



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Rule 9 Submission to the CoE Committee of
Ministers in Relation to the Supervision of
the Cases Concerning the Actions of the
Security Forces in NI: Advice on NI Troubles
(Legacy and Reconciliation) Bill**

August 2022

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1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(1) of the Northern Ireland (NI) Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in NI. The NIHRC is also required, under section 78A(1), to monitor the implementation of Article 2(1) of the Protocol on Ireland/NI of the UK-EU Withdrawal Agreement (Protocol Article 2).¹ Protocol Article 2 requires the United Kingdom (UK) Government 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. In accordance with these functions the following Rule 9 submission is made to the CoE Committee of Ministers on the NI Troubles (Legacy and Reconciliation) Bill (the Bill).
- 1.2 The NIHRC is gravely concerned that the current draft of the Bill, when read as a whole, is incompatible with Articles 2 (right to life) and 3 (freedom from torture) of the European Convention on Human Rights (ECHR).² By extension, the NIHRC is also concerned that the current draft of the Bill is incompatible with the Human Rights Act 1998,³ which embeds the ECHR within domestic law and with the Belfast (Good Friday) Agreement 1998.⁴ Furthermore, the NIHRC is of the view that the current draft of the Bill is contrary to the Stormont House Agreement 2014,⁵ the Fresh Start Agreement 2015⁶ and the New Decade, New Approach 2020 agreement.⁷
- 1.3 The current draft of the Bill does not reflect the views of 17,000 consultees who considered a previous legacy bill in 2018⁸ and is

¹ Agreement on the Withdrawal of the UK of Great Britain and NI from the EU and the European Atomic Energy Community [TS No 3/2020].

² It is also incompatible with provisions that provide for these rights within the UN human rights treaties that the UK has ratified and is bound by the obligations contained within as a result. For example, Articles 6 and 7, UN International Covenant on Civil and Political Rights 1966; Article 2(1), UN Convention against Torture 1984; Articles 6 and 37(a), UN Convention on the Rights of the Child 1989; Articles 10 and 15, UN Convention on the Rights of Persons with Disabilities 2006.

³ Section 3, Human Rights Act 1998.

⁴ Belfast (Good Friday) Agreement, 10 April 1998, at 5.

⁵ The Stormont House Agreement committed to separate mechanisms that included a Historical Investigations Unit, Independent Commission on Information Retrieval, Oral History Archive, and an Implementation and Reconciliation Group.

⁶ 'A Fresh Start: The Stormont Agreement and Implementation Plan', 17 November 2015, at 8.

⁷ NI Office, 'New Decade, New Approach' (NIO, 2020), at Annex, para 16.

⁸ NI Office, 'Addressing the Legacy of NI's Past: Analysis of the Consultation Responses' (NIO, 2019), at 4.

staunchly opposed within NI, including among victims, survivors and their families.⁹

1.4 The NIHRC concludes that the fundamentals of the entire draft of the present Bill require immediate and thorough reassessment, which should take place through meaningful engagement. The result should be victim-centred and human rights compliant, the NIHRC is of the view that this is not delivered by the present Bill.

1.5 As currently drafted, the proposed investigative body is not independent in practice and its mandate does not satisfy procedural human rights obligations. The proposed conditional immunity scheme applies to offences where immunity should not be an option. The proposed immediate cessation of criminal investigations (other than those referred by the ICIR to the prosecutor), police complaints, civil proceedings and inquests/inquiries linked to Troubles-related offences is likely contrary to the right to an effective remedy. This advice highlights the main reasons for these conclusions.¹⁰ In an effort to keep the advice manageable, this advice provides an overview of the key issues, but the NIHRC is ready and willing to provide additional assistance that may be required.

Protocol Article 2

1.6 While not a direct focus of the Committee, members may wish to note that the NIHRC is also considering whether the proposed Bill is compliant with the UK's commitments under Protocol Article 2 not to diminish certain rights.¹¹

1.7 The NIHRC is concerned, for example, that the proposed Bill may not be compliant with obligations under the EU Victims' Directive to ensure 'sufficient access to justice',¹² for victims and their next-of-kin, particularly in relation to the lack of opportunity to inform or

⁹ NI Affairs Committee, 'Oral Evidence: Addressing the Legacy of NI's Past – The UK Government's Proposals – Oral Evidence', 7 June 2022.

¹⁰ The NIHRC refers back to its advice on the previous legacy bill, which was not encumbered in the same respects and was legitimised by the Stormont House Agreement. See NI Human Rights Commission, 'Submission to NI Office's Consultation on Addressing the Legacy of NI's Past' (NIHRC, 2018).

¹¹ Protocol Article 2 is elaborated further in Annex 2 paragraphs 1.10-1.12.

¹² Recital 9, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

challenge decisions on immunity and referral for criminal enforcement action.¹³ Compliance with the EU Directive's obligations on compensation is also under consideration. As a piece of EU law, obligations under the EU Victims' Directive must be interpreted in line with the EU Charter of Fundamental Rights, Article 47 on the right to an effective remedy and to a fair trial is particularly relevant in this regard.

- 1.8 Prior to the end of 2020, the UK was bound by EU obligations above and the NIHR is looking in detail at whether, as currently drafted, provisions on mandatory and irrevocable immunity and restrictions on criminal enforcement action, therefore result in a diminution in the rights of victims, in breach of Protocol Article 2.
- 1.9 The NIHR will be developing its advice further on this matter ahead of further engagement on the proposed Bill during its parliamentary passage.

2.0 Investigations

- 2.1 Article 1 of the ECHR, which is incorporated directly into UK law, requires that the UK "secure to everyone within their jurisdiction the rights and freedoms defined in... [the ECHR]". This means there must be an effective official investigation conducted whenever "there is reason to believe that an individual has died in suspicious circumstances" and/or it is "arguable" and "raises reasonable suspicion" that an unlawful breach of Article 3 of the ECHR has occurred.¹⁴ Such investigations are not limited to State action or inaction, but extend to the resulting actions of non-State actors that the State knew or ought to have known about.¹⁵ Similar obligations also arise under international human rights standards.¹⁶

¹³ Article 6 (Right to Receive Information about their Case) and Article 11 (Rights in the Event of a Decision Not to Prosecute), Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹⁴ *ROD v Croatia* (2008) ECHR 1048, at Section 1; *Assenov and Others v Bulgaria* (1998) ECHR 98, at para 102; *M and Others v Italy and Bulgaria* (2012) ECHR 1967, at para 100.

¹⁵ *Ergi v Turkey* (1998), ECHR 59, at para 82.

¹⁶ Such as Articles 6 and 7, UN International Covenant on Civil and Political Rights 1966; Article 2(1), UN Convention against Torture 1984; Articles 6 and 37(a), UN Convention on the Rights of the Child 1989; Articles 10 and 15, UN Convention on the Rights of Persons with Disabilities 2006.

- 2.2 The same investigation-based procedural obligations apply to both the right to life and to freedom from torture.¹⁷ Under these rights, for an investigation to be effective it must satisfy the required purpose, be independent and impartial, be thorough, of the State's own motion, commence promptly, progress with reasonable expedition and be subject to public scrutiny.¹⁸ These are the minimum standards. The Explanatory Memorandum purports that the Independent Commission for Reconciliation and Information Recovery (ICRIR) "will conduct investigations into deaths and very serious injuries which resulted from conduct forming part of the Troubles".¹⁹ Yet, the current draft of the Bill does not include the term 'investigation' and, instead, proposes a type of review in some individual cases and the production of a 'historical record'. The NIHRC has grave concerns that the mandate of the ICRIR proposed by the present Bill does not, in practice, meet the minimum standards for investigation set by law. As former UN Independent Expert on Combating Impunity, Diane Orentlicher, warned "impunity arises from a failure by States to meet their obligations to investigate violations".²⁰ The NIHRC is concerned that this will result in impunity through the current draft of the Bill.
- 2.3 The following sets out a summary analysis of the minimum aspects required for effective investigations and concerns specific to the Bill.

Purpose of an investigation

- 2.4 As a fundamental starting point, it is important to recall the purpose of the investigations that are required by law. The purpose of an investigation is to secure:

¹⁷ *Assenov and Others v Bulgaria* (1998) ECHR 98, at para 102; *Mocanu and Others v Romania* (2014) ECHR 958, at paras 319-325; Articles 12 and 14, UN Convention against Torture 1984; CAT/C/GC/2, 'UN CAT Committee General Comment No 2', 24 January 2008, at paras 5, 17, 18 and 25; CAT/C/GC/3, 'UN Committee against Torture General Comment No 3', 13 December 2012, at para 5.

¹⁸ *Hugh Jordan v UK* (2001) ECHR 327; *McKerr v UK* (2001) ECHR 329; *Assenov and Others v Bulgaria* (1998) ECHR 98, at para 102; *Mocanu and Others v Romania* (2014) ECHR 958, at paras 319-325; CCPR/C/GC/36, 'UN Human Rights Committee General Comment No 36: Right to Life', 30 October 2018, at paras 27 and 28; CAT/C/GC/3, 'UN Committee against Torture General Comment No 3', 13 December 2012, at para 5; UN General Assembly, 'Resolution 60/147: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', 16 December 2005, at para 3(b).

¹⁹ UK Government, 'NI Troubles (Legacy and Reconciliation) Bill: Explanatory Notes' (UK Gov, 2022), at para 1.

²⁰ E/CN.4/2005/102/Add.1, 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher', 8 February 2005, at Principle 1.

the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances.²¹

- 2.5 Moreover, when read with the right to an effective remedy (Article 13 of the ECHR), it necessitates “in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure”.²² A similar approach applies to remedy for torture or ill-treatment.²³
- 2.6 An investigation must honour the rule of law, be transparent and provide effective accountability.²⁴ The available criminal law remedies must be capable of altering the course of an investigation.²⁵
- 2.7 While the nature and degree of scrutiny required by an investigation is determined by the circumstances of each case, for example undisputed cases may require a simple investigation, but disputed or suspicious cases will require additional scrutiny.²⁶ Importantly, those potentially implicated must not be investigated by the ones who also determine what is required by way of investigation.
- 2.8 The UN Human Rights Committee reiterates:

investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), and must be aimed at ensuring that those responsible are brought to justice, at promoting accountability and preventing impunity, at avoiding denial of justice and at drawing necessary lessons on revising

²¹ *Kaya v Turkey* (1998) ECHR 10, at para 87.

²² *Kaya v Turkey* (1998) ECHR 10, at paras 106-107.

²³ *Assenov and Others v Bulgaria* (1998) ECHR 98, at para 102; *Mocanu and Others v Romania* (2014) ECHR 958, at paras 319-325; Articles 12 and 14, UN Convention against Torture 1984; CAT/C/GC/2, ‘UN CAT Committee General Comment No 2’, 24 January 2008, at paras 5, 17, 18 and 25; CAT/C/GC/3, ‘UN Committee against Torture General Comment No 3’, 13 December 2012, at para 5.

²⁴ *Avsar v Turkey* (2001) ECHR 439.

²⁵ *Sirin Yilmaz v Turkey* (2004) ECHR 405, at para 86.

²⁶ *Velikova v Bulgaria* (2000) ECHR 198, at para 80.

practices and policies with a view to avoiding repeated violations.²⁷

2.9 The UN Human Rights Committee continues:

given the importance of the right to life, State parties must generally refrain from addressing violations of Article 6 [of the ICCPR] merely through administrative or disciplinary measures, and a criminal investigation is normally required, which should lead, if enough incriminating evidence is gathered, to a criminal prosecution.²⁸

2.10 It further provides that “States parties are also under an obligation to take steps to prevent the occurrence of similar violations in the future”.²⁹ The right to life is a limited right, which can only be interfered with when “absolutely necessary” and proportionate in three very specific scenarios – in defence from unlawful violence, to effect a lawful arrest or prevent escape of a person lawfully detained, or to lawfully quell a riot or insurrection.³⁰ Freedom from torture or ill-treatment is an absolute right, which should not be interfered with under any circumstances.³¹ On that basis it is imperative that the procedural obligation to investigate is taken seriously. This is not only essential from the perspective of dealing with the past, but to ensure that similar violations do not occur in the future.

2.11 The UN Revised Minnesota Protocol provides that the duty to investigate “gives practical effect to the duties to respect and protect the right to life, and promotes accountability and remedy where the substantive right may have been violated”.³² It continues that “investigations must be capable of ensuring accountability for

²⁷ CCPR/C/GC/36, ‘UN Human Rights Committee General Comment No 36: Right to Life’, 30 October 2018, at para 27.

²⁸ CCPR/C/GC/36, ‘UN Human Rights Committee General Comment No 36: Right to Life’, 30 October 2018, at para 27.

²⁹ CCPR/C/GC/36, ‘UN Human Rights Committee General Comment No 36: Right to Life’, 30 October 2018, at para 28.

³⁰ Articles 2 and 15(2), European Convention on Human Rights 1950; Article 6, UN International Covenant on Civil and Political Rights 1966; Article 6, UN Convention on the Rights of the Child 1989; Article 10, UN Convention on the Rights of Persons with Disabilities 2006.

³¹ Articles 3 and 15(2), European Convention on Human Rights 1950; Article 7, UN International Covenant on Civil and Political Rights 1966; Article 2(1), UN Convention against Torture 1984; Article 37(a), UN Convention on the Rights of the Child 1989; Article 15, UN Convention on the Rights of Persons with Disabilities 2006.

³² UN Office of the High Commissioner for Human Rights, ‘The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions’ (OHCHR, 2016), at para 8(c).

unlawful death; leading to the identification and, if justified by the evidence and seriousness of the case, the prosecution and punishment of all those responsible; and preventing future unlawful death".³³

2.12 The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states "the purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about the death".³⁴

2.13 The UN Office of the High Commissioner for Human Rights highlights that:

the right to the truth about gross violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations. This right is closely linked with other rights and has both an individual and a societal dimension and should be considered as a non-derogable right and not be subject to limitations.³⁵

2.14 The former UN Special Rapporteur on the promotion of truth, Pablo de Greiff, recommends that "the structural and systemic dimension of violence and rights violations and abuses should be examined. A comprehensive understanding of the past requires instruments that do not treat it merely as a series of unconnected events".³⁶

2.15 It should also be noted that the Stormont House Agreement 2014 provides that:

the UK and Irish Governments recognise that there are outstanding investigations and allegations into Troubles-

³³ UN Office of the High Commissioner for Human Rights, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 24.

³⁴ UN Economic and Social Council, 'Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions', 24 May 1989, at para 9.

³⁵ E/CN.4/2006/91, 'Study on the Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights', 8 February 2006, at Summary.

