



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

**Submission to the House of Commons and  
House of Lords Joint Committee on Human  
Rights: Remedial Order to the NI Troubles  
(Legacy and Reconciliation) Act 2023**

**January 2025**

## Table of Contents

<b>1.0</b>	<b>Introduction .....</b>	<b>3</b>
<b>2.0</b>	<b>Response to Domestic Judgments .....</b>	<b>3</b>
<b>3.0</b>	<b>The McKerr Group of Cases.....</b>	<b>6</b>
<b>4.0</b>	<b>Windsor Framework Article 2 .....</b>	<b>8</b>

## 1.0 Introduction

1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to section 69(1) of the Northern Ireland Act 1998, is required to keep under review the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). The NIHRC is also required, by section 78A(1) of the Northern Ireland Act 1998, to monitor the implementation of Article 2 of the Windsor Framework, to ensure there is no diminution of rights protected in the “Rights, Safeguards and Equality of Opportunity” chapter of the Belfast (Good Friday) Agreement 1998 as a result of the UK’s withdrawal from the EU.<sup>1</sup> In accordance with these statutory duties, the following submission is made to the House of Commons and House of Lords Joint Committee on Human Rights on the proposed Remedial Order to the NI Troubles (Legacy and Reconciliation) Act 2023 (the 2023 Act).

## 2.0 Response to Domestic Judgments

2.1 The Joint Committee for Human Rights has asked whether the proposed Remedial Order would rectify all the incompatibilities of the 2023 Act with the European Convention on Human Rights (ECHR) which were identified by the High Court of Justice in NI.<sup>2</sup> In addition, whether the proposed Remedial Order will rectify the incompatibility with the ECHR regarding the bringing of new civil cases identified by the Court of Appeal.<sup>3</sup>

2.2 The NIHRC provided advice to the UK Parliament and to the NI Office during the then NI Troubles (Legacy and Reconciliation) Bill. The NIHRC advised that the then Bill rendered the Independent Commission for Reconciliation and Information Recovery incapable of discharging the State’s obligation under Articles 2 and 3 of the ECHR. The investigations by the Independent Commission for Reconciliation and Information Recovery would not be effective

---

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

<sup>2</sup> *Re Dillion and Others* [2024] NIKB 11.

<sup>3</sup> *RE Dillion and Others* [2024] NICA 59.

investigations as required by ECHR jurisprudence. The Independent Commission for Reconciliation and Information Recovery fails in several respects including, but not limited to, the requirement for independence. The NIHRC's advice on the then Bill was dismissed.

- 2.3 Since the enactment of the legislation the NIHRC has continued to raise significant concerns about the 2023 Act. The NIHRC intervened in the proceedings before the High Court of Justice in NI and on appeal to the NI Court of Appeal. The NIHRC's submissions to the domestic courts can be provided, if considered helpful. The concern of the NIHRC was alleviated in part by the subsequent judgments, but not completely. A significant concern remains as to the independence of the Independent Commission on Reconciliation and Information Recovery to conduct an investigation that is compliant with Articles 2 and 3 of the ECHR. For the avoidance of doubt, the NIHRC remains of the view that the Independent Commission on Reconciliation and Information Recovery is not sufficiently independent or impartial. This was not adequately addressed by the High Court or Court of Appeal. It was left to individual applicants to test this element of compliance individual cases. The NIHRC does not accept that to be an appropriate response to the State's failure to secure of its own volition adequate measures to ensure effectiveness. Moreover, the Remedial Order does not purport to address the independence of the Independent Commission on Reconciliation and Information Recovery.
- 2.4 It is the NIHRC's considered view that the proposed Remedial Order addresses most of the issues identified by the High Court and Court of Appeal. It does not, however, address all the issues identified by the courts, nor does it address all of the issues identified more widely by the NIHRC and other human rights bodies. By way of overview, the following reflects the primary concern of the NIHRC. The NIHRC continues to advise that further action is required if Troubles-related investigations are to be ECHR compliant.
- 2.5 The Remedial Order does not amend section 38 of the 2023 Act, which provides that "no criminal investigation of any Troubles-related offence may be continued or begun". This affects new Troubles-related investigations by the Police Service of NI and the Police Ombudsman for NI and those investigations that were

