized from computer systems. The subsequent report linked police informants to ten murders and 72 other crimes including attempted murders. The Police Ombudsman was concerned that documents had gone missing, were lost or destroyed not as a result of “an oversight but was a deliberate strategy and had the effect of avoiding proper accountability.” The PSNI accepted all recommendations that followed.³⁴

The issue of former police serving in the Ombudsman’s office was considered at various stages, including in a review by Criminal Justice Inspection NI in 2011, which questioned some legacy investigations and whether there was adequate demonstration of independence in those, but was satisfied that contemporary complaints were sufficiently independent. The Police Ombudsman in Northern Ireland has never come from a UK policing background. In 2011, a report by Criminal Justice Inspection NI found that operational independence had been lowered in historical cases.³⁵

A recent academic analysis reported that “Civilian independence from police in handling complaints against police is widely regarded as essential for public confidence in making complaints and for police accountability more generally.” It observes that best practice means the oversight and investigatory agency is “independent of the police and government, with the majority of staff from outside policing backgrounds and no current or former officers from the regulated police agency.”³⁶ The enduring importance of complete independence and the appearance of it is highlighted in the 20 year review of PONI in which it is observed “The determination of some within the wider policing community to protect the image of the Royal Ulster Constabulary from what they see as uninformed criticism has continued throughout the years.”³⁷

In 2009, the Police Ombudsman for Northern Ireland (a former Canadian police officer) when commenting upon suggested reforms said, “There are still issues and practicalities which I suspect need to be refined. It is important, for example, to ensure that those people investigating police complaint issues from the past are and are seen to be wholly independent of those they are investigating.

³⁴ Ibid.

³⁵ 2011, CJINI

³⁶ The Police Ombudsman for NI: a model agency for managing complaints against police and optimising police integrity?, June 5, 2025, Tim Prenzler, Michael Maguire and Louise Porter.

³⁷ Ibid.

Another example of police complaints handling is in Scotland and the Office of the Police Investigations and Review Commissioner, who is appointed by the Scottish Ministers for a fixed term of office. The 2006 Act prescribes that the Commissioner is not a servant or agent of the Crown, and it precludes former police officers from being appointed to that office.

In her review of police accountability Rt Hon Dame Elish Angiolini DBE KC noted "The operational independence of the body which investigates the police is of paramount importance as it is in the public interest that the Commissioner and the investigation teams can act without fear or favour. The role of the Commissioner is central to the effective investigation of policing and crucial to public confidence in that system. The Commissioner must be independent and must be seen to be independent. The office places heavy responsibilities on the individual appointed to hold what is a singleton post."³⁸

She continued "I support the current policy of the PIRC to reduce reliance on the employment of retired police officers as investigators. At the point at which the PIRC was establishing the investigation teams in 2012-13 it made complete sense to recruit retired police officers. The new, expanded organisation was put together very rapidly after the passage of the legislation and there was an imperative to get it up and running in time for 1 April 2013. This policy was appropriate and necessary for a new organisation taking on new investigative functions. There are significant benefits in making good use of investigation skills and previous policing experience, but it is also true that this can be perceived as diminishing the independence of the investigation because it has the appearance of the police investigating their former colleagues in the police. There is also a risk that as policing practices change, skills will diminish, particularly in specialist areas, and therefore there is a need to maintain current skills and knowledge in those who have come from a policing background."

She referred to the position in England and Wales where the Independent Office of Police Conduct (IOPC) "must now be filled by non-police officers. As in the case of the Police Investigations and Review Commissioner, the legislation prescribes that a former police officer cannot be appointed as the Director General of the IOPC. In its one-year report, the (then) IPCC pointed out that the most senior members of its management team were all from a non-police background. The PIRC should adopt a similar policy. There are obvious benefits in drawing on the experience and expertise of those who have served with the police but it does leave the PIRC open to criticism based on the danger of unconscious bias. It is

³⁸ Police complaints handling, investigations and misconduct issues: independent review, November 11, 2020, Rt Hon. Dame Eilish Angiolini DBE KC.

important that public confidence is not affected by the perception of a close relationship between the investigator and those being investigated. The need for balance and the risk of loss of organisational memory suggest that any changes in staffing should be gradual.”³⁹ The Council of Europe notes that an independent oversight agency should be “staffed by persons wholly unconnected with the Police Department.”⁴⁰

The United Nations has reiterated, in its Police Resource Toolkit, “An Independent Police Oversight Body (IPOB), like any other institution, is only as strong as its leader. Leading an IPOB is a complex position requiring a careful manoeuvring among entrenched interests with a need to fulfil the IPOB’s mandate of effective investigations. To successfully lead an IPOB, its director must be assured of the agency’s independence from external pressures, particularly from police interest groups... Working within a governmental structure to hold other parts of the same government criminally accountable leaves the director vulnerable to either overt political or subtle interference... In order to foster public confidence in an IPOB, the governing legislation should make it clear that current or former police officers are disqualified from selection as director. While there is no doubt that many officers could be effective leaders, the need for the appearance of independence demands that the IPOB not be vulnerable to accusations of institutional bias.”⁴¹

Part of the rationale is as follows. “Criminal investigations of the police are often complex, and subject to opposing pressure from policing interest groups on the one hand and involved citizen groups on the other. Investigations of crimes such as homicide, torture, sexual assault, and corruption require specific technical skills. If a charge proceeds to trial, the IPOB investigators will likely be called as witnesses and subject to searching cross-examinations focussing on the competency of their investigation. Thus, the selection of these investigators is critical to the agency’s success.”⁴²

On specific challenges it deals with “Avoiding perceptions of bias: Hiring of former, seconded police officers, or investigators with no police experience...The practicalities of staffing an agency mandated to conduct major criminal investigations, particularly in an IPOB’s early stages, means the only readily accessible pool of qualified candidates will be police officers. However, perceptions of bias surrounding the use of former or seconded officers will erode public trust... former officers should not be involved in any investigation that relates to the police service where they

³⁹ Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing Preliminary Report June 2019 The Rt. Hon. Dame Elish Angiolini DBE KC

⁴⁰ Ibid.

⁴¹ POLICE RESOURCE TOOLKIT for professional, human rights-compliant Policing, Chapter 8 UNODC, 2024.