³⁶ A/HRC/34/62/Add.1, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff on his Mission to the UK of Great Britain and NI', 17 November 2016, at para 125.

related incidents, including a number of cross-border incidents. They commit to co-operation with all bodies involved to enable their effective operation, recognising their distinctive functions, and to bring forward legislation where necessary.³⁷

2.16 The UN Human Rights Committee,³⁸ UN Committee against Torture (UN CAT Committee),³⁹ UN Special Rapporteurs⁴⁰ and the CoE Commissioner for Human Rights⁴¹ have stressed the need for the UK Government to take urgent measures to advance and implement the Stormont House Agreement, particularly in relation to investigating conflict-related violations. The UN CAT Committee has stressed that the UK Government should “ensure that effective and independent investigations are conducted into outstanding allegations of torture, ill-treatment and conflict-related killings to establish the truth and identify, prosecute and punish perpetrators”.⁴² Multiple independent human rights experts have publicly raised particular concerns with the UK Government’s approach to legacy since March 2020.⁴³

2.17 The present Bill proposes establishing a body called the ICRIR, which is to consist of a Chief Commissioner, Commissioner for investigations and up to three other Commissioners, who will be supported by an undisclosed number of ICRIR officers.⁴⁴ The present Bill proposes that the ICRIR will conduct reviews, upon request, into deaths and serious injuries resulting from or connected with conduct during the Troubles.⁴⁵ It also proposes that

³⁷ A/HRC/34/62/Add.1, ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff on his Mission to the UK of Great Britain and NI’, 17 November 2016, at para 55.

³⁸ CCPR/C/GBR/CO/7, ‘UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI’, 17 August 2015, at para 11(b).

³⁹ CAT/C/GBR/CO/6, ‘UN Committee against Torture Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 7 June 2019, at paras 41(a) and 41(b).

⁴⁰ A/HRC/34/62/Add.1, ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff on his Mission to the UK of Great Britain and NI’, 17 November 2016, at para 39; Office of the High Commissioner for Human Rights, ‘Press Release: UN experts voice concern at proposed blanket impunity to address legacy of “the Troubles” in NI, 10 August 2021.

⁴¹ Letter from CoE Commissioner for Human Rights, Dunja Mijatovic to Secretary of State for NI, Brandon Lewis MP, 13 September 2021.

⁴² CAT/C/GBR/CO/6, ‘UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 7 June 2019, at para 41(c).

⁴³ Letter from CoE Commissioner for Human Rights, Dunja Mijatovic to Secretary of State for NI, Brandon Lewis MP, 13 September 2021; Office of the High Commissioner for Human Rights, ‘Press Release: UN experts voice concern at proposed blanket impunity to address legacy of “the Troubles” in NI, 10 August 2021; CoE Commissioner for Human Rights, ‘Press Release: UK – Backsliding on human rights must be prevented’, 4 July 2022.

⁴⁴ Clauses 2(3) and 3, NI Troubles (Legacy and Reconciliation) Bill.

⁴⁵ Clauses 9-17, NI Troubles (Legacy and Reconciliation) Bill.

the ICIR will produce a historical record of all remaining deaths that occurred during the Troubles (i.e. Troubles-related deaths that are not subject to a review by the ICIR).⁴⁶

2.18 The Explanatory Memorandum to the present Bill equates an ICIR review to an investigation.⁴⁷ It is notable that the same language is not applied to the historical record.⁴⁸

2.19 Anecdotally, the word review is commonly used by crime enforcement to mean an evaluation of the conduct of an enquiry. An investigation requires significantly more than this to satisfy procedural human rights obligations. It merits repetition – an investigation must be independent and impartial, thorough, be of the State’s own motion, commence promptly, be conducted with reasonable expedition, and be subject to public scrutiny.⁴⁹ An investigation’s conclusions “must be based on thorough, objective and impartial analysis of all relevant elements” and follow “an obvious line of inquiry”.⁵⁰ The investigation should seek to establish what happened,⁵¹ identify the perpetrator and hold the perpetrator to account,⁵² with a view to preventing future violations.⁵³

2.20 The intergenerational and transgenerational aspects of conflict, both in terms of its effects and potential replications, is an added factor that enhances the importance of establishing the truth, ensuring accountability and preventing future violations. A study by Queen’s University Belfast has found that:

the effects of harm (broadly defined) and the experience of injustice carried by a particular generation can, if not addressed or resolved, be passed on to the next generation to produce a range of social and psychological pathologies, such as self harm, suicide, anti-social behaviour, anomie and inter-personal violence.⁵⁴

⁴⁶ Clauses 24 and 25, NI Troubles (Legacy and Reconciliation) Bill.

⁴⁷ UK Government, ‘NI Troubles (Legacy and Reconciliation) Bill: Explanatory Notes’ (UK Gov, 2022), at para 1.

⁴⁸ Ibid.

⁴⁹ *Hugh Jordan v UK* (2001), at para 107.

⁵⁰ *Kolevi v Bulgaria* (2009), at para 201; *Armani da Silva v UK* (2016), at para 234.

⁵¹ UN Office of the High Commissioner for Human Rights, ‘The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions’ (OHCHR, 2016).

⁵² *Kaya v Turkey* (1998) ECHR 10, at para 87.

⁵³ *Paniagua Morales et al* (1998), Inter-American Court of Human Rights, Judgment of 8 March 1998, at para 173; *Armani da Silva v UK* (2016), at para 230.

⁵⁴ Stephanie Burns et al, ‘Intergenerational Aspects of the Conflict in NI’ (QUB, 2010), at 78.

2.21 The NIHRC is aware of the evidence that truth and accountability is just as important for family members from later generations and family members who were born after a victim died, as those who were directly or indirectly affected at the time of the offence.⁵⁵ It has been stated from a victims and survivors perspective that “legacy should be addressed appropriately and properly, and that we should free our next generation from carrying the injustice of the past by having a properly resourced and fully independent process”.⁵⁶

2.22 The immunity aspect of the Bill raises concerns regarding accountability and preventing future violations, which is discussed further in Section 4.0.

2.23 The NIHRC is gravely concerned that the current draft of the Bill renders the ICRIR incapable of discharging the State’s obligations to undertake investigations that are in line with the rule of law, transparent, ensure accountability and provide an effective remedy.

Independent and impartial investigations

2.24 It is imperative that rights protections are not “theoretical and illusory”.⁵⁷ This is especially so when the rights involved are the most fundamental - right to life and freedom from torture. As a bare minimum, investigations must be “independent and impartial”.⁵⁸ 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”.⁵⁹ This requires a “lack of hierarchical or institutional connection, but also a practical independence”.⁶⁰

⁵⁵ Stephen Breen, ‘Tell me the truth about my granny’, *Belfast Telegraph*, 4 July 2008; Enda McClafferty, ‘Troubles legacy: Government warned not to “trample” on victims’, *BBC News*, 29 June 2022.

⁵⁶ NI Affairs Committee, ‘Oral Evidence: Addressing the Legacy of NI’s Past – The UK Government’s Proposals – Sandra Peake, WAVE Trauma Centre’, 7 June 2022, at 422.

⁵⁷ *Khashiyev and Akayeva v Russia* (2005) ECHR 132, at para 177.

⁵⁸ *Kamalak v Turkey* (2013), Application No 2251/11, Judgment of 8 October 2013, at para 31; CCPR/C/GC/36, ‘UN Human Rights Committee General Comment No 36: Right to Life’, 30 October 2018, at para 28.

⁵⁹ *Ergi v Turkey* (1998), ECHR 59, at paras 83-84; *Hugh Jordan v UK* (2001) ECHR 327, at para 120; *McKerr v UK* (2001) ECHR 329, at para 128.

⁶⁰ *Ergi v Turkey* (1998), ECHR 59, at paras 83-84; *Hugh Jordan v UK* (2001) ECHR 327, at para 120; *McKerr v UK* (2001) ECHR 329, at para 128.

2.25 For example, in the seminal NI cases of *McKerr v UK* (2001) and *Hugh Jordan v UK* (2001), the European Court of Human Rights (ECtHR) considered situations where Royal Ulster Constabulary officers were responsible for investigating other Royal Ulster Constabulary officers' behaviour, with the Royal Ulster Constabulary Chief Constable in a monitoring role. In addition, the former Independent Commission for Police Complaints could require the Chief Constable to refer the investigating report to the Director of Public Prosecutions for a decision on prosecution or to initiate disciplinary proceedings, which the ECtHR acknowledged was an independent element but that it was not sufficiently independent.⁶¹

2.26 The UN Revised Minnesota Protocol provides investigators must be qualified and relevant experts.⁶² It elaborates that:

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 the 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.⁶³

2.27 The UN Revised Minnesota Protocol continues "investigations must also be free from undue external influence, such as the interests of political parties or powerful social groups".⁶⁴

2.28 The UN Revised Minnesota Protocol also refers to impartiality. It states "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 inculpatory evidence".⁶⁵

⁶¹ *Hugh Jordan v UK* (2001) ECHR 327, at para 120; *McKerr v UK* (2001) ECHR 329, at para 128.

⁶² UN Office of the High Commissioner for Human Rights, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 27.

⁶³ *Ibid.*, at para 28.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, at para 31.

2.29 To ensure independence and impartiality, the UN Revised Minnesota Protocol provides:

investigators must be able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and must be able to operate free from the threat of prosecution or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics. This applies equally to lawyers, whatever their relationship to the investigation.⁶⁶

2.30 The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states members of an investigatory body “shall be chosen for their recognised impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry”.⁶⁷

2.31 The NIHRC is gravely concerned that there are several provisions within the current draft of the Bill that prevent the ICRIR from being operationally independent. By way of example, how it is proposed that the Secretary of State is involved in: making the rules/guidance,⁶⁸ proposing cases for review,⁶⁹ determining resources⁷⁰ and monitoring⁷¹ the ICRIR. Critically, the present Bill proposes that the ICRIR’s work can be concluded, or shut down, when the “Secretary of State is satisfied that *the need* for ICRIR” to exercise its functions “has ceased”. This means the Secretary of State can stop the ICRIR from completing its work generally or in respect of individual cases.⁷² The extent of the Secretary of State’s involvement in ICRIR’s operations and monitoring proposed by the present Bill raises serious questions of undue external influence. It also calls into question the ICRIR’s objectivity and impartiality.

⁶⁶ Ibid, at para 30.

⁶⁷ UN Economic and Social Council, ‘Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions’, 24 May 1989, at para 11.

⁶⁸ Clauses 20(3), 21(6), 21(7), 21(8), 29, 30, 31, 53, Schedule 1, NI Troubles (Legacy and Reconciliation) Bill.

⁶⁹ Clauses 9(3) and 10(2), NI Troubles (Legacy and Reconciliation) Bill.

⁷⁰ Clause 2(1), NI Troubles (Legacy and Reconciliation) Bill.

⁷¹ Clause 32, NI Troubles (Legacy and Reconciliation) Bill.

⁷² Clause 33(1), NI Troubles (Legacy and Reconciliation) Bill.

2.32 The NIHRC advises that the extent of the Secretary of State’s influence and involvement across the ICRIR’s operations proposed by the current draft of the Bill raises serious concerns as to whether the ICRIR’s work can be sufficiently independent and impartial, as required by human rights standards, including Articles 2 and 3 of the ECHR.

Thorough investigations

2.33 A human rights compliant investigation is not one that is “half-hearted and dilatory”.⁷³ To be human rights compliant, an “investigation’s conclusions must be based on thorough, objective and impartial analysis of *all* relevant elements... failing to follow an obvious line of inquiry undermines the investigations’ ability to establish the circumstances of the case and the person responsible”.⁷⁴

2.34 This requires State authorities to take:

reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.⁷⁵

2.35 The ECtHR warned that “any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard”.⁷⁶

2.36 The UN Revised Minnesota Protocol provides guidance on what a thorough investigation entails. It states that:

investigations must, at a minimum, take all reasonable steps to:

a) Identify the victim(s);

⁷³ *Acar and Others v Turkey* (2005) ECHR 313, at para 91.

⁷⁴ *Kolevi v Bulgaria* (2009) ECHR 1838, at para 201; *Armani da Silva v UK* (2016), Application No 5878/08, Judgment of 30 March 2016, at para 234.

⁷⁵ *Hugh Jordan v UK* (2001) ECHR 327, at para 107. For more information on what constitutes reasonable steps, see Hannah Russell, *The Use of Force and Article 2 of the ECHR in Light of European Conflicts* (Hart Publishing, 2017), at Chapter 7.

⁷⁶ *Ramsahai and Others v Netherlands* (2007) ECHR 393, at para 324.

- b) Recover and preserve all material probative of the cause of death, the identity of the perpetrator(s) and the circumstances surrounding the death;
- c) Identify possible witnesses and obtain their evidence in relation to the death and the circumstances surrounding the death;
- d) Determine the cause, manner, place and time of death, and all of the surrounding circumstances. In determining the manner of death, the investigation should distinguish between natural death, accidental death, suicide and homicide; and
- e) Determine who was involved in the death and their individual responsibility for the death.⁷⁷

2.37 Under the UN Revised Minnesota Protocol:

the investigation must determine whether or not there was a breach of the right to life. Investigations must seek to identify not only direct perpetrators but also all others who were responsible for the death, including, for example, officials in the chain of command who were complicit in the death. It should also seek to identify policies and systemic failures that may have contributed to a death, and identify patterns where they exist.⁷⁸

2.38 In addition, the UN Revised Minnesota Protocol states:

an investigation must be carried out diligently and in accordance with good practice. The investigative mechanism charged with conducting the investigation must be adequately empowered to do so. The mechanism must, at a minimum, have the legal power to compel witnesses and require the production of evidence, and must have sufficient financial and human resources, including qualified investigators and relevant experts.⁷⁹

2.39 To enable a thorough investigation some protective measures may be required. The UN Human Rights Committee provides "States

⁷⁷ UN Office of the High Commissioner for Human Rights, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 25.

⁷⁸ Ibid, at para 26.

⁷⁹ Ibid, at para 27.

parties must also take the necessary steps to protect witnesses, victims and their relatives and persons conducting the investigation from threats, attacks and any act of retaliation".⁸⁰

2.40 This is also reflected in the UN Revised Minnesota Protocol, which states "any investigative mechanism must also be able to ensure the safety and security of witnesses, including, where necessary, through an effective witness protection programme".⁸¹

2.41 Furthermore, the UN Revised Minnesota Protocol states:

family members should be protected from any ill-treatment, intimidation or sanction as a result of their participation in an investigation or their search for information concerning a deceased or disappeared person. Appropriate measures should be taken to ensure their safety, physical and psychological well-being, and privacy.⁸²

2.42 Article 13(3) of the UN Declaration on the Protection of All Persons from Enforced Disappearance states in the context of investigating enforced disappearance "steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal".⁸³

2.43 Article 13(4) of the UN Declaration further states "steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished".⁸⁴

2.44 The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides "the investigative authority shall have the power to obtain all the

⁸⁰ CCPR/C/GC/36, 'UN Human Rights Committee General Comment No 36: Right to Life', 30 October 2018, at para 28.