brought to an end on 1 May 2024. The Remedial Order will remove the conditional immunity scheme provided by the 2023 Act, but what will remain is the continued prohibition on criminal investigations by the Police Service of NI, Police Ombudsman for NI and other police services throughout the UK. In other words, immunity will be provided in those cases as a matter of practice. It is also notable that, in instances where the Independent Commission for Reconciliation and Information Recovery may consider criminal cases, it is not able to initiate such actions of its own motion and is reliant on reviews by others.<sup>4</sup> This must be seen in the context that its ability to consider cases with sufficient independence and impartiality is in question.

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

2.7 Regarding civil cases, there are over 1,000 ongoing legacy civil claims against State agencies.<sup>5</sup> While the proposed Remedial Order will remove the prohibition on Troubles-related civil cases, it does not contain any alternative provisions that will ensure prompt and expeditious determinations of any outstanding claims. The ECtHR has been clear that excessive and unreasonable delays in the examination of a claim may breach an individual's right to fair trial (Article 6 of the ECHR).<sup>6</sup> Additionally, that a "chronic overload... cannot justify an excessive length of proceedings".<sup>7</sup> If effective mitigations to address existing delays on Troubles-related civil cases are not put in place, there is the risk of further findings of incompatibility in the future. The Remedial Order does not address this.

**2.8 The NIHRC recommends that the Joint Committee seeks confirmation from the UK Government on the steps that will**

---

<sup>4</sup> Section 10, NI Troubles (Legacy and Reconciliation) Act 2023.

<sup>5</sup> UK Parliament Hansard, 'Written Answers: Civil Proceedings and Coroners NI – Baroness Anderson of Stoke-on-Trent – UIN HL2914', 26 November 2024.

<sup>6</sup> *Frydlender v France* (2000) ECHR 353, at para 43; *Von Maltzan and Others v Germany*, at para 132.

<sup>7</sup> *Probstmeier v Germany* (1997) ECHR 40, at para 64.

**be taken to ensure prompt and expeditious determinations of Troubles-related civil cases.**

- 2.9 Section 44 of the 2023 Act provides for the prohibition of new inquests and the closure of existing inquests of deaths resulting directly from the Troubles. The Court of Appeal in NI held that the Independent Commission for Reconciliation and Information Recovery was not capable of delivering a human rights compliant investigation into deaths in instances where it was acting ‘in place of’ a coroner’s inquest. The Secretary of State for NI made clear his intention to bring forward legislation to reinstate inquests. That is welcomed by the NIHRC. However, there is no clear timeframe for introducing the necessary primary legislation. That could and should be addressed by the Remedial Order.
- 2.10 **The NIHRC recommends that the Joint Committee explores with the UK Government its reasons for failing to address within the Remedial Order the clear finding of the Court of Appeal that the Independent Commission for Reconciliation and Information Recovery is incapable of delivering human rights compliant investigation into deaths in instances where it is acting in place of a coroner’s inquest.**

### **3.0 The McKerr Group of Cases**

- 3.1 The Joint Committee on Human Rights is considering the effect of the Remedial Order on the UK’s implementation of the ECHR’s judgments in the *McKerr* group of cases. This is an important consideration. The Remedial Order deals with several issues raised by the CoE Committee of Ministers. For example, the Committee of Ministers reiterated concern “including in particular the proposed conditional immunity scheme which risks breaching obligations under Article 2 of the ECHR to prosecute and punish serious grave breaches of human rights”.<sup>8</sup> This is addressed by the proposed Remedial Order. However, the Committee of Ministers has also expressed “grave concern” at the then UK Government’s general

---

<sup>8</sup> CM/Del/Dec(2024)1501/H46-40, ‘CoE Committee of Ministers *McKerr Group v UK* (Application No 28883/95)’, 14 June 2024, at para 5.

plans for Troubles-related offences, including the 2023 Act.<sup>9</sup> This included particular concerns “relating to independence of disclosure”, “the initiation of reviews [by the Independent Commission on Reconciliation and Information Recovery]”, and the general lack of support for the 2023 Act in NI.<sup>10</sup> The proposed Remedial Order does not address any of that.