⁴² Ibid.

previously worked. As well, former police officers ought not to be the majority of IPOB investigators. IPOBs should make a concerted effort to draw promising candidates from other backgrounds and develop a mentorship and training program within the agency.” The PONI is cited as an example of good practice. “At its inception, PONI recruited investigators from around the world to have their experience without the perception of bias associated with hiring local former police officers.”

It is important to recall also that the PSNI Historical Enquiries Team (HET) faced overwhelming criticism on the question of independence in state involvement cases including with the involvement of former RUC officers, particularly those with an intelligence role. The HET was established as an independent unit of the PSNI however it was alleged that the HET was answerable to the ACC Crime Operations, whose responsibilities included Intelligence Branch C3. A report by Her Majesty’s Inspectorate of Constabulary (HMIC) which found that the HET was incompatible with the ECHR due to a lack of independence, including by the use of former RUC/PSNI officers to manage information from C3. The HMIC reported “the independence necessary to satisfy Article 2 can only be guaranteed if former RUC officers are not involved in investigating state involvement cases. Whether there is state involvement in a case (in particular the role of informants) can at times only be determined by an investigation itself.”

In the context of the current point, if there is any suggestion that investigators are neither hierarchically nor practically independent, that has the potential to taint the investigative process and likely result in a finding that it is not Article 2 compliant. By way of example, a PSNI officer who is a former RUC officer who was or may have been concerned in any way either personally or through his or her contact with other RUC officers who may be implicated in the subject of the investigation, should not be responsible for the investigation. at any stage. That may include an officer who was responsible for policy, training or supervision of those officers. Even if a PSNI officer was not formerly a member of the RUC, if he or she is not practically or hierarchically independent from those who may be implicated in the investigation or not free to exercise his or her duties free from improper interference, the process is likely to fall foul of Article 2. A self-recusal process is unlikely in itself to be sufficient to ensure the independence of the process.

Independence of ICRIR Investigations

Independence and impartiality are assessed in the relevant circumstances of the investigations including the purpose of the Article 2 procedural requirement for an official effective investigation.

The Council of Europe’s Commissioner for Human Rights, following her visit to the UK in 2022, made the following observation under the heading

Northern Ireland – Dealing with the legacy of the troubles “. She raised concerns about the entire approach. In particular she said “The Bill [the Legacy Bill] raises a number of serious issues of compliance with the ECHR, including in relation to the independence and effectiveness of the mechanism for the review of Troubles-related incidents by the Independent Commission for Reconciliation and Information Retrieval (ICRIR), the closure of many important existing avenues for victims to seek truth and justice, and the conditional immunity scheme...”

She continued “The Commissioner calls on the UK government to consider withdrawing the Bill. She urges a return to previously agreed principles which provide a basis for a human rights compliant approach. Any steps to address the legacy of the past must put the rights and needs of victims at its heart.” She concluded “In view of the widespread opposition in Northern Ireland, and fundamental questions about the compatibility of key parts of this instrument with the UK’s obligations under the ECHR, the Commissioner calls on the UK government to consider withdrawing the Northern Ireland Troubles (Legacy and Reconciliation) Bill...The Commissioner stresses that any further steps on legacy must place the rights and needs of victims at its heart. To this end, timely, open and genuine consultations must be held with all stakeholders, but especially victims and their families, as well as victims’ groups.”⁴³

The UK Government in its formal response said they “intend to strengthen confidence in the Commission’s independence by stipulating that the Secretary of State for Northern Ireland must consult individuals and bodies before appointing the Chief Commissioner, and have regard to relevant international experience in appointing Commissioners. These amendments are intended to go some way to allaying concerns that... the Commission is independent and seen to be independent.”⁴⁴

In April 2025, the NI Affairs Committee heard evidence from: Chief Constable PSNI Jon Boutcher, Lead Officer Operation Kenova, Sir Iain Livingstone and Baroness Nuala O’Loan on the Government’s new approach to legacy. CC Boutcher said “legacy is about trust and confidence... In Kenova, we made so much progress. We did stuff that had not been done before, because we learned from those other inquiries... But it feels like – when I read the Bill, my heart sank- the Bill was designed to stop the progress that Kenova had made. So whenever I hear people saying, “This is a Kenova approach” – let me be very clear. I built Kenova, and the Bill is not a Kenova approach.”

Claire Hanna MP asked the Chief Constable “Would you agree with Baroness O’Loan’s written comments that ICRIR has been “widely

⁴³ 18 November 2022, country report, Council of Europe

⁴⁴ UK Government Response to Commissioner for Human Rights Report Following Her Visit to the United Kingdom from 27 June to 1 July 2022

rejected”? He replied “There is no doubt that it has been widely rejected – I do not think it is really up for debate... we need to do something that gets the families trust back.” The specific question was asked by Gavin Robinson MP as to former police officers in ICRIR. He asked “I want to ask about the inclusion of individuals within ICRIR and the investigative process who have a policing past, be that the RUC or PSNI. I find the argument that they cannot be involved repugnant, biased and politically prejudicial, but this Committee has received evidence, including from the Northern Ireland Human Rights Commission, suggesting that people with a policing past are incapable or should be ineligible to participate in legacy bodies. Do you agree with the assessment of the NIHRC that anyone who served in the PSNI or RUC is incapable of performing their task in a way that is filled with integrity and professionalism?”⁴⁵

Sir Iain remarked “I think this is very challenging, because certainly one of Kenova’s virtues was that nobody involved had served previously as a police officer in Northern Ireland... Jon took that view right at the outset that he would do that, to go and gather the trust and confidence of communities that had never had trust and confidence in state agencies in the past. My own view... is that there might be a distinction to be drawn between those in the position of commissioner and those in the position of investigator... Having served in policing, they can go and serve in the Commission, but perhaps not in the leadership or assessment of it. If there is validity in the objection, perhaps you could draw a distinction between those who are appointed to the position of commissioner roles... Are they capable of discharging it independently? No, they are definitely not. I think this is more about apparent bias than actual bias, but as we know, apparent or perceived bias can be challenging.”