⁸¹ UN Office of the High Commissioner for Human Rights, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 27.

⁸² Ibid, at para 36.

⁸³ A/RES/47/133, 'Declaration on the Protection of All Persons from Enforced Disappearance', 18 December 1992.

⁸⁴ Ibid.

information necessary to the inquiry”.⁸⁵ It further states those persons conducting the investigation:

shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify. The same shall apply to any witness. To this end, they shall be entitled to issue summonses to witnesses, including the officials allegedly involved and to demand the production of evidence.⁸⁶

2.45 Within the current draft of the Bill, it is proposed that the ICRIR’s functions will be limited to a light-touch review or the establishment of a historical record.⁸⁷ In the NIHRC’s view, these do not equate to thorough and effective investigations.⁸⁸

2.46 The NIHRC advises that a thorough investigation requires that inquiries be capable of establishing the facts, identifying the perpetrator and follow all lines of inquiry. It is the NIHRC’s view that this cannot be achieved by conducting a light-touch review or producing a basic historical record as proposed within the current draft of this Bill.

2.47 The former European Commission on Human Rights clarified that:

the nature and degree of scrutiny which satisfies this minimum threshold must, in the Commission’s view, depend on the circumstances of the particular case. There may be cases where facts surrounding a deprivation of life are clear and undisputed and the subsequent inquisitorial examination may legitimately be reduced to a minimum formality. But equally, there may be other cases where a victim dies in circumstances which are unclear, in which event the lack of any effective procedure to investigate the cause of the deprivation of life could by itself raise an issue under Article 2 of the [ECHR].⁸⁹

2.48 The current draft of the Bill indicates that a review will be a more detailed exploration than the historical record.⁹⁰ The current draft of

⁸⁵ UN Economic and Social Council, ‘Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions’, 24 May 1989, at para 10.

⁸⁶ Ibid.

⁸⁷ Clauses 9-17 and 24-25, NI Troubles (Legacy and Reconciliation) Bill.

⁸⁸ This is compounded by concerns about compellability below.

⁸⁹ *McCann v UK* (1995) 21 EHRR 97, at para 79.193.

⁹⁰ Clauses 13-16 and 24(1), NI Troubles (Legacy and Reconciliation) Bill.

the Bill does not justify this distinction.⁹¹ The current draft of the Bill does not require that an assessment be undertaken to establish which cases should be subject to a review (which unlike set out in the present Bill should equate to a thorough investigation) and which cases could be satisfied solely through inclusion within the historical record, for example cases where the facts are clear and undisputed. The current draft of the Bill indicates that this distinction is determined by whether a family member is able and willing to request a review or that a State agent (such as the Secretary of State, Coroner or Attorney General) wishes to make a request.⁹²

2.49 The NIHRC advises that the arbitrary distinction between reviews and the historical record within the current draft of the Bill creates an unjustified disparity between cases, which risks further diluting the UK Government’s adherence to its procedural human rights obligations.

State’s own motion

2.50 The State is required to ensure that it “carry out an effective official investigation on their own motion”, when they are aware of a suspicious death.⁹³ It “cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures”.⁹⁴ The “mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation under Article 2 of the [ECHR] to carry out an effective investigation into the circumstances surrounding the death”.⁹⁵ This obligation may be burdensome, but it cannot be displaced by a “high incidence of fatalities”.⁹⁶ Instead, there is a specific need for cases to be investigated where the “circumstances are in many respects unclear”.⁹⁷

2.51 The ECtHR confirms that:

⁹¹ Clauses 9 and 24, NI Troubles (Legacy and Reconciliation) Bill.

⁹² Clauses 9 and 23, NI Troubles (Legacy and Reconciliation) Bill.

⁹³ *McCann v UK* (1995) 21 EHRR 97, at para 173; *McKerr v UK* (2001) ECHR 329, at para 111; *Hugh Jordan v UK* (2001) ECHR 327, at para 105.

⁹⁴ *Ilhan v Turkey* (2000) ECHR 354, at para 63; *Jelic v Croatia* (2014) ECHR 809, at para 66.

⁹⁵ *Ergi v Turkey* (1998), ECHR 59, at para 82.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

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.⁹⁸

2.52 The ECtHR further provides 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.⁹⁹

2.53 The UN Human Rights Committee states “an investigation into alleged violations of the right to life should commence when necessary *ex officio*”.¹⁰⁰

2.54 Article 13(1) of the UN Declaration on the Protection of All Persons from Enforced Disappearance states in the context of investigating enforced disappearance:

each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.¹⁰¹

⁹⁸ *Brecknell v UK* (2007) ECHR 989, at para 70.

⁹⁹ *Ibid*, at para 71.

¹⁰⁰ CCPR/C/GC/36, ‘UN Human Rights Committee General Comment No 36: Right to Life’, 30 October 2018, at para 28.

¹⁰¹ A/RES/47/133, ‘Declaration on the Protection of All Persons from Enforced Disappearance’, 18 December 1992.

2.55 Within the current draft of the Bill, a range of State agents can request that the ICIR conducts a review into a particular death, such as the Secretary of State, a coroner, the Attorney General for NI.¹⁰² Considering that investigations should be of the State's own motion,¹⁰³ it is right that a review can be requested by State agents. However, as advised throughout, the ICIR cannot under the current draft of this Bill conduct its operations so as to be compliant with the State's legal obligations.

2.56 The NIHRC advises that investigations should be of the State's own motion and it is right that the current draft of the Bill enables reviews to be requested by State agents. However, the NIHRC stresses that the resulting review must equate to an Article 2 ECHR compliant investigation, particularly regarding thoroughness and independence. The NIHRC is of the view that this is not delivered in the current draft of this Bill.

Prompt commencement and expedition

2.57 Investigations into suspicious deaths must be commenced promptly.¹⁰⁴ This extends to the commencement of initial evidence gathering¹⁰⁵ and the re-commencement of adjourned investigations.¹⁰⁶

2.58 Reasons for any delay in promptly commencing investigations must be reasonably justified.¹⁰⁷

2.59 What constitutes prompt commencement depends on the context and facts of the case. For example, investigations of enforced disappearances must be "taken immediately after the crime was reported to the authorities" and a delay of days can constitute a

¹⁰² Clause 9, NI Troubles (Legacy and Reconciliation) Bill.

¹⁰³ *McCann v UK* (1995) 21 EHRR 97, at para 173; *McKerr v UK* (2001) ECHR 329, at para 111; *Hugh Jordan v UK* (2001) ECHR 327, at para 105.

¹⁰⁴ *Mentese and Others v Turkey* (2005) ECHR 22, at para 54; *Aslakhanova and Others v Russia* (2012) ECHR 2075, at paras 11-12; *Hugh Jordan v UK* (2001) ECHR 327, at para 136; CCPR/C/GC/36, 'UN Human Rights Committee General Comment No 36: Right to Life', 30 October 2018, at para 28.

¹⁰⁵ *Mentese and Others v Turkey* (2005) ECHR 22, at para 54; *Aslakhanova and Others v Russia* (2012) ECHR 2075, at paras 11-12.

¹⁰⁶ *Hugh Jordan v UK* (2001) ECHR 327, at para 136.

¹⁰⁷ *Ibid*, at para 136 and 138.

violation of Article 2.¹⁰⁸ This combined with the principle of reasonableness indicates that a chronological approach to historical investigations is permitted, as long as there is the ability to react to a case's individual circumstances.

2.60 The UN Revised Minnesota Protocol states "the failure of the State promptly to investigate does not relieve it of its duty to investigation at a later time: the duty does not cease even with the passing of significant time".¹⁰⁹

2.61 The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary states "those persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation".¹¹⁰

2.62 To maintain "public confidence" in a State's "adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts", investigations into suspicious deaths must be carried out within reasonable expedition.¹¹¹ It is also the case that "with the passing of time, it becomes more and more difficult to gather evidence from which to determine the cause of death".¹¹²

2.63 What constitutes reasonable expedition is determined by the circumstances of each individual case. The ECtHR appreciates that there "may be obstacles or difficulties which prevent progress in an investigation in a particular situation".¹¹³ However, this "cannot relieve the authorities of their obligations under Article 2 [of the ECHR] to carry out an investigation".¹¹⁴ This extends to "where there are serious allegations of misconduct and infliction of unlawful harm implicating State security officers".¹¹⁵ In such instances, "it is

¹⁰⁸ *Betayev and Betayeva v Russia* (2008) ECHR 469, at para 85.

¹⁰⁹ UN Office of the High Commissioner for Human Rights, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 23.

¹¹⁰ UN Economic and Social Council, 'Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions', 24 May 1989, at para 10.

¹¹¹ *Hugh Jordan v UK* (2001) ECHR 327, at paras 108 and 138.

¹¹² *Slimani v Turkey* (2004), Application No 57671/00, Judgment of 27 July 2004, at para 32.

¹¹³ *McKerr v UK* (2001) ECHR 329, at para 114.

¹¹⁴ *Yasa v Turkey* (1998) ECHR 83, at para 104.

¹¹⁵ *Mahmut Kaya v Turkey* (2000) ECHR 129, at para 107.

incumbent on the authorities to respond actively and with reasonable expedition”.¹¹⁶

2.64 The former UN Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, supported this approach:

it is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate – this would eviscerate the non-derogable character of the right to life – but they may affect the modalities or particulars of the investigation.¹¹⁷

2.65 It is not sufficient that an investigation is pending, an investigation must be progressing to satisfy the requirement of reasonable expedition.¹¹⁸

2.66 The UN Revised Minnesota Protocol confirms that “the duty of promptness does not justify a rushed or unduly hurried investigation”.¹¹⁹

2.67 The undue delays in commencing and progressing human rights compliant investigations regarding the Troubles thus far constitute ongoing violations of Articles 2 and 3 of the ECHR.¹²⁰ The main way to address these violations is to commence the necessary investigations as soon as possible. However, the procedural obligations attached to Articles 2 and 3 of the ECHR are interlinked. Immediate commencement of an investigation will not be human rights compliant if the investigation being undertaken is not thorough or does not satisfy the intended purpose of a human rights compliant investigation for example. Consequently, being subject to a watched clock cannot be a reason or justification to rush legislation through without meaningful consultation or the backing of victims and survivors. The CoE Venice Commission

¹¹⁶ Ibid.

¹¹⁷ E/CN.4/2006/53, 'Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Philip Alston', 8 March 2006, para 36.

¹¹⁸ *Yasa v Turkey* (1998) ECHR 83, at para 104.

¹¹⁹ UN Office of the High Commissioner for Human Rights, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016), at para 23.

¹²⁰ CM/Notes/1436/H46-35, 'CoE Committee of Ministers Decision on McKerr Group v UK (Application No 28883/95)', 10 June 2022.

requires that the process for making laws is “transparent, accountable, inclusive and democratic”.¹²¹ The Explanatory Notes to the present Bill state that the Bill “builds on the principles and other aspects of the Stormont House Agreement.”¹²² The current draft of this Bill bears very little similarity to the Stormont House Agreement. Furthermore, the consultation on a previous legacy Bill which received a response from 17,000 stakeholders, if taken into account, would have dictated that this Bill in its current form did not proceed.

2.68 The NIHRC advises that the requirement to conduct reasonably prompt and expeditious investigations cannot be a reason for legislation to be rushed through without meaningful consultation or the support of victims and survivors. Additionally, the speed of the process is peripheral if the other aspects of the procedural obligations of the right to life and freedom from torture are not met, particularly that investigations are thorough, independent and impartial. That said, immediate concrete steps should be taken to address these issues for the purpose of progressing offences that are awaiting a human rights compliant investigation.

Public Scrutiny

Non-disclosure

2.69 Article 2 of the ECHR requires that an investigation into a suspicious death and its results must be subject to sufficient public scrutiny,¹²³ the degree of which varies from case to case.¹²⁴ In all investigations into a suspicious death, the next-of-kin of the victim must be involved in the procedure “to the extent necessary to safeguard his or her legitimate interests”.¹²⁵ This does not provide families with the automatic right to have access to police files or any other information that they request.¹²⁶ It also does not require families to

¹²¹ CDL-AD(2016)007rev, ‘CoE European Commission for Democracy Through Law: Rule of Law Checklist’, 18 March 2016, at 13.

¹²² UK Government, ‘NI Troubles (Legacy and Reconciliation) Bill: Explanatory Notes’ (UK Gov, 2022), at para 10.

¹²³ *McCann v UK* (1995) 21 EHRR 97, at para 159.

¹²⁴ *McKerr v UK* (2001) ECHR 329, at para 115.

¹²⁵ *Ibid.*

¹²⁶ *Hugh Jordan v UK* (2001) ECHR 327, at paras 122-124.

be kept informed throughout the investigation.¹²⁷ This is on the basis that such information may involve sensitive issues with possible prejudicial effect to private individuals or other investigations.¹²⁸ When families' access to information is restricted they must be provided with access at "other stages of the available procedures".¹²⁹ Victims must not be denied access to information "for no valid reason".¹³⁰

- 2.70 The ECHR's jurisprudence clarifies that at a minimum, the next-of-kin must be informed of a decision regarding prosecution,¹³¹ cannot be prohibited outright from access to the investigation and court documents,¹³² and must be given the opportunity to tell the court their version of events.¹³³
- 2.71 Non-disclosure of information by the State engages Article 10 of the ECHR (right to freedom of expression) and Article 8 (the right to respect for private and family life). These rights are protected by a range of other human rights treaties.¹³⁴
- 2.72 The ECtHR has found that determinations of national security threats must not be arbitrary and must contain sufficient safeguards for the individual. It has found that:

where the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.¹³⁵

¹²⁷ Ibid, at paras 122-124.

¹²⁸ Ibid, at para 121.

¹²⁹ Ibid.

¹³⁰ *Eremiášová and Pechová v Czech Republic*, Application No 23944/04, Judgment of 16 May 2012, at para 149.

¹³¹ *Güleç v Turkey*, Application No 21593/93, Judgment of 27 July 1998, at para 82.

¹³² *Ogur v Turkey* (1999) ECHR 30, at para 92.