3.2 In reiterating its commitment to “repeal and replace the Legacy Act”,<sup>11</sup> the UK Government has acknowledged that what is proposed within the Remedial Order is insufficient to ensure human rights compliant investigations into Troubles-related offences. The NIHRC welcomes the commitment, but suggests that there are several issues that must be addressed including clear findings by the Court of Appeal in NI, that are not included in the Remedial Order. The NIHRC sees no reason for their exclusion. By way of example, the Court of Appeal criticised the 2023 Act for its failure to permit “effective next of kin participation” and in respect of “the role of the Secretary of State for NI in relation to disclosure in cases where, previously, an inquest would have been required to discharge the State’s Article 2 of the ECHR obligations”.<sup>12</sup>

3.3 Thus, the NIHRC continues to advise that additional aspects beyond those within the proposed Remedial Order require consideration.<sup>13</sup> These should include:

- the independence and impartiality of any investigatory body when discharging the State’s obligations under the ECHR;

---

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

<sup>10</sup> CM/Del/Dec(2023)1475/H46-44, ‘CoE Committee of Ministers McKerr Group v UK (Application No 28883/95)’, 21 September 2023, at paras 9-12; CommDH(2022)27, ‘CoE Commissioner for Human Rights, Dunja Mijatovic: Report Following Visit to UK From 27 June to 1 July 2022’, 18 November 2022, at 37-40.

<sup>11</sup> UK Parliament Hansard, ‘House of Commons Oral Answers to Questions: NI Troubles (Legacy and Reconciliation) Act 2023 – Hillary Benn MP – Volume 752’, 24 July 2024; UK Parliament Hansard, ‘House of Commons Debate: NI Legacy of the Troubles – Hillary Benn MP – Volume 758’, 4 December 2024.

<sup>12</sup> *In the Matter of an Application by Martina Dillon and Others* [2024] NICA 59, at para 311.

<sup>13</sup> NI Human Rights Commission, ‘Advice on NI Troubles (Legacy and Reconciliation) Bill’ (NIHRC, 2022); NI Human Rights Commission, ‘Supplementary Briefing: UK Government’s Additional Proposed Amendments to NI Troubles (Legacy and Reconciliation) Bill’ (NIHRC, 2023); NI Human Rights Commission, ‘Rule 9 Submission to the CoE Committee for Ministers in Relation to the Supervision of the Cases Concerning the Actions of the Security Forces in NI: NI Troubles (Legacy and Reconciliation) Act 2023’ (NIHRC, 2024).

- providing the investigatory body with the ability to initiate and pursue cases. The body must be sufficiently independent and must be guided by an objective assessment of whether investigative obligations have been complied with in Troubles-related offences. This should not exclude consideration of the human rights compliance of investigations that are deemed concluded and must enable the body to revisit any case concluded by another investigative body;
- expanding the definition of relevant offences to include all Troubles-related offences that engage Article 3 of the ECHR to enable these to be investigated by the investigatory body;
- enhancing public scrutiny of Troubles-related investigations through ensuring disclosure by the investigatory body to family members and adopting a broad definition of a family member that reflects modern-day society; and
- ensuring that biometric data linked to Troubles-related investigations are only retained where it is relevant to the work of the investigatory body.

**3.4 The NIHRC advises that the UK Government repeals the NI Troubles (Legacy and Reconciliation) Act 2023 and introduces legislation that is compliant with the ECHR. Not least the new legislation should be victim-centred, not restrict the investigation and prosecution of alleged unlawful killings and serious injuries, and be compatible with Articles 2 (right to life) and 3 (freedom from torture) of the ECHR. The NIHRC recommends that the Joint Committee seeks clarity from the UK Government on how its broader proposals will ensure such an approach.**