In response to the same question Baroness O’Loan said “I gave evidence to the effect that those who had held very high office in the RUC, PSNI, armed forces, Ministry of Defence, GCHQ or security services should be excluded from any senior role in the legacy body. As Iain has said, the perception would be that this was the old brigade coming in to run the new system. That is a very damaging perception, and it would militate against the development of any trust in the new organisation... there are men and women of great courage in all those organisations who serve with great honour, but the fact is that there have been very serious problems, some at a very high level in the RUC. Certainly, from my personal experience, I have heard comments from very senior officers when independent investigators have come in to do inquiries, particularly from England, such as, “wine them, dine them and given them nothing. That sort of mentality has been described for the protection of the state and the organisations within it that must manage our national security. It is necessary that we protect our organisations, but it is not necessary that

⁴⁵ Note, this was not and is not an accurate reflection of the NIHRC’s position or that of its Chief Commissioner.

we allow people to hold very high offices in an organisation that deal with our legacy.”

Chief Constable Boutcher added “why I made the decision that nobody with a background in the security forces in Northern Ireland would be part of Operation Kenova. It was not to do with competence or integrity; it was entirely because I was at the beginning of an investigation at a time when people had no or little trust... because of that and because of my focus on trying to be compliant with human rights... needed to make a statement at the beginning that this would be different... I agree with Iain that...to have people in senior levels is probably a bridge too far...it is about the perception of families.”

Baroness O’Loan returned to the question and said “...the comments that have been made quite widely by a number of individuals about those who should hold high level appointments in the ICRIR do not refer in any way to the individuals who actually hold those high level appointments. I think everybody has the greatest respect for them as individuals and for the work that they have done. It is a perception issue, an independence issue and a compliance with Article 2 of the ECHR and our own Human Rights Act issue. It is all those things, and they inevitably lead to the conclusion that there should be nobody at a high level in the organisation – at commissioner or senior investigator level- who has antecedence in the forces, which, as well as the paramilitaries, will be under investigation in the course of the work of the ICRIR.”

In direct response, Gavin Robinson MP concluded “I think all that is accepted.”

Dr Pinkerton MP asked about the ICRIR’s conflict of interest policy to which the Chief Constable responded “...It is one of a number of issues that caused so many concerns cumulatively. As we said... the Bill had a bad start ...It had a really difficult birth. People also joined the Commission without legal challenges being resolved. I do not criticise them for that – people were trying to get on with the creation of the Commission – but that caused a lack of confidence in people’s decision making about joining the Commission at that time.”

It is important, to add context, to refer to some of the incidents and cases that were already, or might have been, before a Coroner, a civil court, a criminal court or liable to be investigated by the Police Ombudsman of Northern Ireland. Such cases will now be channelled through the ICRIR.

The ICRIR has the remit to investigate deaths and serious injuries related to the Troubles between 1 January 1966 and 10 April 1998.⁴⁶ The remit is

⁴⁶ The Commissioner for Investigations served for 32 years between 1976 and 2008 i.e. 22 years of service overlapped with the relevant period to be investigated by the ICRIR.

broad. It may include incidents that have previously been investigated and those in which no investigation has taken place. In respect of conflicts of interest, all are dealt with according to the ICRIR's own conflict of interest policy. The answer to a conflict arising with any investigator, member of staff or Commissioner in any particular review is for that person to recuse themselves from that review. If the person is the Commissioner for Investigations, it is he who makes the decision to recuse and to whom his powers are vested. The question of delegation of those statutory powers which rest with the Commissioner alone is considered elsewhere but for example the Commissioner may not delegate the power to designate another ICRIR officer.

The McGuirk's Bar Bomb investigation (1971)

The investigation by the Police Ombudsman found serious failings in the RUC investigation.

The Claudy Bomb investigation (1972)

In 2010, the Police Ombudsman found failings in the RUC investigation into the Claudy bomb. He found the investigation was "compromised."

The Good Samaritan Bomb (1988)

In 2013, the Police Ombudsman found that police could and should have done more to protect residents killed and injured in the so-called Good Samaritan Bomb in Derry/Londonderry.

The murder of Gerard Slane (1988)

In 1988 Mr Slane was killed by Loyalist terrorists, which is alleged to have involved the British agent Brian Nelson.

The murder of Patrick Finucane (1989)

It was found that Mr Finucane's murder involved state agents. Litigation continues.

The Heights Bar Loughinisland (1994)

In 2016, the Police Ombudsman released his statement following an investigation into the terrorist attack on the Heights Bar in Loughinisland. Among other things, he found there to have been serious failings in the police investigation including the actions of police informants in the importation of guns.

The murder of Paul Thompson (1994)

Mr Thompson was shot and killed while being given a lift in a taxi. The case involves allegations that the RUC was aware of a credible threat against the taxi firm but failed to provide a warning. The NIHRC intervened in this judicial review on the issue of disclosure, which is awaiting judgment.

The murder of Raymond McCord Junior (1997).

In 2007, the Police Ombudsman released findings into her investigation of the handling of the murder of Raymond McCord Junior. More than 100 serving and retired police officers were interviewed (24 under caution). Thousands of police documents, including intelligence material, were seized from computer systems. The subsequent report linked police informants to ten murders and 72 other crimes including attempted murders. The Police Ombudsman was concerned that documents had gone missing, were lost or destroyed not as a result of "an oversight but was a deliberate strategy and had the effect of avoiding proper accountability.

The murder of Seamus Dillon (1997)

Mr Dillon after he was shot and killed by loyalist terrorists in Dungannon.

The murder of Sean Brown (1997)

Mr Brown was abducted outside the GAA club in Bellaghy. His murder was initially attributed to loyalist paramilitaries. In February 2024, an investigation indicated that a number of individuals linked to the murder were state agents. The investigation opened by the RUC was closed in July 1998 with no individuals charged. The applicant made a complaint to PONI in 2001, which resulted in a report in 2004. The report concluded that an earnest effort to identify the murderers could not be evidenced from the investigation file. An inquest was opened in 1997, which faced significant delays. In November 2021, the Brown family brought judicial review proceedings challenging the failure to commence an inquest and were awarded damages. The inquest hearing commenced in March 2023 but ceased. The Coroner recommended a public inquiry. The SoS refused and the case is now before the Supreme Court.