¹³³ *Gül v Turkey*, Application No 22676/93, Judgment of 14 December 2000, at para 93.

¹³⁴ Articles 17 and 19, UN International Covenant on Civil and Political Rights 1966; Article 5(d)(viii), UN Convention on the Elimination of All Forms of Racial Discrimination 1965; Articles 12, 13 and 16(1), UN Convention on the Rights of the Child 1989; Articles 21 and 22, UN Convention on the Rights of Persons with Disabilities 2006.

¹³⁵ *Leander v Sweden* (1987) ECHR 4, at para 51.

2.73 The ECtHR also holds that the rule of law requires that:

measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural adjustments related to the use of classified information.¹³⁶

2.74 Also, that the:

individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.¹³⁷

2.75 The UN Human Rights Committee requires that:

when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.¹³⁸

2.76 The ECtHR recognises the right to the truth in cases of gross human rights violations, which includes violations of the right to life.¹³⁹ The ECtHR indicates that this extends to "not only for the applicant and

¹³⁶ *M and Others v Bulgaria* (2011) ECHR 1195, at para 100.

¹³⁷ *Ibid*, at para 101.

¹³⁸ CCPR/C/GC/34, 'UN Human Rights Committee General Comment No 34: Article 19 - Freedom of Opinion and Expression', 12 September 2011, at para 35.

¹³⁹ *El-Masri v The Former Yugoslav Republic of Macedonia* (2012), Application No 39630/09, Judgment of 13 December 2012, at para 191; *Janowiec and Others v Russia* (2013) ECHR 1003, at para 9 of the Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller; *Varnava and Others v Turkey* (2009) ECHR 1313, at paras 200-202.

his family, but also for other victims of similar crimes and the general public”.¹⁴⁰

2.77 The UN Revised Minnesota Protocol states:

the right to know the truth extends to society as a whole, given the public interest in the prevention of, and accountability for, international law violations. Family members and society as a whole both have a right to information held in a State’s records that pertains to serious violations, even if those records are held by security agencies or military or policy units.¹⁴¹

2.78 The purpose of this requirement is to ensure public confidence in the process.¹⁴² There are strong indications that public confidence is currently lacking due to the UK Government publishing and forging ahead with the present Bill without meaningful consultation.¹⁴³ There is also little evidence that expert views on what such legislation would require to be human rights compliant were meaningfully considered when drafting the present Bill. In response to the UK Government’s approach, the CoE Committee of Ministers “noted with regret the lack of formal public consultation on this draft legislation and firmly reiterated their previous calls on the authorities to ensure that any proposals garner public trust and confidence by engaging fully with all stakeholders”.¹⁴⁴ These concerns have been echoed by independent human rights experts.¹⁴⁵ The CoE Commissioner for Human Rights, Dunja Mijatović, has stated that “the lack of consultation” after “such a radical shift away from earlier approaches, and the unilateral steps by the UK Government in this respect, were repeatedly identified

¹⁴⁰ *El-Masri v The Former Yugoslav Republic of Macedonia* (2012), Application No 39630/09, Judgment of 13 December 2012, at para 191.

¹⁴¹ UN Office of the High Commissioner for Human Rights, ‘The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions’ (OHCHR, 2016), at para 13.

¹⁴² *McKerr v UK* (2001) ECHR 329, at para 114.

¹⁴³ CoE Commissioner for Human Rights, ‘Press Release: UK – Backsliding on human rights must be prevented’, 4 July 2022.

¹⁴⁴ CM/Notes/1436/H46-35, ‘CoE Committee of Ministers Decision on *McKerr Group v UK* (Application No 28883/95), 10 June 2022, at para 5.

¹⁴⁵ Letter from CoE Commissioner for Human Rights, Dunja Mijatovic to Secretary of State for NI, Brandon Lewis MP, 13 September 2021; Office of the High Commissioner for Human Rights, ‘Press Release: UN experts voice concern at proposed blanket impunity to address legacy of “the Troubles” in NI, 10 August 2021.

[by victims and survivors] as a major source of concern” and did not equate to a “victim-centred approach”.¹⁴⁶

- 2.79 The current draft of the Bill proposes that a draft review report must be given to an interested person (e.g. an individual mentioned in the report, the person who requested the review, or a family member) and that person will have the chance to make representations on the report.¹⁴⁷ The same does not apply to the historical record. Limits on what information is included in the final report apply, but these do not extend to draft reports.¹⁴⁸ However, clause 15(11) of the present Bill proposes that the same draft review report does not have to go to all the persons who should receive a draft, which indicates that it is the discretion of the ICIR as to what information is provided in a draft review report. The right to respect for private life and data protection legislation indicate that a more structured approach is required.
- 2.80 The current draft of the Bill proposes that the ICIR “may”, not ‘must’, publish the final report of any review, thus limiting the opportunity for public scrutiny.¹⁴⁹ In contrast, the present Bill proposes that the ICIR “must publish the historical record”.¹⁵⁰ The current draft of the Bill proposes that any publication is subject to certain conditions such as it threatens life or national security, has a prejudicial effect on criminal proceedings, contains sensitive evidence or protected international information, it is in the public interest or is subject to data protection legislation.¹⁵¹
- 2.81 The current draft of the Bill also proposes that if a report does not include disclosed information, it must contain a statement that the Secretary of State decided to prohibit disclosure and why this was the case.¹⁵² The present Bill further proposes that the Secretary of State’s decision can be appealed.¹⁵³ It is proposed that this only applies to published reports. The current draft of the Bill does not

¹⁴⁶ Letter from CoE Commissioner for Human Rights, Dunja Mijatovic to Secretary of State for NI, Brandon Lewis MP, 13 September 2021.

¹⁴⁷ Clause 15, NI Troubles (Legacy and Reconciliation) Bill.

¹⁴⁸ Clauses 4(1), 25(2), 25(3), 26(2) and 26(3), NI Troubles (Legacy and Reconciliation) Bill.

¹⁴⁹ Clause 16(3), NI Troubles (Legacy and Reconciliation) Bill.

¹⁵⁰ Clause 25(1), NI Troubles (Legacy and Reconciliation) Bill.

¹⁵¹ Clauses 4(1), 15(8), 25(2), 25(3), 26(2) and 26(3), NI Troubles (Legacy and Reconciliation) Bill.

¹⁵² Clause 8 of Schedule 5, NI Troubles (Legacy and Reconciliation) Bill.

¹⁵³ Clause 8 of Schedule 5, NI Troubles (Legacy and Reconciliation) Bill.

propose requiring that reasons be provided nor that there is a right of appeal if the final report of a review is not published.

2.82 The NIHRC advises that the Bill should require that the ICRIR publishes all its reports, with limited exception. There should be a structured approach towards what is or is not included in a draft and final report. Where exceptions are in place they must be lawful and proportionate and include safeguards that ensure these are not applied arbitrarily and that the commitments aimed at enabling effective public scrutiny are not illusory.

Family Members

2.83 Victims, for the purposes of the ECHR, are divided into direct and indirect victims. A direct victim is an individual who is able to show that he or she was “directly” affected by an alleged violation.¹⁵⁴ If the direct victim has died, it may be possible for an indirect victim to take action. An indirect victim is traditionally viewed as the next-of-kin,¹⁵⁵ but it is now accepted that such status can extend to close family members. The question of whether they were legal heirs of the deceased is not relevant.¹⁵⁶ The ECtHR has adopted a less strict approach to who qualifies as an indirect victim when the individual is closely linked to the death or disappearance of the direct victim. As an indication of what is meant by a close family member in the context of Article 2 of the ECHR, the ECtHR has accepted married partners,¹⁵⁷ unmarried partners,¹⁵⁸ parents,¹⁵⁹ siblings,¹⁶⁰ children,¹⁶¹ and nephews.¹⁶² In other contexts, the ECtHR has been more restrictive and generally declines to grant standing to any other person unless that person could, exceptionally, demonstrate an interest of their own.¹⁶³

¹⁵⁴ *Tanas v Moldova*, Application No 7/08, Judgment of 27 April 2010, at para 104; *Burden v UK* (2008) ECHR 356, at para 33; *Lambert and Others v France* (2015) ECHR 545, at para 89.

¹⁵⁵ *Varnava and Others v Turkey* (2009) ECHR 1313, at para 112.

¹⁵⁶ *Van Colle v UK* (2012) ECHR 1928, at para 86.

¹⁵⁷ *McCann v UK* (1995) 21 EHRR 97; *Salman v Turkey* (2000) ECHR 357.

¹⁵⁸ *Velikova v Bulgaria* (2000) ECHR 198.

¹⁵⁹ *Ramsahai and Others v the Netherlands* (2007) ECHR 393; *Giuliani and Gaggio v Italy* (2011) ECHR 513.

¹⁶⁰ *Andronicou and Constantinou v Cyprus*, Application No 86-1996-705-897, Judgment of 9 October 1997.

¹⁶¹ *McKerr v UK* (2001) ECHR 329.

¹⁶² *Yasa v Turkey* (1998) ECHR 83.

¹⁶³ *Karpylenko v Ukraine* (2016) ECHR 173, at para 104; *Nassau Verzekering Maatschappij NV v the Netherlands* (2011) ECHR 1798, at para 20.

2.84 There is no jurisdictional requirement for a direct or indirect victim, other than that the alleged incident must have taken place within the jurisdiction of the State in question. This includes *de jure* and *de facto* jurisdictions.¹⁶⁴

2.85 Article 2 of the ECHR's focuses on close family members and indicates that it permits a distinction to be made between close and other family members. However, this does not mean such a distinction is either required or desirable.

2.86 The UN Human Rights Committee requires disclosure of:

relevant details about the investigation to the victim's next of kin, allow them to present new evidence, afford them with legal standing in the investigation, and make public information about the investigative steps taken and the investigation's findings, conclusions and recommendations, subject to absolutely necessary redactions justified by a compelling need to protect the public interest or the privacy and other legal rights of directly affected individuals.¹⁶⁵

2.87 The former UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff, noted that:

truth-seeking requires the active participation of individuals who wish to express their grievances and report on the facts and underlying causes of the violations and abuses which occurred. Truth-seeking will only be regarded a justice measure if civil society, in particular victims' organisations, is adequately represented in the composition of a truth commission. Prosecutions, for their part, can only serve as actual justice measures if the victims and their families are effectively involved in the processes and provided with the necessary information relevant to their participation in proceedings.¹⁶⁶

¹⁶⁴ See Hannah Russell, *The Use of Force and Article 2 of the ECHR in Light of European Conflicts* (Hart Publishing, 2017), at Chapter 5.

¹⁶⁵ CCPR/C/GC/36, 'UN Human Rights Committee General Comment No 36: Right to Life', 30 October 2018, at para 28.

¹⁶⁶ A/HRC/21/46, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff', 9 August 2012, at para 54.

2.88 The UN Approach to Transitional Justice, states as a guiding principle, that measures should “ensure the centrality of victims in the design and implementation of transitional justice processes and mechanisms”.¹⁶⁷

2.89 The UN Revised Minnesota Protocol states:

family members have the right to seek and obtain information on the causes of a killing and to learn the truth about the circumstances, events and causes that led to it. In cases of potentially unlawful death, families have the right, at a minimum, to information about the circumstances, location and condition of the remains and, insofar as it has been determined, the cause and manner of death.¹⁶⁸

2.90 The UN Revised Minnesota Protocol continues “the State must enable all close relatives to participate effectively in the investigation, though without compromising its integrity. The relatives of a deceased person must be sought, and informed of the investigation”.¹⁶⁹

2.91 The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions support this approach stating “there shall be thorough, prompt and impartial investigations of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural deaths”.¹⁷⁰

2.92 The UN Declaration on the Protection of All Persons from Enforced Disappearance, Article 13(4), states in the context of investigating enforced disappearance, “the findings of such an investigation shall be made available upon request by all persons concerned, unless doing so would jeopardise an ongoing criminal investigation”.¹⁷¹

¹⁶⁷ UN General Assembly, ‘Guidance Note of the Secretary-General: UN Approach to Transitional Justice’ (UNGA, 2010), at 2.

¹⁶⁸ UN Office of the High Commissioner for Human Rights, ‘The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions’ (OHCHR, 2016), at para 11.

¹⁶⁹ Ibid, at para 35.

¹⁷⁰ UN Economic and Social Council, ‘Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions’, 24 May 1989, at para 9.

¹⁷¹ A/RES/47/133, ‘Declaration on the Protection of All Persons from Enforced Disappearance’, 18 December 1992.

2.93 The current draft of the Bill's proposal that there is express provision for keeping family members informed is welcomed.¹⁷² Yet, the current draft of the Bill proposes creating a two-tiered approach. A 'close family member' has precedence over 'other family members'.¹⁷³ This is not dissimilar to the ECtHR's definition of next of kin, but the present Bill's proposed interpretation of a close family member is narrower.¹⁷⁴ The current draft of the Bill proposes limiting a close family member to a victim's spouse, civil partner, cohabitee, child, parent, brother, sister, step-child, step-parent, half-brother, half-sister, step-brother or step-sister.¹⁷⁵ In right to life cases, the ECtHR has accepted married partners,¹⁷⁶ unmarried partners,¹⁷⁷ parents,¹⁷⁸ siblings,¹⁷⁹ children,¹⁸⁰ and nephews.¹⁸¹ The ECtHR has also indicated that nieces, aunts, uncles and grandparents could be categorised as a close family member.

2.94 In recent years, the ECtHR has also found that it may be possible for a person with "close personal links" and who "provides care"¹⁸² for a victim that "has no capacity of discernment" to take an action.¹⁸³

2.95 The NIHRC advises that, considering human rights jurisprudence, the proposed definition of 'close family member' within the current draft of the Bill is too narrow. It should extend to grandparents, aunts, uncles, nieces or nephews.

2.96 The NIHRC advises that, considering human rights jurisprudence, the definition of 'other family member' within the current draft of the Bill should take account of situations where it may be appropriate for a non-familial person, with

¹⁷² Clauses 15 and 16, NI Troubles (Legacy and Reconciliation) Bill.

¹⁷³ Clauses 9(1), 9(2) and Schedule 3, NI Troubles (Legacy and Reconciliation) Bill.

¹⁷⁴ *McKerr v UK* (2001) ECHR 329; *Hugh Jordan v UK* (2001) ECHR 327; *Gül v Turkey*, Application No 22676/93, 14 December 2000; *Ogur v Turkey* (1999) ECHR 30; *Gülec v Turkey*, Application No 21593/93, 27 July 1998; *McCann v UK* (1995) 21 EHRR 97.