## **4.0 Windsor Framework Article 2**

4.1 In addition to finding that the conditional immunity provisions in the NI Troubles (Legacy and Reconciliation) Act 2023 were incompatible with the ECHR, the High Court for Justice in NI also found that the



removal of the possibility of prosecution was incompatible with the EU Victims' Directive<sup>14</sup> and therefore breaches Windsor Framework Article 2.<sup>15</sup> The High Court held that pursuant to Section 7A of the EU (Withdrawal) Act 2018, Windsor Framework Article 2 has primacy over the conflicting provisions of the 2023 Act and therefore those provisions should be disapplied in respect of NI.<sup>16</sup> This decision was confirmed in the Court of Appeal in NI.<sup>17</sup>

4.2 The Court of Appeal found, as did the High Court, that victims' rights are within scope of the rights set out in the relevant chapter of the Belfast (Good Friday) Agreement because they are promoted and given effect by civil rights available to all victims of crime, including Articles 2, 3, 6 and 14 of the ECHR.<sup>18</sup> These rights are particularised to some extent and enhanced by the EU Victims' Directive specifically by the right to challenge a decision not to prosecute.<sup>19</sup> The Court of Appeal rejected the argument that, where an EU Charter right is mirrored in the ECHR, there can be no diminution in rights, noting that a diminution in rights can occur where the available remedies to vindicate the right have been reduced.<sup>20</sup> It is clear from the above reasoning that where ECHR rights are mirrored, particularised or enhanced by EU minimum standards which applied in the UK prior to withdrawal from the EU, Windsor Framework Article 2 provides an additional, stronger remedy of disapplication where there is a diminution in those rights and safeguards.

---

<sup>14</sup> Article 11 of the EU Victims Directive affords victims of crime the right to request a review of a decision not to prosecute. (Directive 2012/29/EU, 'EU Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012). Other EU obligations underpinning the rights of victims include Directive 2011/36/EU 'EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2011/92/EU, 'EU Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011; Directive 2004/80/EC, 'EU Council Directive Relating to the Compensation to Crime Victims', 29 April 2004.

<sup>15</sup> *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at paras 608 and 710.

<sup>16</sup> *Ibid*, at para 710.

<sup>17</sup> *In the Matter of an Application by Martina Dillon and Others* [2024] NICA 59, at paras 126, 134-136, 151-156 and 310. The Court of Appeal disagreed with the trial Judge that a breach of an ECHR right was equivalent to a breach of an EU Charter right and would therefore breach Windsor Framework Article 2 at para 137. The Court of Appeal found that the disapplication of Sections 8 and 43(1) of the NI Troubles (Legacy and Reconciliation) Act 2023 was based on EU Charter rights alone and could not stand at para 161.

<sup>18</sup> *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NICA 59, at paras 117-119.

<sup>19</sup> *Ibid*, at para 119.

<sup>20</sup> *Ibid*, at para 160.

- 4.3 As noted above, the NIHRC welcomes the provisions of the proposed Remedial Order which will amend the 2023 Act to remove the conditional immunity provisions.<sup>21</sup> This will, therefore, remove the incompatibility with the EU Victims' Directive identified by the court and address the breach of Windsor Framework Article 2. The EU Victims' Directive also provides for additional guarantees to ensure victims receive appropriate information, support and protection and are able to participate in criminal proceedings.
- 4.4 **The NIHRC continues to advise the UK Government to repeal the NI Troubles (Legacy and Reconciliation) Act 2023 and introduce legislation that is victim-centred and is compliant with Windsor Framework Article 2, including the EU Victims' Directive.**
- 4.5 **The NIHRC recommends that the Joint Committee seeks clarity from the UK Government on how it will embed consideration of Windsor Framework Article 2 and the EU Victims' Directive in the development of its broader proposals to repeal and replace the NI Troubles (Legacy and Reconciliation) Act 2023.**

---

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

## Contact us

For queries: [Colin.Caughey@nihrc.org](mailto:Colin.Caughey@nihrc.org) and  
[Eilis.Haughey@nihrc.org](mailto:Eilis.Haughey@nihrc.org)

[www.nihrc.org](http://www.nihrc.org) | [info@nihrc.org](mailto:info@nihrc.org) | +44 (0)28 9024 3987  
4<sup>th</sup> Floor, Alfred House, 19-21 Alfred Street, Belfast, BT2 8ED