The Omagh Bomb investigation (1998)

The Ombudsman's investigation found failures to disseminate intelligence held by RUC Special Branch both before and after the bombing. It also noted "at a senior management level within the police, the response to the Police Ombudsman enquiry had been defensive and at times uncooperative."⁴⁷

The On the Runs Scheme

In 2014, the Police Ombudsman reported his findings of an investigation into the role police played in a political scheme which became known as the 'On the Runs' scheme. He found that it had been marked by a lack of clarity, structure and leadership, with disjointed communication between key police officers. It concerned a case in February 2014 when a suspected IRA bomber's trial collapsed at the Old Bailey London Central Criminal Court. John Downey was set to go on trial charged with killing four soldiers in the 1982 IRA Hyde Park bombing. He cited an official

⁴⁷ December 12, 2001, public statement PONI.

letter he had received in 2007. The judge ruled that Mr Downey, who denied any involvement in the bombing, should not be prosecuted because he was given a guarantee he would not face trial. The court heard of 187 people who had received letters assuring them they did not face arrest and prosecution for IRA crimes. The Crown Prosecution Service had argued that the assurance was given in error - but the judge said it amounted to a "catastrophic failure" that misled Downey.

It is impossible to distinguish in many cases whether other state agencies may feature in ICRIR reviews because of the nature of joint deployments, support and sharing of information.

In his interim report on Operation Kenova Jon Boutcher QPM (then Officer in Overall Command) summarised a number of reports such as Stevens I, II and III. He records "These reports describe a catalogue of unacceptable practices around how the security forces used agents during the Troubles. They evidence a culture, both then and subsequently, of secrecy and resistance to fair and measured scrutiny, and of failing properly to disclose information. Most worryingly, these reports demonstrate a concerted and continued absence of effort by those responsible for leading the security forces and by successive governments to establish the truth. It is as though there is an unwritten and deliberate policy of obfuscation paralysing legacy investigations and inquiries, especially regarding the use of agents."

*Operation Kenova*⁴⁸

In his 2024 Interim Report the then Officer in Overall Command said he "decided that no former members of the RUC, PSNI, the Ministry of Defence (MOD) or Army or the security and intelligence services would be part of the team. This was not a reflection on those organisations, rather it was to demonstrate Kenova's absolute independence and authenticity and to avoid any concerns about bias or conflict of interest."⁴⁹

"I made clear from the start that victims and families would be at the heart of Operation Kenova. Families often had no contact with the police after the murder of a loved one. In many cases, they were not even made aware that an inquest into the death was due or had been held... Personal contact is essential to give families support, understanding and the information they deserve as well as assisting us in our investigation. I make personal contact with surviving victims and families at the start of each investigation to reassure them that Kenova is independent, listen to their concerns, answer any questions and better understand their

⁴⁸ Operation Kenova is concerned with an alleged Army agent within the Provisional Irish Republican Army (PIRA) Internal Security Unit (ISU). Therefore, this interim report focuses at a high level on the activities of PIRA and its ISU and on the security forces and their handling of agents.

⁴⁹ Interim Report CC Jon Boutcher QPM at page 19.

experiences. Families have direct access ... We have found that once families have trust and confidence in us, many have felt able to provide new and significant evidence that was not made available to previous investigations."

On ECHR Article 2 independence he referred to Senior Counsel's advice and reported "Although PSNI provides the funding for Kenova, our business functions are provided by Bedfordshire Police. This ensures PSNI has no say on how the funding, once provided, is used by the investigation..."

He addressed the course of the investigation and noted "My investigations in Northern Ireland have widened extensively beyond the 'Stakeknife' cases originally commissioned and we have demonstrated that serious criminality has been tolerated and left unchecked and families from all sections of the conflict have been let down and ignored." He noted "It is clear to me that there can be no meaningful reconciliation following the Northern Ireland Troubles unless and until victims and families know the truth of what happened, however uncomfortable that might be for those involved. Where the security forces got things wrong, as was inevitable, it is exposing those errors and demonstrating that we have learned from them that distinguishes us from the terrorists." In his acknowledgements he records "When I began this work, some warned me that I would be engaging mainly with 'terrorist' families. This was indicative of the culture towards legacy cases and, as far as I could determine, few had actually engaged with these families to be able to make such an assessment. It was an early and stark example of prejudice which was both unfair and revealing."

He concluded in his interim report that "Legacy cases can be investigated successfully and the truth can be uncovered: Kenova has shown it is possible to find the truth of what happened for many victims and families. In many of our cases we have discovered information that was not previously known to families and they have, in turn, provided us with vital information not previously disclosed to the authorities. However, this requires an absolute commitment to examining events thoroughly, dedication to and openness with families and an uncompromising approach towards those who seek to stop the truth from being uncovered. Some remain dismissive about legacy investigations, and we should not underestimate the determination of those who seek to undermine and invalidate those seeking the truth. Such undermining is predominantly from those connected to the groups involved in fighting the conflict."⁵⁰

⁵⁰Kenova Interim Report at page 33.

Independence – ICRIR Commissioner for Investigations

From the outset, the critique that follows is not based upon the competence, ability, integrity, professionalism or previous conduct of the person appointed. Quite the contrary. The NIHRC through the Chief Commissioner has made this clear in evidence to parliamentary committees, in public speeches and in interview with the media. The person appointed is held in high regard with a distinguished career but that is aside from the point in all of these circumstances.

This is based entirely, and only, on the nature of the statutory role occupied and the need for independence in terms of Articles 2 and 3 of the ECHR, applied directly by the Human Rights Act 1998. It is not the view or advice of NIHRC or its Chief Commissioner that service in the RUC *of itself* either disqualifies a person from appointment to the ICRIR as an ICRIR officer or that it would, without more, be in conflict with Article 2 ECHR. That is the advice consistently given by the Chief Commissioner since appointment in September 2021. The observation and advice are confined to the singular role of Commissioner for Investigations due to the uniqueness of the role, its powers, responsibilities and privileges. There is some application to be seen across the body of ICRIR officers, but which depends upon the number or those with RUC experience and those without, the ring-fencing put in place for state cases and the accountability structures. A mixture of background within the body of officers is, already, required by the Legacy Act.