¹⁷⁵ Clause 1(2) of Schedule 3, NI Troubles (Legacy and Reconciliation) Bill.

¹⁷⁶ *McCann v UK* (1995) 21 EHRR 97; *Salman v Turkey* (2000) ECHR 357.

¹⁷⁷ *Velikova v Bulgaria* (2000) ECHR 198.

¹⁷⁸ *Ramsahai and Others v the Netherlands* (2007) ECHR 393; *Giuliani and Gaggio v Italy* (2011) ECHR 513.

¹⁷⁹ *Andronicou and Constantinou v Cyprus*, Application No 86-1996-705-897, Judgment of 9 October 1997.

¹⁸⁰ *McKerr v UK* (2001) ECHR 329.

¹⁸¹ *Yasa v Turkey* (1998) ECHR 83.

¹⁸² *Guberina v Croatia* (2016) ECHR 287, at paras 77-79.

¹⁸³ *Belli and Arquier-Martinez v Switzerland* (2018) ECHR 1012, at para 97.

close personal links and who provides care for a victim to seek remedy on the victim's behalf.

3.0 Scope of the ICRIR

Definition of offences

- 3.1 The current draft of the Bill proposes recognising someone who has died or someone who has suffered very specific serious physical or mental harm (as defined by clause 1(6) of the Bill) due to a Troubles-related offence as a direct victim for the purposes of the ICRIR's work.¹⁸⁴ The present Bill proposes that it is only individuals whose cases fall within these two categories that the ICRIR will consider for review. The historical record is limited further under the current draft of the Bill. The present Bill also proposes that the ICRIR is only mandated to create a historical record for Troubles-related deaths, its mandate does not include creating a historical record for serious physical or mental harm,¹⁸⁵ with no alternative mechanism available for such cases.
- 3.2 A prescriptive list limited to extreme injuries and that does not accommodate rehabilitative injuries, as proposed within the current draft of the Bill, is unlikely to be deemed human rights compliant. It ignores the absolute nature of the right to freedom from torture.¹⁸⁶ ECtHR jurisprudence indicates that each potential case should be assessed on its own circumstances,¹⁸⁷ not determined by a rigid list of extreme outcomes. It is also a notable departure from the Victims and Survivors (NI) Order 2006, which broadly defines a victim and survivor as "someone who has been physically or psychologically injured as a result of or in consequence of a conflict-related incident", "someone who provides substantial amount of care on a regular basis for" such an individual, or "someone who has been bereaved as a result of or in consequence of a conflict-related incident".¹⁸⁸

¹⁸⁴ Clauses 1(6), 9 and 10, NI Troubles (Legacy and Reconciliation) Bill.

¹⁸⁵ Clauses 24 and 25, NI Troubles (Legacy and Reconciliation) Bill.

¹⁸⁶ Article 15(2), ECHR.

¹⁸⁷ *Mursic v Croatia* (2016) ECHR 927, at para 97.

¹⁸⁸ Article 3, Victims and Survivors (NI) Order 2006.

- 3.3 **The NIHRC advises that a human rights compliant approach requires that the Bill should adopt a broad approach to determining what offences fall within the ICRIR’s mandate. There should be flexibility built in to ensure the individual circumstances of each potential case and broader human rights commitments, including the investigative obligations attached to the right to life and freedom from torture, can be considered and are used to inform the determination of whether a case should be considered by the ICRIR.**

Non-duplication

- 3.4 The ECtHR has determined that the UK Government has failed to implement ECtHR judgments stipulating measures to achieve effective investigations into ‘Troubles-related’ deaths since 2001 and this failure is itself resulting in new findings of violations against the UK.¹⁸⁹ The CoE Committee of Ministers has expressed deep regret that the implementation of the judgments has not occurred.¹⁹⁰ It has emphasised “that it is crucial that the legislation ultimately adopted is in full compliance with the ECHR and will enable effective investigations into all outstanding cases”.¹⁹¹
- 3.5 The Historical Enquiries Team was a unit of the Police Service NI set up in September 2005 to investigate Troubles-related deaths between January 1969 and 10 April 1998. It was found to be non-compliant with Article 2 of the ECHR due to inconsistencies and lack of independence.¹⁹²
- 3.6 The Historical Enquiries Team was replaced by the Legacy Investigative Branch, a unit within the Police Service NI headed by a Detective Chief Superintendent, tasked with investigating Troubles-related cases between 1 January 1969 and 1 March 2004. The House of Commons and House of Lords Joint Committee on Human Rights, has stated that “as well as having fewer resources at its disposal than its predecessor, the Legacy Investigative Branch

¹⁸⁹ *Hemsworth v UK* (2013) ECHR 683.

¹⁹⁰ ‘CoE Committee of Ministers Item H46-42 McKerr Group v UK (Application No. 28883/95)’, 7-8 June 2016.

¹⁹¹ CM/Notes/1436/H46-35, ‘CoE Committee of Ministers Decision on McKerr Group v UK (Application No 28883/95), 10 June 2022, at para 4.

¹⁹² Her Majesty’s Inspectorate of Constabulary, ‘Inspection of the Police Service NI Historical Enquiries Team’ (HMIC, 2013), at 28.

cannot itself satisfy the requirements of Article 2 of the ECHR because of its lack of independence from the police service".¹⁹³

3.7 The Police Ombudsman for NI has established a Historical Investigations Directorate to investigate matters in which members of the Royal Ulster Constabulary "may have been responsible for deaths or serious criminality in the past, and in particular between 1968 until 10 April 1998".¹⁹⁴ The Directorate includes staff from a variety of professional backgrounds, including those with an expertise of investigation, complaint handling and dealing with people affected by events during the Troubles.¹⁹⁵ This does not eliminate the possibility of a conflict of interest, which may bring the independence of an investigation by the Directorate into question.

3.8 Noting the inadequacies of previous initiatives, it is important that the ICIR is empowered within the Bill to investigate all deaths which have not received an effective investigation in full compliance with human rights standards, including Articles 2 of the ECHR. This includes those deaths which have been the subject of previous initiatives. As stated by the CoE Committee of Ministers when it:

called upon the authorities to take all necessary measures to ensure the Historical Investigations Unit can be established and start its work without any further delay, particularly in light of the length of time that has already passed since these judgments became final and the failure of previous initiatives to achieve effective, expeditious investigations.¹⁹⁶

3.9 The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions further states:

in cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases

¹⁹³ UK Joint Committee on Human Rights, 'HL Paper 130, HC 1088: Human Rights Judgments Seventh Report of Session 2014-15', 11 March 2015.

¹⁹⁴ Police Ombudsman NI, 'Historical Investigations'. Available at: <https://policeombudsman.org/About-Us/Historical-Investigations>

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

where there are complaints from the family of the victim about these inadequacies or other substantial reasons, governments shall pursue investigations through an independent commission of inquiry or similar procedure.

3.10 Clause 11(7) of the current draft of the Bill proposes that the ICIR “must take into account” a review or investigation that has already been carried out and “in particular, must ensure that the ICIR does not do anything which duplicates any aspect of that review unless, in the ICIR’s view, the duplication is necessary”. The present Bill does not propose that the ICIR considers whether all previous investigations into Troubles-related offences were or were not human rights compliant. The shortcomings exposed in case law from the ECtHR¹⁹⁷ and findings of the CoE Committee of Ministers¹⁹⁸ make it clear that, in many circumstances, previous Troubles-related investigations were not human rights compliant.

3.11 The NIHRC advises that there should be an assessment of whether all previous investigations into Troubles-related offences were human rights compliant. The NIHRC is concerned that the current draft of the Bill does not include a mechanism to assess whether previous investigations were human rights compliant, and if not, to determine that they should fall within the ICIR’s remit.

Temporal scope

3.12 The UK is bound by the ECHR (and other relevant human rights treaties) from the date of ratification or when the treaty came into force, whichever is later. The UK was one of the first States to ratify the ECHR on 4 November 1950, but the ECHR did not come into force until 3 September 1953. The ECHR is the first human rights treaty that the UK ratified. In principle, 3 September 1953 is the date from when the UK’s ECHR obligations apply,¹⁹⁹ with additional human rights obligations from other treaties following as they were ratified. However, the UK did not recognise the competence of the European Commission on Human Rights to examine individual

¹⁹⁷ *McKerr v UK* (2001) ECHR 329; *Kelly and Others v UK* (2001) ECHR 328; *Shanaghan v UK* (2001) ECHR 330.

¹⁹⁸ CM/ResDH(2020)367, ‘CoE Committee of Ministers Execution of the Judgments of the European Court of Human Rights: McKerr and Other Seven Cases Against the UK’, 3 December 2020.

¹⁹⁹ *Silih v Slovenia* (2009) ECHR 571, at para 164.

applications and the jurisdiction of the ECtHR until 1966. The ECtHR recognises this year as the 'critical date' for when ECHR obligations apply domestically.²⁰⁰

- 3.13 The UK adopts a dualist legal system, which means that any international obligations must be incorporated into domestic law to have direct effect – i.e. a court must take account of the ECHR, where relevant, in its rulings and public authorities are directly responsible for ensuring that they do not act in a way that is incompatible with the ECHR.²⁰¹ The Human Rights Act, which directly incorporates the ECHR into domestic law, came into force on 2 October 2000. The ECHR is the only human rights treaty to be directly incorporated into domestic law.
- 3.14 The UK Government initially rejected that the ECHR applied to cases dealing with pre-Human Rights Act 1998 acts or omissions.²⁰² The UK Supreme Court revised this approach in *Re McCaughey* [2011], accepting that procedural obligations apply to pre-Human Rights Act violations.²⁰³ However, the UK Supreme Court changed its view in *McQuillan, McGuigan and McKenna* [2021] where it held that the domestic 'critical date' for ECHR obligations is 2 October 2000, when the Human Rights Act 1998 came into force.²⁰⁴ Nevertheless, the ECtHR is of the view that the procedural obligation to investigate "has evolved into a separate and autonomous duty".²⁰⁵ Considering Article 2 specifically, the ECtHR found that:

although it is triggered by acts concerning the substantive aspects of Article 2 [of the ECHR] it can give rise to a finding of a separate and independent 'interference'... In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date.²⁰⁶

- 3.15 Clause 51(2) of the current draft of the Bill proposes defining Troubles-related offences as those that occurred on or after 1

²⁰⁰ *Chong and Others v UK* (2018) ECHR 802, at paras 84-90.

²⁰¹ Sections 2 and 6, Human Rights Act 1998.

²⁰² *Mc Kerr* [2004] UKHL 12.

²⁰³ *Re McCaughey and Ancor* [2011] UKSC 20.

²⁰⁴ *McQuillan, McGuigan and McKenna* [2021] UKSC 55.

²⁰⁵ *Silih v Slovenia* (2009) ECHR 571, at para 159.

²⁰⁶ *Ibid.*

January 1966. That matches the date widely recognised as the escalation of tension into violence and the first troubles related death.²⁰⁷ It also fits with the year identified by the ECtHR as the UK's 'critical date' for application of the ECHR.²⁰⁸

3.16 The end date of 10 April 1998 reflects the signing of the Belfast (Good Friday) Agreement. However, as we are reminded by victims and survivors, peace is a process and Troubles-related offences continue to occur.

3.17 The NIHRC advises that to justify the proposed end date of 10 April 1998 a review confirming that offences after this date have been investigated or have the option of being investigated in line with human rights obligations is required.

3.18 Other developments may impact upon the practical application of clause 51(2) of the current draft of the Bill. In addition to the UK Supreme Court's decision in *McQuillan, McGuigan and McKenna* [2021],²⁰⁹ clause 5(1) of the recently introduced Bill of Rights Bill proposes that "a court may not adopt a post-commencement interpretation of a Convention right that would require a public authority to comply with a positive obligation". Clause 5(2) of this Bill also proposes that there are restrictions placed on the circumstances when a court should apply a pre-commencement interpretation.

3.19 The NIHRC is gravely concerned that the benefit of a broad temporal scope within this Bill will be ineffective in practice due to this Bill's general incompatibility with the ECHR, the UK Supreme Court's ruling in *McQuillan, McGuigan and McKenna* [2021] and the arguably non-compliant approach proposed towards positive obligations in the Bill of Rights Bill.

²⁰⁷ David McKittrick et al, 'Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the NI Troubles' (Mainstream Publishing, 2007), at 23.

²⁰⁸ *Silih v Slovenia* (2009) ECHR 571, at para 159.

²⁰⁹ *McQuillan, McGuigan and McKenna* [2021] UKSC 55.

Jurisdictional scope

3.20 Article 1 of the ECHR states that ratifying States, such as the UK, “shall secure to everyone within their jurisdiction the rights and freedoms defined” within the ECHR. This means that the ECHR must be adhered to within the territory of each ratifying State. It also means that more than one State could have investigative obligations. For example, if the potential violation occurred in another CoE jurisdiction, if it involved a cross-border element with another CoE jurisdiction, or affected a victim based in another CoE jurisdiction.

3.21 Under Articles 2 and 3 of the ECHR, an ECHR-ratifying State is required to investigate a death or allegation of torture/ill-treatment if the alleged violation took place within its jurisdiction or authorities from that State had “any causal connection with its occurrence”.²¹⁰ For an investigation to be effective, the investigating State “must take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located” within its territory.²¹¹ Thus, the “procedural obligation under Article 2 [of the ECHR] mandates cooperation between States in securing available evidence”.²¹² The “nature and scope of the cooperation required by the States involved in meeting their procedural obligations under Article 2 [of the ECHR] will, inevitably, depend on the circumstances of the particular case”.²¹³ The ECtHR has found that Article 2 of the ECHR will be violated if lack of cooperation between States prevented criminal proceedings from coming to “a proper conclusion”.²¹⁴ Furthermore:

where there are cross-border elements to an incident of unlawful violence leading to loss of life... the authorities of the State to which the perpetrators have fled and in which evidence of the offence could be located may be required by Article 2 [of the ECHR] to take effective measures in that regard, if necessary of their own motion. Otherwise, those indulging in cross-border attacks would be able to operate with impunity and the authorities of

²¹⁰ *Al-Adsani v UK* (2001) ECHR 761, at para 40; *Emin and Others v Cyprus* (2010) ECHR 909, at para 2a; *Rantsev v Cyprus and Russia* (2010) ECHR 22, at para 241.

²¹¹ *Rantsev v Cyprus and Russia* (2010) ECHR 22, at para 241.

²¹² *Güzelyurtlu and Others v Cyprus and Turkey* (2017) ECHR 308, at para 284.

²¹³ *Ibid*, at para 287.