The NIHRC accepts that Article 2 does not prevent the employment of any ex-RUC officers and has never advised that it does. The NIHRC advises that it is not fatal to Article 2 but much will depend on an analysis of the structure, the number, the oversight arrangements, the public scrutiny involved etc. By way of example, if the investigatory team was largely made up of those with service in the same agencies that are under investigation and is led by a person with the same service, that would inevitably fall foul of Article 2.

The role of Commissioner for Investigations is a statutory role, established by the Legacy Act. The ICRIR is a body corporate and comprises the Chief Commissioner, the Commissioner for Investigations and between one and five “other Commissioners,” the latter appointed by the Chief Commissioner. The ICRIR may employ persons to be “officers of the ICRIR” and “make arrangements for persons to be seconded as officers.” In “employing and seconding persons, the ICRIR must ensure that (as far as it is practicable) the officers of the ICRIR include- (a) persons who have experience of conducting criminal investigations in Northern Ireland, and (b) persons who do not have that experience but have experience of conducting criminal investigations outside of Northern Ireland.”

The Commissioner for Investigations (which is a singular role) is invested with powers relating to investigations. For example, in relation to disclosure to the ICRIIR, it is the Commissioner for Investigations (as per section 5), who determines what is reasonably required from relevant authorities. It is the Commissioner for Investigations who has power to "require assistance" from the Chief Constable PSNI, the chief officer of a police force in GB, the Police Ombudsman for NI, the Director General of the Independent Office for Police Conduct, the Police Investigations and Review Commissioner. By section 6, it is the Commissioner for Investigations who is "designated as a person having the powers and privileges of a constable." It is the Commissioner for Investigations alone who may "designate any other ICRIIR officer as a person having the powers and privileges of a constable, "if that Commissioner [for Investigations] is satisfied..."

When it comes to requests for review, it is the Commissioner for Investigations who (by section 11) is "to decide the form and manner of a request for a review... the circumstances (if any) in which a request for a review may be changed (including by changing particular questions included in the request) or withdrawn." It is the Commissioner for Investigations who decides how a request is dealt with. By section 13 it is "the Commissioner for Investigations has operational control over the conduct of reviews by the ICRIIR". On a review the Commissioner for Investigations has responsibility for ensuring that all the circumstances are looked into, including any Troubles-related offences (whether serious or not) which relate to, or are otherwise connected with" the death or other harmful conduct. In deciding how and when different reviews are carried out the Commissioner for Investigations is also responsible for "deciding (a) whether different reviews should be carried out in conjunction with each other; (b) what steps are necessary in carrying out any review." It goes on "In particular the Commissioner for Investigations is to decide whether a criminal investigation is to form part of a review." Moreover, there are several powers reserved to the Commissioner for Investigations to require: attendance of persons; production of documents etc.

By section 25, the Commissioner for Investigations considers whether "there is evidence that relevant conduct constitutes an offence...by a person whose identity is known to the Commissioner... [and he] may refer the conduct to the Director of Public Prosecutions for Northern Ireland..." Where the Commissioner refers conduct to a prosecutor he must give the prosecutor "such information and material relating to the relevant conduct as the Commissioner considers appropriate." If the prosecutor requests it, he must obtain information or material as it is practicable to obtain.

If a function of the Commissioner for Investigations is to be delegated, it is the Commissioner for Investigations himself alone who may authorise it. No delegation can be authorised if it is an operational power under section 6 of the Act (i.e. operational powers of ICRI officers).

Conflicts of interest are dealt with in the Act, at Schedule 1. In full, it provides:

“11. (1) The Secretary of State may require-
A Commissioner, or
(b) a person who is being considered for appointment as a Commissioner, to provide the Secretary of State with information about any relevant matter.
(2) In this paragraph “relevant matter” means any matter which might reasonably be expected to-
(a) give rise to a conflict of interest in respect of a person’s work as a Commissioner, or
(b) otherwise affect a person’s ability to carry out the work as a Commissioner fairly and impartially.”

The Commissioner for Investigations served for 32 years (between 1976 and 2008) with the RUC and then the PSNI. His responsibilities and history with the two organisations were comprehensive and senior. They included, by way of example, ultimate responsibility for Intelligence Branch (often referred to as Special Branch), transfer of primacy of national security to MI5⁵¹ and leadership of the service including on counter-terrorism policy and practice.

Victims’ concerns

The following are some examples of victims who expressed their concerns over independence.

In September 2023, Christine Duffy, whose teenage brother was killed by a shot from an RUC officer in 1989, told UTV that she had no confidence in the appointment of a former RUC officer to the lead role. The incident occurred while the head of investigations was still serving. On the appointment she said that Mr Sheridan “...was appointed this morning to investigate is an ex-RUC man – the same people who investigated my brother’s murder... It is the RUC investigating the RUC. If my brother had been killed by the IRA, and they put an ex-IRA commander in to investigate my brother’s murder I’d have felt the same way.”⁵²

In October 2023, the Head of Investigations told the media that he had “consulted senior republicans and loyalists before applying...” There followed a number of concerns expressed by victims.

⁵¹ See Irish News, Connla Young, October 13, 2023

⁵² UTVx 14th September 2023 at 6.11pm.

In 2024, in the UK Constitutional Law Association, two respected academic experts said “Allowing the truth to be aired, insofar as it ever can be, provides a meaningful basis for societal reconciliation. But this can only happen if these arrangements are generally accepted, and it is a precursor to that that they are rights compliant.”⁵³

In February 2025, the NIHRC was called to give evidence to NIAC. The Chief Commissioner was asked about trust in the ICRIR and addressed practical independence. It was said: “We have talked about and the courts have looked at structural independence, hierarchical independence, the importance of both actual independence and demonstrable independence and why it is critical, particularly where you have cases where the state may be a perpetrator...The court has not really reached a view on the practical independence of this ICRIR. It has said it will probably have to deal with it on a case-by-case basis. That may be okay if the ICRIR ... only had one case at a time. Everything is going to go through the ICRIR. You have two men with very distinguished careers—I would not suggest otherwise—who were appointed at a time when there was an amnesty in place. None of the amendments were even considered, let alone put forward. The first senior appointment that was made by the chief commissioner was a very distinguished man—please do not take it any other way—but the fact of the matter is that he did not have practical independence for the purposes of any of these investigations. He was a very senior and well-respected serving officer within the RUC and PSNI. With no discredit to RUC or PSNI, that is not what “absence of practical conflict” means...Just practically, if you imagine the numbers that are going to go through ICRIR, how on earth can we ask these families to take their place in a queue, after all they have been through, to get in front of a court to say, “The chief investigator in this case was trained by the police, who we say killed my loved one.” You cannot extricate them. You cannot add more bodies to somehow dilute it....I do not take any pleasure in saying that because both men have had very distinguished careers...”

The evidence session continued in which the Chief Commissioner added “In terms of veterans and military, it is a really important point that is so rarely brought up. I met quite a few of the veterans and military, many of whom are the victims, and many of whom I met through Jon Boutcher’s Kenova investigations. They are calling out for independent investigations too. RUC widows I met recently are calling out for independent investigations. They are not satisfied with this either. They think the state let them down, at best, or turned away, at worst. The other point about veterans and military is if they may be suspects. What they are getting with ICRIR is not a court process, which has been refined over centuries,

⁵³ An Unfortunate Legacy: Fixing the northern Ireland Troubles (Legacy and Reconciliation) Act 2023, UKCLA July 29, 2024, Anurag Deb and Colin Murray

where the rights of everyone are taken into account and balanced. They are getting something much more akin to the Police Ombudsman or the HET. The courts have found problems with that too because they are not making proper findings. They are not being interviewed under caution, for example. This is something that is not serving anybody, including veterans and military, many of whom are victims in this. We are not simply talking about state crimes either. For the most part, we are talking about paramilitary murders, kidnappings and tortures. Too often, people think we are coming at it from a more partisan position and it really is not that."

"...Finally, the very last thing I would say is this: Article 2 of the European convention is not just about investigating the past anyway. It is about learning why it happened, the root cause of why it happened, and stopping it ever happening again. If we do not know why it happened or why some of the cases happened, we will never know how to stop them happening again. There are people still walking around in Northern Ireland today who have never been interviewed by the police."

"...The point is that there are legal obligations that have to be discharged. If you are talking about human rights, there is a legal obligation on the state. ICRIR is set up to discharge the state's human rights obligations. That is what ICRIR itself says. That is what the police say. That is what everyone says. We have to look at whether it is doing that, whether it is lawful under human rights legislation. If politics and society can come up with a solution that suits them, if it is lawful, I have nothing more to say, but if it is not, then I have to. Article 2 is not just very technical law. Article 2 of the European convention is about the purpose for it. It has decided cases over decades and says that it is about learning from the past. The right to life is meaningless if you do not have proper investigation, because you will never stop it happening again. It is about next of kin, family of the deceased, knowing what happened and people being held to account. It is not technical. Maybe I explain it in a way that is very arid."

And finally on the difference between Operation Kenova and ICRIR

"...What you have to remember is that Kenova was a criminal investigation. It was called in by the PSNI because they were not, in their own view, sufficiently independent to do it. It was simply a criminal investigation... Jon Boutcher, who was appointed, before he did a thing took advice on the human rights framework that he had to set up his investigations around. He spoke to every single person who was involved in his investigations. He instilled confidence and trust. He told them stuff. He explained every single thing he was doing. He told them in advance what he was doing, within reason, and he created such confidence and trust that people who had refused to speak to the police for decades shared information with him. Because they came forward with information

and new people came forward with information, he got more information than anybody else has ever got. In terms of the difference between Kenova and one other thing that he ended up taking on, which was the Glennane series of cases, known as the Glennane gang, was that that was not a criminal investigation. I will not go into the details of that, but he was asked to take it on as a review. Because it was a review, he was unable to require information cross-border from An Garda Síochána and there had to be a lot of clever legal stepping and statutory orders and things put in place to enable him to compel information. I saw that as being one of the key differences. This is proof of what a criminal investigation can achieve with a truly independent, properly minded person, compared with a review, even by that properly minded person. He got information one and he did not on the other. Glennane is still going through, trying to get information. It started off with the right appointment and he started off with the right approach. He went to those people most affected. He also instilled trust in serving and ex-officers, who felt that they were going to be hung out to dry with these sorts of things. It can be done, but he had the trust. He built the trust..”

The same answers were given when interviewed by the Irish News’s Connla Young.

The NIHRC Formal Position on Legacy Investigations and Independence

In 2018, the NIHRC intervened in the case of *Gribben v the UK* before the European Court of Human Rights (ECtHR). The case concerned the shootings (in 1990) of Mr. Martin McGaughey and Mr Desmond Grew by soldiers from a specialist unit of the British Army who were providing support to the RUC. The RUC were not implicated in the shootings. The RUC carried out the initial investigation into the deaths and interviewed the soldiers. There followed an inquest and civil challenges to the proceedings. In its intervention the NIHRC contended that RUC investigations into the Army were not sufficiently independent. It noted “aspects of the death investigation system were very often inadequate. For example, killings by army personnel were often investigated by the police force in circumstances where the investigating officers were connected (albeit indirectly) to the operation under investigation...”⁵⁴

In August 2018, the NIHRC made a submission to the Northern Ireland Office on its Consultation on Addressing the Legacy of the Past in Northern Ireland. That submission was lengthy and included a dedicated section on independence and impartiality. It highlighted extracts from the Revised Minnesota Protocol on the investigation of Potentially Unlawful Death, which states “Investigators and investigative mechanisms must be, and must be seen to be, independent of undue influence. They must be independent institutionally and formally, as well as in practice and perception, at all stages. Investigations must be independent of any suspected perpetrators and units, institutions or agencies to which they belong. Investigations of law enforcement killings, for example, must be capable of being carried out free from undue influence that may arise from institutional hierarchies and chains of command.”

The NIHRC also emphasised that “investigations must also be free from under external influence, such as the interests of political parties or powerful social groups... investigators must be impartial and must act at all times without bias. They must analyse all evidence objectively. They must consider and appropriately pursue exculpatory as well as inculpatory evidence.”⁵⁵

The NIHRC also cited with agreement the UN Principles on the Effective prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions that states members of an investigatory body “shall be chosen for their recognised impartiality, competence and independence as

⁵⁴ *Gribben v UK* (2018) Application no 28864/18 at para 113.