²¹⁴ *Ibid*, at para 296.

the Contracting State which has suffered the attack would be foiled in their own efforts to protect the fundamental rights of their citizens.²¹⁵

3.22 Clause 1(7) of the current draft of the Bill proposes that “it does not matter if an event or conduct occurred in NI, in another part of the UK, or elsewhere”. As the impact of the NI conflict extended beyond NI, not placing a jurisdictional limit on Troubles-related offences is welcomed. Yet, the ICRIR’s limited mandate and lack of a thorough investigation by the ICRIR due to the current drafting of the Bill may have a negative impact on another State’s ability to fulfil their procedural obligations, as the information available will be severely curtailed. This is compounded by the limitations on disclosure listed within the current draft of the Bill discussed in the above section on non-disclosure.

3.23 Clause 26(1) of the current draft of the Bill proposes that “the ICRIR may disclose any information held by the ICRIR to any other person”. Clause 26(2) of the current draft of the Bill proposes placing limitations on what information can be shared, such as prohibiting the sharing of sensitive information or protected international information. Clause 3(2) of Schedule 5 of the current draft of the Bill includes a list of specified persons or organisations to which disclosure of sensitive information is permitted. The proposed list focuses on Public Prosecutors, police and coroners based in the UK. It does not provide for such information to be shared with equivalent authorities in other States that may have a duty to investigate Troubles-related offences.

3.24 The NIHRC welcomes the recognition within the current draft of the Bill that the NI conflict extended beyond NI. However, the NIHRC is gravely concerned that the ICRIR’s mandate and approach to investigations as proposed by the present Bill will significantly hinder the ability for other States to satisfy their procedural obligations regarding the NI conflict.

²¹⁵ *Cummins and Others v UK*, Application No 27306/05, Judgment of 13 December 2005.

Biometric data

3.25 Article 8(1) of the ECHR states “everyone has the right to respect for his private and family life, his home and his correspondence”. The ECtHR has confirmed that this right is engaged in the context of biometric material.²¹⁶ This is reflected in a range of other international human rights treaties.²¹⁷

3.26 The right to respect for private and family life is a qualified right, meaning that it can be interfered with in certain circumstances. The circumstances in which interference may be permitted is set out in Article 8(2) of the ECHR. This provision states:

there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

3.27 For an interference to be in accordance with law, the ECtHR has elaborated that the relevant measure should “have some basis in domestic law” and “to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention” and inherent in “the object and purpose of Article 8”.²¹⁸ Thus, the:

law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.²¹⁹

3.28 Specific to retention of biometric material for suspects, the ECtHR states:

²¹⁶ *S and Marper v UK* (2008) ECHR 1581.

²¹⁷ Article 17, UN International Covenant on Civil and Political Rights 1966; Article 16(1), UN Convention on the Rights of the Child 1989; Article 22, UN Convention on the Rights of Persons with Disabilities 2006.

²¹⁸ *Malone v UK* (1984) ECHR 10, at paras 66-68.

²¹⁹ *Ibid*, at para 66; *Silver and Others v UK* (1983) ECHR 5, at paras 87-88.

the domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose which those data are stored. The domestic law must also afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse.²²⁰

3.29 The ECtHR further states that consideration must be given to “whether the permanent retention of... all suspected but unconvicted people is based on relevant sufficient reasons”.²²¹ Consideration should also be given as to “whether such retention is proportionate and strikes a fair balance between the competing public and private interests”.²²²

3.30 A “blanket and indiscriminate nature of powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences... fails to strike a fair balance between the competing public and private interests”.²²³ It “overstepped any acceptable margin of appreciation in this regard”.²²⁴

3.31 The UN Human Rights Committee states:

the term ‘unlawful’ means that no interference can take place except in cases envisaged by the law. Interference authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant. The expression ‘arbitrary interference’ is also relevant to the protection of the right provided for in Article 17 [of the UN ICCPR]. In the [UN Human Rights] Committee’s view the expression ‘arbitrary interference’ can also extend to interference provided under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions,

²²⁰ *S and Marper v UK* (2008) ECHR 1581, at para 103.

²²¹ *Ibid*, at para 114.

²²² *Ibid*, at para 118.

²²³ *Gaughran v UK* (2020) ECHR 144; *S and Marper v United Kingdom* (2008) ECHR 1581, at para 125.

²²⁴ *Ibid*.

aims and objectives of the [UN ICCPR]... and should be, in any event, reasonable in the particular circumstances.²²⁵

3.32 The UN Human Rights Committee continues:

even with regard to interferences that conform to the [UN ICCPR]... relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorised interference must be made only by the authority designated under the law, and on a case-by-case basis.²²⁶

3.33 The UN Human Rights Committee further states:

the gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorised by law to receive, process and use it, and is never used for purposes incompatible with the [UN ICCPR]... In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law every individual should have the right to request rectification or elimination.²²⁷

3.34 Clause 31 of the current draft of the Bill proposes that retention of biometric data and material will be subject to periodic review and that the material will be destroyed within a reasonable period after the conclusion of the ICRIR's work. Under the present Bill, the ICRIR can use the evidence,²²⁸ but it is not stated that retained biometric data must be relevant to the ICRIR's work. This is unlikely

²²⁵ UN Human Rights Committee, 'UN Human Rights Committee General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation', 8 April 1988, at paras 3-4.

²²⁶ Ibid, at para 8.

²²⁷ Ibid, at para 10.

²²⁸ Clause 31(1)(d), NI Troubles (Legacy and Reconciliation) Bill.

to be a proportionate approach, as required by Article 8 of the ECHR (right to a private life).²²⁹

3.35 The NIHRC advises that the proposed provisions within the current draft of the Bill relating to the retention and use of biometric data are largely in line with human rights standards. However, to ensure proportionality as required by human rights standards, the present Bill should include a requirement that biometric data retained for the purposes of ICIRIR’s work must be relevant to that work.

4.0 Conditional Immunity Scheme

4.1 An immunity scheme for gross abuses of human rights, such as those related to Articles 2 and 3, violates the ECHR.²³⁰ This reflects the limited nature of Article 2 of the ECHR and absolute nature of Article 3 of the ECHR.²³¹

4.2 The most recent and authoritative of the ECtHR cases states that:

granting amnesty in respect of the killing and ill-treatment of civilians would run contrary to the State’s obligations under Articles 2 and 3 of the ECHR since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible. Such a result would diminish the purpose of the protection guaranteed by... Articles 2 and 3 of the ECHR and render illusory the guarantees in respect of an individual’s right to life and the right not to be ill-treated. The object and purpose of the ECHR as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.²³²

4.3 The UN CAT Committee, in its concluding observations on accountability for conflict-related violations in NI, is clear that the UK Government should “refrain from enacting amnesties or statutes

²²⁹ *Mozer v Republic of Moldova and Russia* (2016) ECHR 213, at para 194.

²³⁰ *Margus v Croatia* (2014) ECHR 523, at para 126; *Abdülsamet Yamana v Turkey* (2004) ECHR 572, at para 55; *Ali and Ayse Duran v Turkey* (2008) ECHR 289, at para 69; *Okkali v Turkey*, Application No 52067/99, Judgment of 17 October 2006, at para 76; *Yesil and Sevim v Turkey*, Application No 34738/04, Judgment of 5 June 2007, at para 38.

²³¹ Articles 2, 3 and 15(2), European Convention on Human Rights 1950.

²³² *Margus v Croatia* (2014) ECHR 523, at para 126.

of limitations for torture or ill-treatment, which the [UN CAT] Committee has found to be inconsistent with States parties' obligations under the [UN CAT]".²³³

- 4.4 Over the years, alternative views have been expressed within ECtHR jurisprudence. These views rely on the amnesty being in the public interest²³⁴ or an existing effective reconciliation process and/or form of compensation to the victims.²³⁵ This is not the case in NI. The UK Government purports that the present Bill is in the public interest and that it delivers an effective reconciliation process.²³⁶ This is impossible without buy-in from victims and survivors and elected representatives. The Victims Payments scheme is a compromise,²³⁷ but is not an all-encompassing form of compensation.
- 4.5 The UK Government frequently highlights the South Africa Truth and Reconciliation Commission as an example of where a conditional immunity scheme has been used.²³⁸ There are several differences which mean this comparison is of limited use. Unlike the UK, South Africa is not a High Contracting State to the ECHR and thus not bound by it. Second, the South Africa Commission was established after an extensive consultation process that put victims and political representatives at the heart of the process. A consultation process that focused on civil society was conducted for a full year and the results of this formed the legislation on which the South Africa Truth and Reconciliation Commission was based.²³⁹ The South African Commission came as part of a broader reconciliation process. Furthermore, the immunity process was fully transparent with public hearings held before decisions were reached.
- 4.6 The current draft of the Bill proposes that a person who has committed a serious Troubles-related crime "must" be granted

²³³ CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 41(f).

²³⁴ *Duarjdin v France*, Application No 16734/90, Judgment of 2 September 1991; *Tarbuk v Croatia* (2012) ECHR 2049, at para 50.

²³⁵ *Ould Dah v France* (2009) ECHR 532; *Association 21 December 1989 and Others v Romania* (2012), Application Nos 33810/07 and 18817/08, Judgment of 24 May 2011.

²³⁶ UK Government, 'NI Troubles (Legacy and Reconciliation) Bill: ECHR Memorandum' (UK Gov, 2022), at paras 56-63.

²³⁷ Victims' Payments Regulations 2020.

²³⁸ UK Government, 'NI Troubles (Legacy and Reconciliation) Bill: ECHR Memorandum' (UK Gov, 2022), at paras 48-50.

²³⁹ Promotion of National Unity and Reconciliation Act 1995.

immunity from prosecution if they satisfy three basic conditions – the individual requested immunity, provides a true account and is exposed to prosecution due to a Troubles-related offence.²⁴⁰ This does not subject everyone equally to the law, instead appearing to arbitrarily distinguish between alleged offenders that can and cannot have immunity. This means that those who have committed grave violations of human rights, such as murder and torture, will be immune from the law if they access the mechanism and satisfy the conditions under the present Bill.

- 4.7 Removing the possibility of immunity for an on-going case or in respect of a previous conviction²⁴¹ may constitute a violation of Article 14 of the ECHR (prohibition of discrimination), which requires that there be no discrimination based on “other status”. What constitutes ‘other status’ is ever evolving. There is the potential that it would apply in this instance. It is likely to result in a situation where those that have avoided the justice system can benefit, but those who have been convicted or under active investigation cannot.²⁴²
- 4.8 Alleged paramilitary offenders are more likely to be affected by the Bill’s exclusions from immunity than State agents, with no existing legal basis or ECHR-compliant justifiable reason. The UK Government has indicated in its commentary on the present Bill that this legislation is intended to protect veterans. The former Secretary of State, Brandon Lewis MP, stated that “no longer will those who served – and we have explicitly included veterans of the security services and the Royal Ulster Constabulary – be subjected to a witch hunt over their service in NI, enduring perpetual cycles of investigations and re-investigations”.²⁴³
- 4.9 Victims must not be denied access to information “for no valid reason”.²⁴⁴ The next-of-kin must be informed of a decision regarding prosecution,²⁴⁵ provided with reasons for that decision²⁴⁶

²⁴⁰ Clause 18, NI Troubles (Legacy and Reconciliation) Bill.

²⁴¹ Clause 20(1), NI Troubles (Legacy and Reconciliation) Bill.

²⁴² Clause 20(1), NI Troubles (Legacy and Reconciliation) Bill.

²⁴³ Brandon Lewis, ‘My NI legacy plan. No longer will our veterans be hounded about events that happened decades ago’, *Conservative Home*, 9 June 2022.

²⁴⁴ *Eremiášová and Pechová v Czech Republic*, Application No 23944/04, Judgment of 16 May 2012, at para 149.

²⁴⁵ *Güleç v Turkey*, Application No 21593/93, Judgment of 27 July 1998, at para 82.

²⁴⁶ *Finucane v UK* (2003) ECHR 328, at paras 82 and 83.

and given the opportunity to tell the court their version of events.²⁴⁷ Public scrutiny is necessary to ensure public confidence in the process.²⁴⁸

4.10 Under clause 18 of the current draft of the Bill, immunity decisions rely solely on information provided by the person requesting immunity. The present Bill does not enable victims, family members or interested persons to provide information to inform the ICRIR's immunity decisions. The present Bill also does not include a requirement that victims or family members are informed when an individual has applied for immunity. It also does not currently require victims or family members to be informed of the outcome of the immunity request.

4.11 There is no proposed requirement within the current draft of the Bill for the ICRIR to provide reasons for why it is or is not granting immunity. There is also no proposed option for an individual requesting immunity or an interested person to appeal a decision on immunity made by the ICRIR.

4.12 **The NIHRC is very concerned by the lack of accountability, equality and public scrutiny within the proposed immunity scheme as set out in the current draft of this Bill. The NIHRC remains of the view that an immunity scheme such as that proposed by the current draft of the Bill is not lawful and is not human rights compliant.**

4.13 The former UN Special Rapporteur on Truth, Pablo de Greiff, recommended that "truth, justice and reparation initiatives should expand their focus beyond cases leading to death to address violations and abuses largely excluded from their ambit, including torture, sexual harm, disappearance and illegal detention".²⁴⁹

4.14 The UN CEDAW Committee is clear that gender-based violence in all its forms should be criminalised, legal systems should protect

²⁴⁷ *Gül v Turkey*, Application No 22676/93, Judgment of 14 December 2000, at para 93.

²⁴⁸ *McKerr v UK* (2001) ECHR 329, at para 114; *Finucane v UK* (2003) ECHR 328, at paras 82 and 83.

²⁴⁹ A/HRC/34/62/Add.1, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff on his Mission to the UK of Great Britain and NI', 17 November 2016, at para 126.

victims and offer an effective remedy.²⁵⁰ Furthermore, any laws that facilitate, justify or tolerate any form of gender-based violence should be repealed.²⁵¹

4.15 The UN CAT Committee has specifically recommended that the UK Government “undertake other initiatives, including expanding the mandate of the historical investigations unit, to address allegations of torture, sexual violence and disappearances committed during the conflict, and ensure that victims of torture and ill-treatment obtain redress”.²⁵²

4.16 When drafting new laws, the right to no punishment without law must be considered.²⁵³ This absolute right provides that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed”.²⁵⁴

4.17 The proposed definition of offences in clause 1(6) of the current draft of the Bill, combined with the proposed provisions for immunity²⁵⁵ and the proposed cessation of other legal proceedings,²⁵⁶ raised concerns that there will be no recourse to justice for other Troubles-related offences, in particular sexual offences. This would discriminately affect women.