⁵⁵ NIHRC submission to the NIO Consultation on Addressing the Legacy of the Past in Northern Ireland, August 2018.

individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry.”⁵⁶

In May 2020, the NIHRC made a submission to the Committee of Ministers in relation to the supervision of the cases concerning the actions of the security forces in Northern Ireland. It noted no progress on implementing the judgments in the McKerr cases. In June 2020, the NIHRC made a submission to NIAC on the Government’s new proposals into dealing with the past. It advised it was “deeply concerned that the new legacy body proposed by the UK Government will not be compliant with Article 2 ECHR.”

In written evidence to the NI Affairs Committee sitting in Westminster the NIHRC said, in response to the question what steps the UK Government should take to reform and strengthen the ICRIR’s independence, powers and accountability Advised “the 2023 Act prevents the [ICRIR] from being sufficiently independent in all aspects: hierarchically, operationally and practically.” It went on “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. 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 hierarchical or institutional connection but also clear independence... 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...”

It continued “The ECtHR has found that independence and impartiality is lacking in investigations where the investigators are potential suspects, or are direct colleagues of the persons subject to investigation, or likely to be so. 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. The 2023 Act does allow for delegation of the Independent Commission for Reconciliation and Information Recovery’s functions. 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; determines the operational powers of the Independent Commission for Reconciliation and

⁵⁶ Ibid.

Information Recovery officers (including whether they are provided with powers and privileges of a constable and whether to use these); determines whether it is appropriate for a non-close family member to make a request for review; determines how reviews are requested, whether they satisfy requirements, and whether they are dealt with; and determines whether reviews linked to immunity decisions take place. It would seem impractical for the Commissioner for Investigations to be removed entirely from this role, as and when required.”

It went on “Depending on the previous professional experience of the Commissioner for Investigations in post, practically, this could be often. Thus, while it may be required that the Commissioner for Investigations complies with the Human Rights Act 1998... 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. 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.”

It is advised that “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. 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. The NIHRC recommends that the Committee explores with the UK Government introducing a requirement, like that within Operation 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.”

In June 2022, in further written evidence to the Joint Committee on Human Rights⁵⁷ on legislative scrutiny of the Legacy Bill, the NIHRC said that the Legacy Bill and in particular the review of cases to be undertaken by the ICIR would not meet the State’s Article 2 obligations. Again, in September 2022, in its full submission to the JCHR the NIHRC repeated the fundamental nature of the requirement for independence and impartiality. It said “As a bare minimum, investigations must be

⁵⁷ The Joint Committee of the House of Commons and House of Lords.

independent and impartial. For an investigation to be independent it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This requires a lack of hierarchical or institutional connection, but also a practical independence.⁵⁸

In June 2023, the NIHRC made a submission to the Council of Europe Committee of Ministers (a Case 9 Submission) on the amended Bill. "...contrary to our previous advice the Bill does not preclude former State actors who might be implicated in or be part of the hierarchy of those who might be implicated in the investigation, it mandates inclusion of those with experience in NI. This ensures that independence will be challenged from the outset. There is no reasonable justification for this approach." The submission states "given the established incompatibilities of previous bodies tasked with investigating Troubles-related offences, additional steps are required to ensure independence. For example, it would be beneficial to have a list of who cannot be appointed as a Commissioner. This approach has been adopted with Operation Kenova, which does not permit personnel who are serving in or have previously served in the RUC, the PSNI, the MOD or Security Services. It is disappointing that this has not been adopted within the proposed Bill. Additionally, in terms of the fundamental independence of the ICRIR, it is concerning that, with the recruitment process moving forward, any remaining opportunity to consider this inclusion by Parliament will not be possible.

In its application to intervene in the Dillon case (in November 2023), as drafted by an experienced KC and Junior Counsel, the NIHRC stated "the ICRIR does not have the robust independence required for an ECHR-compliant investigation. Independence from the State has been attributed lesser importance in cases where a *"death did not occur in circumstances which might ... give rise to suspicions against the security forces as an institution"*; by implication, where such suspicion does arise, the Convention demands a higher degree of independence on the part of the investigator. There is often a high degree of suspicion concerning the involvement and/or complicity of State actors in numerous deaths and instances of severe ill-treatment in relation to Troubles-era incidents. This is therefore a context in which a high degree of independence will be required in order for an investigation to comply with Articles 2 and 3. Already, the 'practical', as well as the perceived, independence of the ICRIR has been called into question by its appointment as Commissioner for Investigations a former senior RUC and PSNI officer, and the requirement (as far as it is practicable) that officers of the ICRIR include those with experiences of conducting investigations in Northern Ireland and outside of Northern Ireland (s. 3(3))."

⁵⁸ Advice on NI Troubles (Legacy and Reconciliation) Bill, September 2022.

The NIHRC appeared in the proceedings before Colton J. At the hearing, the written position was advanced in oral argument. The NIHRC applied and was granted leave to intervene in the appeal to the Court of Appeal. In its written statement it stated "Already, the 'practical', as well as the perceived, independence of the ICRIR has been called into question by its appointment as Commissioner for Investigations a former senior RUC and PSNI officer.." the NIHRC observed that it is "insufficient that the Commissioner for Investigations could "recuse himself from any review involving an incident in which he was involved as a former RUC/PSNI officer, or in respect of which there is a personal conflict of interest." That is too narrow a view of the requirements of independence. The Commissioner for Investigations has operational control over the conduct of all ICRIR reviews: He also has responsibility for specifying the terms of disclosure to the ICRIR, determining ICRIR officers' operational powers, determining whether a non-close family member may request a review, deciding how reviews are requested and whether they should be dealt with, and determining whether reviews linked to immunity decisions are to take place. Having an individual with such close links to State institutions, and specifically to the policing and security services which are implicated in a very great number of Troubles-related deaths and instances of serious mistreatment, in this essential role is incompatible with practical and perceived independence."

In April 2025, the NIHRC applied to intervene in the appeal to the UK Supreme Court. That appeal will be heard in October 2025. The issue of practical independence will not be considered as a ground of appeal. Importantly, the NIHRC was an intervenor not a party to the proceedings below. It cannot advance points of appeal. The applicants did not advance the practical independence point in the courts below. Therefore, when it applied to do so before the Supreme Court the court decided to refuse permission to do so as it was not arguable. It is the NIHRC's understanding that was not a consideration of the merits of the point but rather the availability of an appeal on a point not argued by the party to the proceedings below. The interstate case remains before the ECtHR, in which practical independence is a live issue raised by the NIHRC and other intervenors. The NIHRC has not yet seen the written case of Ireland but expects it includes submissions as to practical independence.

On the point that it is settled case law and the ICRIR statement, "The High Court and Appeal Court in Northern Ireland have clearly and unequivocally declared that the ICRIR is an appropriately independent public authority, both operationally, organisationally, and in relation to its governance and sponsorship arrangements. In particular, the Courts concluded: 'The fact that the Commissioner for Investigations is a former RUC/PSNI officer does not mean he lacks the necessary independence to carry out investigations into legacy issues."

In fact, the position is a lot more nuanced than that. Moreover, the case is not over in the domestic courts and will also be considered by the ECtHR. The view of the NIHRC continues to be relevant. The NI courts have not yet *determined* the question of ICRIR practical independence in the context of employing former RUC officers, not least because the actual parties to the case argued independence from government, not the practical independence point, as the High Court ruled that it could only do so when dealing with a specific case under investigation, which it did not have. Colton J. said "The fact that the CfI is a former RUC/PSNI officer does not mean that he lacks the necessary independence to carry out investigations into legacy issues, a principle which has been confirmed by the Supreme Court in the McQuillan case (see paras [206]-[207]). Self-evidently, he must recuse himself from any review involving an incident in which he was involved as a former RUC/PSNI officer, or in respect of which there is a personal conflict of interest. In assessing the issue of independence it is important to note that section 13(2) provides that the CfI has operational control over the conduct of reviews by the ICRIR. Importantly, the preparatory work for the ICRIR, referred to earlier, demonstrates, in my view, that it is focused on ensuring its operational independence... Whilst the court is not dealing with a "specific case" it concludes that the proposed statutory arrangements, taken together with the policy documents published by the Commission inject the necessary and structural independence into the ICRIR. At this remove the court concludes that the ICRIR is sufficiently independent to comply with the requirement for independence to meet the procedural obligations under articles 2/3 ECHR..."

The judgment did not turn on that issue. Colton J. found the Legacy Act to be incompatible with ECHR rights in a number of respects: conditional immunity; the provisions prohibiting criminal enforcement action; retrospective provisions barring civil actions; provisions excluding evidence in civil proceedings; and interim custody order provisions.

The Court of Appeal did not disturb any of that but went on to conclude that the ICRIR lacked sufficient compliance in a further three respects: insufficient participation of the next of kin; the disclosure provisions which gave the Secretary of State an effective veto; the bar on future civil actions was also incompatible with Article 6 (the right to a fair hearing). The Court of Appeal observed "Although the court did not doubt the Independent Commission for Reconciliation and Information Recovery's determination to conduct its affairs in a Convention-compliant manner" there were issues of non-compliance. "We preface the comments we make below about the ICRIR with a recognition of its and its commissioners' commitment to achieving a Convention-compliant, workable system for Troubles victims which may complement other legal remedies... if the underpinning is not there in terms of the necessary powers, independence and participation of the next of kin, no matter how

well intentioned those tasked with an investigation, the investigation will be liable to fail in article 2 compliance.”

The Court of Appeal, on the point of practical independence “The trial judge was understandably influenced by the fact that the Chief Commissioner has a wide discretion as to how the organisation would run and that there was the potential for compatibility. He said that was as much as he could say, he thought, without a concrete example of where victim’s rights may have been breached.” It went as far as to say “the ICRIR has the capability to replicate investigations that were previously with PONI and the police. And provided the necessary safeguards are in place, we think that it has the capability to fulfil article 2 obligations in those cases...”

The Court of Appeal concluded “claim made by Mr Bunting was that the operational structure of the ICRIR denotes a lack of independence. We have considered all of the points made in support of this claim. Having done so, we do not depart from the trial judge’s findings on this issue. We also consider that the appointment terms for commissioners or funding arrangements are not unlawful or unusual. Whilst it might arguably be possible to improve the arrangements to strengthen the ICRIR’s independence or the appearance of it, in agreement with the trial judge, we find that these arrangements do not of themselves offend the principle of independence given the fact that the ICRIR ultimately made up and staffed by independent investigators and decision makers including the commissioners. In our view it is not unreasonable that the SOSNI should set the terms of appointment for Commissioners when he appoints them. Review of the performance of an independent body set up by the lead Department which brought forward the legislation is also not unusual nor, of itself, fatal to the independence of the body concerned. We accept the submission made by the SOSNI that independent bodies are similarly required to report to Secretaries of State on their performance. That does not make them any less independent of the department which set them up. We dismiss this aspect of the cross appeal.”

In Westminster’s Joint Committee on Human Rights paper on the proposed remedial order post-Court of Appeal it recognises “There was also continuing wariness of the ICRIR, its independence, and whether it would be capable of conducting Convention compliant investigations.”⁵⁹ The Joint Committee (of the House of Commons and House of Lords) observed “We can understand the strength of feeling generated by the Government’s decision to appeal some of the Court of Appeal’s judgment. We can also understand the frustration in some quarters about the Government’s bifurcated approach...” The Government has committed to going beyond the remedial order and to proposing primary legislation to

⁵⁹ Proposal for a Draft Remedial Order First Report of Session 2024-25 HC 569/HL Paper 88.

address the other issues with the Legacy Act. This includes consideration of the issue of practical independence. The Joint Committee recommended "The Government should use the opportunity provided by the forthcoming primary legislation to finally resolve all the outstanding issues in the McKerr group of cases."

The outstanding issues include the issue as to practical independence of the statutory powers and duties of the Commissioner remaining vested solely in an officer who served alongside those who may be victims, witnesses, suspects or organisational influencers. The NIHRC awaits the Government's written proposals in respect of its amendments, including those intended to strengthen practical independence of the ICRIIR. The NIHRC will consider those carefully and advise in due course.

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