4.18 An amendment was added to the current draft of the Bill that expressly proposes that there is no immunity from prosecution for Troubles-related sexual offences or a Troubles-related inchoate offence relating to a sexual offence.²⁵⁷ The present Bill proposes to include some guidance on what qualifies as such offences, but that the Secretary of State may also make regulations on the meaning of these offences.²⁵⁸

²⁵⁰ CEDAW/C/GC/35, ‘UN CEDAW Committee General Comment No 35: Gender Based Violence Against Women Updating General Comment No 19’, 14 July 2017, at para 30.

²⁵¹ Ibid, at para 31.

²⁵² CAT/C/GBR/CO/6, ‘UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 7 June 2019, at para 41(e).

²⁵³ Article 7, European Convention on Human Rights 1950.

²⁵⁴ Article 7(1), European Convention on Human Rights 1950.

²⁵⁵ Clause 18, NI Troubles (Legacy and Reconciliation) Bill.

²⁵⁶ Clauses 37 and 39-41, NI Troubles (Legacy and Reconciliation) Bill.

²⁵⁷ Clause 19, NI Troubles (Legacy and Reconciliation) Bill.

²⁵⁸ Clauses 19(7)-19(9), NI Troubles (Legacy and Reconciliation) Bill.

4.19 The NIHRC advises that, while welcomed, excluding Troubles-related sexual offences from the immunity scheme is insufficient to overcome its broader concerns about the immunity scheme proposed by the present Bill.

5.0 Cessation of Proceedings

- 5.1 The right of access to courts and tribunals is an integral part of the right to a fair trial,²⁵⁹ enabling any claim relating to a person's civil rights and obligations be brought before a court or tribunal.²⁶⁰ This right is not absolute and may be subject to limitations. However, limitations "must not restrict or reduce the access left to the individual in such a way or to such an extent that very essence of the right is impaired".²⁶¹
- 5.2 It is also well established that 'possessions', as provided for within the right to property,²⁶² can encompass legal claims provided that the individual invoking the right can establish that the claim has sufficient basis in domestic law.²⁶³
- 5.3 Article 13 of the ECHR (right to an effective remedy) has a close relationship with Articles 2 and 3 of the ECHR.²⁶⁴ For a remedy to be effective it must be accessible, capable of providing redress in respect of the complaint and offer a reasonable prospect of success.²⁶⁵ In other words, it must be available, sufficient, and effective in theory and practice, having regard to the individual circumstances of the case.²⁶⁶
- 5.4 The Belfast (Good Friday) Agreement required the UK Government to incorporate the ECHR into NI law and to do so to provide people with "direct access to the courts, and remedies for breach of the

²⁵⁹ Article 6(1), European Convention on Human Rights 1950; Article 14(1), UN International Covenant on Civil and Political Rights 1966.

²⁶⁰ *Golder v UK* (1975) 1 EHRR 524, at para 28.

²⁶¹ *Philis v Greece* (1991) 13 EHRR 741, at para 59.

²⁶² Article 1, Protocol No 1 of the European Convention on Human Rights 1952

²⁶³ *Vilho Eskelinen v Finland* (2007) ECHR 314.

²⁶⁴ *Isayeva v Russia* (2005) ECHR 128, at para 229.

²⁶⁵ *Bityeva and Others v Russia* (2009) ECHR 672, at para 121; *Akhmadova and Akhmadov v Russia* (2008) ECHR 869, at para 103.

²⁶⁶ *El-Masri v The Former Yugoslav Republic of Macedonia* (2012), Application No 39630/09, Judgment of 13 December 2012, at para 255.

Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency".²⁶⁷ The Human Rights Act 1998 provides this access, which is now to be undermined critically by this present Bill.

5.5 The current draft of the Bill proposes to immediately cease criminal investigations (other than those referred by the ICRIR to the prosecutor), police complaints, civil proceedings and inquests/inquiries linked to Troubles-related offences.²⁶⁸ There is a real risk that such proposals will mean petitioning the ECtHR will become the only viable route to raising breaches. States "have the primary responsibility to secure the rights and freedoms" defined within the ECHR.²⁶⁹ ECtHR judgments are not enforceable, instead relying on State-initiated compliance. Considering the UK Government's approach to existing Troubles-related judgments,²⁷⁰ there is a real risk that any related ECtHR ruling would be disregarded or only partially adhered to.

5.6 The UK Government's proposed justification for ceasing other avenues of remedy through the present Bill is "that the current system has not been delivering for victims as we think they deserve".²⁷¹ The former Secretary of State for NI, Brandon Lewis MP, was of the view that because most Troubles cases were more than 40 years old, the chances of success were "vanishingly small".²⁷² The then Secretary of State for NI stated that:

faith in the criminal justice model to deal with legacy cases has been undermined. The high standard of proof required to secure a successful prosecution, combined with the passage of time and difficulty in securing sufficient evidence, means that victims and their families very rarely, if ever, obtain the outcome they seek from that process.²⁷³

²⁶⁷ The Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

²⁶⁸ Clauses 34-41, NI Troubles (Legacy and Reconciliation) Bill.

²⁶⁹ Protocol No 15 of the European Convention on Human Rights, 24 June 2013.

²⁷⁰ 'CoE Committee of Ministers Item H46-42 McKerr Group v UK (Application No. 28883/95)', 7-8 June 2016; CM/Notes/1436/H46-35, 'CoE Committee of Ministers Decision on McKerr Group v UK (Application No 28883/95), 10 June 2022, at para 4.

²⁷¹ UK Parliament Hansard, 'NI Troubles (Legacy and Reconciliation) Bill: House of Commons Committee Stage Debate – Minister of State, NIO – Conor Burns MP', 29 June 2022, at Volume 717, Column 341.

²⁷² NI Office, 'NI Troubles (Legacy and Reconciliation) Bill: Second Reading Opening Speech by Secretary of State for NI, Brandon Lewis MP', 24 May 2022.

²⁷³ Ibid.

5.7 The UK Government's approach in the current draft of this Bill ignores the progress that has been made with the existing system. In the NIHRC's view, the existing system should be developed, not regressed. There have been significant steps forward for several families in uncovering the truth and seeking justice,²⁷⁴ which would not have been possible without the existing systems in place. Victims and survivors have also been clear that, while they agree that the current system is not delivering for victims as they deserve, the proposals made by this present Bill by no means remedy this and are instead viewed as "perpetrator focused".²⁷⁵ It has been stated that:

victims ultimately want justice and, if they do not want justice, they want some form of accountability for what happened to them. There is nothing within this [Bill] that provides that for them...

The majority of victims we support [at the South East Fermanagh Foundation] know why their loved one was killed, they know the group that killed their loved one, they know where it happened and they know how it happened, but what they want to know is who is responsible... That, to us, cannot be delivered [by this Bill].²⁷⁶

5.8 The NIHRC is gravely concerned that the immediacy of the proposed changes to a victim's access to justice within the current draft of the Bill closes off any pursuit of justice outside of the ICRIR and is therefore incompatible with human rights and the Belfast (Good Friday) Agreement.

²⁷⁴ See for example *Re Bridget Irvine* [2022] NIQB 49; 'Kathleen Thompson: Mother-of-six's killing "unjustified"', *BBC News*, 29 June 2022; *In the Matter of a Series of Deaths that Occurred in August 1971 at Ballymurphy, West Belfast* [2021] NICoroner 6; *In the Matter of an Inquest into the Death of Patrick McElhone* [2021] NICoroner 1; Lord Saville, 'Report of the Bloody Sunday Inquiry' (TSO, 2010).

²⁷⁵ NI Affairs Committee, 'Oral Evidence: Addressing the Legacy of NI's Past – The UK Government's Proposals – Sandra Peake, WAVE Trauma Centre', 7 June 2022, at 418.

²⁷⁶ *Ibid*, at 422.

Annex 1: Summary of Recommendations

- 1.4 The NIHRC concludes that the fundamentals of the entire draft of the present Bill require immediate and thorough reassessment, which should take place through meaningful engagement. The result should be victim-centred and human rights compliant, the NIHRC is of the view that this is not delivered by the present Bill.**
- 2.23 The NIHRC is gravely concerned that the current draft of the Bill renders the ICRIR incapable of discharging the State's obligations to undertake investigations that are in line with the rule of law, transparent, ensure accountability and provide an effective remedy.**
- 2.32 The NIHRC advises that the extent of the Secretary of State's influence and involvement across the ICRIR's operations proposed by the current draft of the Bill raises serious concerns as to whether the ICRIR's work can be sufficiently independent and impartial, as required by human rights standards, including Articles 2 and 3 of the ECHR.**
- 2.46 The NIHRC advises that a thorough investigation requires that inquiries be capable of establishing the facts, identifying the perpetrator and follow all lines of inquiry. It is the NIHRC's view that this cannot be achieved by conducting a light-touch review or producing a basic historical record as proposed within the current draft of this Bill.**
- 2.49 The NIHRC advises that the arbitrary distinction between reviews and the historical record within the current draft of the Bill creates an unjustified disparity between cases, which risks further diluting the UK Government's adherence to its procedural human rights obligations.**
- 2.56 The NIHRC advises that investigations should be of the State's own motion and it is right that the current draft of the Bill enables reviews to be requested by State agents. However, the NIHRC stresses that the resulting review must**

equate to an Article 2 ECHR compliant investigation, particularly regarding thoroughness and independence. The NIHRC is of the view that this is not delivered in the current draft of this Bill.

2.68 The NIHRC advises that the requirement to conduct reasonably prompt and expeditious investigations cannot be a reason for legislation to be rushed through without meaningful consultation or the support of victims and survivors. Additionally, the speed of the process is peripheral if the other aspects of the procedural obligations of the right to life and freedom from torture are not met, particularly that investigations are thorough, independent and impartial. That said, immediate concrete steps should be taken to address these issues for the purpose of progressing offences that are awaiting a human rights compliant investigation.

2.82 The NIHRC advises that the Bill should require that the ICRIR publishes all its reports, with limited exception. There should be a structured approach towards what is or is not included in a draft and final report. Where exceptions are in place they must be lawful and proportionate and include safeguards that ensure these are not applied arbitrarily and that the commitments aimed at enabling effective public scrutiny are not illusory.

2.95 The NIHRC advises that, considering human rights jurisprudence, the proposed definition of 'close family member' within the current draft of the Bill is too narrow. It should extend to grandparents, aunts, uncles, nieces or nephews.

2.96 The NIHRC advises that, considering human rights jurisprudence, the definition of 'other family member' within the current draft of the Bill should take account of situations where it may be appropriate for a non-familial person, with close personal links and who provides care for a victim to seek remedy on the victim's behalf.

- 3.3 The NIHRC advises that a human rights compliant approach requires that the Bill should adopt a broad approach to determining what offences fall within the ICRIR's mandate. There should be flexibility built in to ensure the individual circumstances of each potential case and broader human rights commitments, including the investigative obligations attached to the right to life and freedom from torture, can be considered and are used to inform the determination of whether a case should be considered by the ICRIR.**
- 3.11 The NIHRC advises that there should be an assessment of whether all previous investigations into Troubles-related offences were human rights compliant. The NIHRC is concerned that the current draft of the Bill does not include a mechanism to assess whether previous investigations were human rights compliant, and if not, to determine that they should fall within the ICRIR's remit.**
- 3.17 The NIHRC advises that to justify the proposed end date of 10 April 1998 a review confirming that offences after this date have been investigated or have the option of being investigated in line with human rights obligations is required.**
- 3.19 The NIHRC is gravely concerned that the benefit of a broad temporal scope within this Bill will be ineffective in practice due to this Bill's general incompatibility with the ECHR, the UK Supreme Court's ruling in *McQuillan, McGuigan and McKenna* [2021] and the arguably non-compliant approach proposed towards positive obligations in the Bill of Rights Bill.**
- 3.24 The NIHRC welcomes the recognition within the current draft of the Bill that the NI conflict extended beyond NI. However, the NIHRC is gravely concerned that the ICRIR's mandate and approach to investigations as proposed by the present Bill will significantly hinder the ability for other States to satisfy their procedural obligations regarding the NI conflict.**

3.35 The NIHRC advises that the proposed provisions within the current draft of the Bill relating to the retention and use of biometric data are largely in line with human rights standards. However, to ensure proportionality as required by human rights standards, the present Bill should include a requirement that biometric data retained for the purposes of ICRIR's work must be relevant to that work.

4.12 The NIHRC is very concerned by the lack of accountability, equality and public scrutiny within the proposed immunity scheme as set out in the current draft of this Bill. The NIHRC remains of the view that an immunity scheme such as that proposed by the current draft of the Bill is not lawful and is not human rights compliant.

4.19 The NIHRC advises that, while welcomed, excluding Troubles-related sexual offences from the immunity scheme is insufficient to overcome its broader concerns about the immunity scheme proposed by the present Bill.

5.8 The NIHRC is gravely concerned that the immediacy of the proposed changes to a victim's access to justice within the current draft of the Bill closes off any pursuit of justice outside of the ICRIR and is therefore incompatible with human rights and the Belfast (Good Friday) Agreement.

Annex 2: List of Human Rights Standards

1.1 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems.²⁷⁷ The relevant regional and international treaties in this context include:

- CoE European Convention on Human Rights 1950 (ECHR);²⁷⁸
- UN International Covenant on Civil and Political Rights 1966 (ICCPR);²⁷⁹
- UN International Convention on the Elimination of All Forms of Racial Discrimination 1965 (UN CERD);²⁸⁰
- UN Convention on the Elimination of All Forms of Discrimination against Women 1981 (UN CEDAW);²⁸¹
- UN Convention against Torture 1984 (UN CAT);²⁸²
- UN Convention on the Rights of the Child 1989 (UN CRC);²⁸³ and
- UN Convention on the Rights of Persons with Disabilities 2006 (UN CRPD).²⁸⁴

1.2 In addition to these standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:

²⁷⁷ The NI Executive is subject to the obligations contained within the specified regional and international treaties by virtue of the United Kingdom (UK) government's ratification. In addition, the NI Act 1998, Section 26(1) provides that "if the Secretary of State considers that any action proposed to be taken by a Minister or NI department would be incompatible with any international obligations... [s]he may by order direct that the proposed action shall be taken". The NIHRC further recalls that the NI Act 1998, Section 24(1)(a) states that "a Minister or NI department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act... is incompatible with any of the Convention rights".

²⁷⁸ Ratified by the UK in 1951.

²⁷⁹ Ratified by the UK in 1976.

²⁸⁰ Ratified by the UK in 1969.

²⁸¹ Ratified by the UK in 1986.

²⁸² Ratified by the UK in 1988.

²⁸³ Ratified by the UK in 1991.

²⁸⁴ Ratified by the UK in 2009.

- UN Human Rights Committee General Comment No 16;²⁸⁵
- UN Economic and Social Council resolution on effective prevention and investigation of extra-legal, arbitrary and summary executions;²⁸⁶
- UN Declaration on the protection of all persons from enforced disappearances;²⁸⁷
- UN Independent Expert, Diane Orentlicher's report on combatting impunity;²⁸⁸
- UN General Assembly resolution on right to a remedy;²⁸⁹
- UN High Commissioner for Human Rights study on right to truth;²⁹⁰
- UN Special Rapporteur on extrajudicial summary or arbitrary executions, Philip Alston's report;²⁹¹
- UN Committee against Torture (UN CAT Committee) General Comment No 2;²⁹²
- UN General Assembly guidance note on transitional justice;²⁹³
- UN Special Rapporteur on promotion of truth, Pablo de Greiff's report;²⁹⁴
- UN CAT Committee General Comment No 3;²⁹⁵
- UN CRPD Committee General Comment No 2;²⁹⁶
- UN Human Rights Committee Concluding Observations on the UK;²⁹⁷

²⁸⁵ UN Human Rights Committee, 'UN Human Rights Committee General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation', 8 April 1988.

²⁸⁶ UN Economic and Social Council, 'Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions', 24 May 1989.

²⁸⁷ A/RES/47/133, 'Declaration on the Protection of All Persons from Enforced Disappearance', 18 December 1992.

²⁸⁸ E/CN.4/2005/102/Add.1, 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher', 8 February 2005.

²⁸⁹ UN General Assembly, 'Resolution 60/147: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', 16 December 2005.

²⁹⁰ E/CN.4/2006/91, 'Study on the Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights', 8 February 2006.

²⁹¹ E/CN.4/2006/53, 'Report of the UN Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Philip Alston', 8 March 2006

²⁹² CAT/C/GC/2, 'UN CAT Committee General Comment No 2', 24 January 2008.

²⁹³ UN General Assembly, 'Guidance Note of the Secretary-General: UN Approach to Transitional Justice' (UNGA, 2010).

²⁹⁴ A/HRC/21/46, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff', 9 August 2012.

²⁹⁵ CAT/C/GC/3, 'UN Committee against Torture General Comment No 3', 13 December 2012.

²⁹⁶ CRPD/C/GC/2, 'UN CRPD Committee General Comment No 2: Accessibility', 22 May 2014

²⁹⁷ CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI', 17 August 2015

- Revised Minnesota Protocol on the investigation of a potentially unlawful death;²⁹⁸
- CoE European Commission for Democracy through Law's rule of law checklist;²⁹⁹
- CoE Committee of Ministers 2016 Decision on McKerr Group of cases;³⁰⁰
- UN Special Rapporteur on the promotion of truth, Pablo de Greiff, report on the UK;³⁰¹
- UN CEDAW Committee General Comment No 35;³⁰²
- UN Human Rights Committee General Comment No 36;³⁰³
- UN CAT Committee Concluding Observations on the UK;³⁰⁴
- CoE Committee of Ministers 2022 Decision on McKerr Group of cases.³⁰⁵

1.3 The NIHR further advises on the UK Government's commitment in Protocol Article 2 to ensure there is no diminution of rights, safeguards and equality of opportunity in the relevant section of the Belfast (Good Friday) Agreement as a result of the UK's withdrawal from the EU. This is given effect in UK law by section 7A of the EU (Withdrawal) Act 2018. The relevant EU measures in this context include:

- EU Victims' Directive;³⁰⁶ and
- EU General Data Protection Regulation.³⁰⁷

²⁹⁸ UN Office of the High Commissioner for Human Rights, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (OHCHR, 2016).

²⁹⁹ CDL-AD(2016)007rev, 'CoE European Commission for Democracy Through Law: Rule of Law Checklist', 18 March 2016.

³⁰⁰ 'CoE Committee of Ministers Item H46-42 McKerr Group v UK (Application No. 28883/95)', 7-8 June 2016.

³⁰¹ A/HRC/34/62/Add.1, 'Report of the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff on his Mission to the UK of Great Britain and NI', 17 November 2016.

³⁰² CEDAW/C/GC/35, 'UN CEDAW Committee General Comment No 35: Gender Based Violence Against Women Updating General Comment No 19', 14 July 2017.

³⁰³ CCPR/C/GC/36, 'UN Human Rights Committee General Comment No 36: Right to Life', 30 October 2018.

³⁰⁴ CAT/C/GBR/CO/6, 'UN Committee against Torture Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019.

³⁰⁵ CM/Notes/1436/H46-35, 'CoE Committee of Ministers Decision on McKerr Group v UK (Application No 28883/95)', 10 June 2022.

³⁰⁶ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

³⁰⁷ Regulation (EU) 2016/679, 'Regulation of the European Parliament and of the Council on the Protection of Natural Persons with regard to the Processing of Personal Data on the Free Movement of such Data, and Repealing Directive 95/46/EC', 27 April 2016.

Annex 3: UK Government Commitments on Legacy

Issues

- 1.1 The Commission considers that a summary of the background to and context of the current Bill is helpful, as set out in this Annex. This Bill does not arise out of the agreement of political representatives in NI, nor from agreement with the Government of Ireland. This has a fundamental bearing on the legitimacy of the Bill, given its clear departure from core human rights standards and the rule of law.
- 1.2 For present purposes, the starting point is the Belfast (Good Friday) Agreement 1998 as a foundational, constitutional document protection of which is said to guide and drive the UK Government's approach to legacy.

Belfast (Good Friday) Agreement

- 1.3 The Belfast (Good Friday) Agreement, in the declaration of support, is described as "a truly historic opportunity for a new beginning."³⁰⁸ The parties continued "we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all."³⁰⁹ Human rights, as protected by the ECHR, were clearly central to the 1998 Agreement. By way of example, the safeguards for the 1998 Agreement were to include provisions prohibiting incompatible legislation by the NI Assembly. Furthermore, the NIHRC was established to advise on and oversee such compatibility. The safeguards were to include "arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR."
- 1.4 The Belfast (Good Friday) Agreement states that "the British Government will complete incorporation into NI law of the ECHR, with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency".³¹⁰

³⁰⁸ Belfast (Good Friday) Agreement, 10 April 1998, at Declaration of Support.

³⁰⁹ Ibid, at Declaration of Support.

³¹⁰ Ibid, at UK Legislation.

1.5 The Belfast (Good Friday) Agreement recognises the particular importance of reconciliation in the context of victims of violence. It states “the participants believe that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation. They look forward to the results of the work of the NI Victims Commission”.³¹¹

NI Act 1998

1.6 The NI Act 1998 was enacted to give effect to the provisions of the Belfast (Good Friday) Agreement 1998. It established and provided for the institutions, including the NIHRC. The NIHRC is obliged to keep under review “the adequacy and effectiveness in NI of law and practice relating to the protection of human rights”.³¹²

Human Rights Act 1998

1.7 The Human Rights Act 1998, an Act of the UK Parliament, was brought into force across the UK on 4 October 2000. It was intended to give further effect to rights and freedoms guaranteed under the ECHR.

1.8 By virtue of the Human Rights Act, the ECHR is enforceable directly in local courts across the UK. A safeguard for existing human rights is guaranteed by section 11 of the 1998 Act, which provides that a person’s reliance on an ECHR right does not restrict: any other right or freedom conferred by or under any law having effect in any part of the UK; or the right to make any claim or bring any proceedings. In other words, the 1998 Act is intended to enhance existing rights at a domestic level, not to diminish rights.

1.9 The 1998 Act sets out expressly the ECHR rights that are directly enforceable, including the Articles 2 (right to life) and 3 (freedom from torture).

³¹¹ The Commission for Victims and Survivors (NI) has commented on the compatibility of the NI Troubles (Legacy and Reconciliation) Bill with the wishes and needs of victims of violence.

³¹² Section 69(1), NI Act 1998.

Protocol Article 2

- 1.10 Protocol Article 2 requires the UK Government to ensure that no diminution of rights, safeguards and equality of opportunities contained in the relevant part of the Belfast (Good Friday) Agreement 1998 occurs as a result of the UK's withdrawal from the EU. This includes an obligation to "keep pace" with any changes made to the six Annex 1 Equality Directives which improve the minimum levels of protection available, on or after 1 January 2021.³¹³
- 1.11 For other EU obligations which underpin the rights, safeguards and equality of opportunity in Article 2, the UK Government commitment to ensure 'no diminution' is measured by the relevant EU standards on 31 December 2020.³¹⁴
- 1.12 Victims' rights are addressed in the relevant chapter of the Belfast (Good Friday) Agreement which recognises "the right of victims to remember as well as to contribute to a changed society".³¹⁵ The EU Victims' Directive has been acknowledged by the UK Government as falling within the scope of Protocol Article 2.³¹⁶

Stormont House Agreement 2014

- 1.13 The Stormont House Agreement 2014 puts its terms in context. It states:

as part of the transition to long-term peace and stability the participants agree that an approach to dealing with the past is necessary which respects the following principles:

³¹³ UK Government, 'UK Government commitment to no-diminution of rights, safeguards and equality of opportunity in Northern Ireland' (NIO, 2020), at 13.

³¹⁴ Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000; Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000; Directive 2004/113/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services', 13 December 2004; Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006; Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.; Directive 79/7/EEC, 'EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

³¹⁵ Belfast (Good Friday) Agreement, 10 April 1998, at Part 6 on Rights, Safeguards and Equality of Opportunity.

³¹⁶ UK Government, 'UK Government commitment to no-diminution of rights, safeguards and equality of opportunity in Northern Ireland' (NIO, 2020), at 13.

promoting reconciliation; upholding the rule of law; acknowledging and addressing the suffering of victims and survivors; facilitating the pursuit of justice and information recovery; is human rights compliant; and is balanced, proportionate, transparent, fair and equitable.³¹⁷

1.14 The Stormont House Agreement was signed following 11 weeks of talks between the UK Government the five largest political parties in the NI Assembly and the Government of Ireland, in accordance with the three-stranded approach reflected in the Belfast (Good Friday) Agreement 1998.

1.15 Of particular relevance, the UK Government provided:

legislation will establish a new independent body to take forward investigations into outstanding Troubles-related deaths; the Historical Investigations Unit. The body will take forward outstanding cases from the Historical Enquiries Team process, and the legacy work of the Police Ombudsman for NI. A report will be produced in each case. Processes dealing with the past should be victim-centred. Legacy inquests will continue as a separate process to the Historical Investigations Unit. Recent domestic and European judgments have demonstrated that the legacy inquest process is not providing access to a sufficiently effective investigation within an acceptable timeframe. In light of this, the Executive will take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements.

Appropriate governance arrangements will be put in place to ensure the operational independence of the two different elements of the work of the Historical Investigations Unit.

The Historical Investigations Unit will have dedicated family support staff who will involve the next of kin from the beginning and provide them with expert advice and other necessary support throughout the process.

The Historical Investigations Unit will consider all cases in respect of which Historical Enquiries Team and Police Ombudsman NI have not completed their work, including Historical Enquiries Team cases which have already been identified as requiring re-examination. Families may apply

³¹⁷ Stormont House Agreement, 23 December 2014, at para 21.

to have other cases considered for criminal investigation by the Historical Investigations Unit if there is new evidence, which was not previously before the Historical Enquiries Team, which is relevant to the identification and eventual prosecution of the perpetrator.

As with existing criminal investigations, the decision to prosecute is a matter for the Director of Public Prosecutions and the Historical Investigations Unit may consult his office on evidentiary issues in advance of submitting a file.

When cases are transferred from Historical Enquiries Team and Police Ombudsman NI, all relevant case files held by those existing bodies will be passed to the new body. In respect of its criminal investigations, the Historical Investigations Unit will have full policing powers. In respect of the cases from Police Ombudsman NI, the Historical Investigations Unit will have equivalent powers to that body.

The UK Government makes clear that it will make full disclosure to the Historical Investigations Unit. In order to ensure that no individuals are put at risk, and that the [UK] Government's duty to keep people safe and secure is upheld, Westminster legislation will provide for equivalent measures to those that currently apply to existing bodies so as to prevent any damaging onward disclosure of information by the Historical Investigations Unit.³¹⁸

A Fresh Start – Stormont Agreement and Implementation Plan

2015

1.16 The then First Minister, Peter Robinson, and Deputy First Minister, Martin Magennis, stated that:

we reached agreement on this framework fully aware of the many areas of disagreement and mistrust that have bedevilled progress in embedding peace and reconciliation. Confidence has to be built if we are to fully overcome the legacy of our tragic past. The essence of this Agreement, the vision which must inspire our leadership, is our shared belief that the civic values of respect, mutuality, fairness and justice must take precedence over those narrow values

³¹⁸ UK Government, 'NI Troubles (Legacy and Reconciliation) Bill: Explanatory Notes' (UK Gov, 2022), at paras 30-36.

that too often manifest in division. This document signals our resolve to engender the sea change so longed for by our community – a new beginning, an opportunity to move forward with a real sense of hope and purpose”.³¹⁹

1.17 The then Secretary of State for NI, Theresa Villers, however noted:

despite some significant progress we were not able at this stage to reach a final agreement on the establishment of new bodies to deal with the past. The Government continues to support these provisions of the Stormont House Agreement and to providing better outcomes for victims and survivors. We will now reflect with the other participants on how we can move forward and achieve broad consensus for legislation.³²⁰

1.18 Despite that the Secretary of State for NI recorded that the Fresh Start Agreement “will be a further stage in delivering one of the [UK] Government’s key manifesto commitments for NI, the full implementation of the Stormont House Agreement”.³²¹

1.19 And, the then Minister of Foreign Affairs and Trade for Ireland, Charlie Flanagan said:

while important progress was made on taking forward aspects of the Stormont House Agreement dealing with the legacy of the past, it did not prove possible to resolve all of the key issues within the timescale of this negotiation. Nevertheless, the two Governments will persist in our efforts to secure an agreed basis for the establishment of the institutions dealing with the past envisaged in the Stormont House Agreement.³²²

Public consultation

1.20 A public consultation on addressing the legacy of the past was launched on 11 May 2018 and ran for 21 weeks. The then Secretary of State for NI, Julian Lewis MP, identified in the opening to the consultation, that the UK Government’s approach to the legacy of NI

³¹⁹ ‘A Fresh Start: The Stormont Agreement and Implementation Plan’, 17 November 2015, at 6.

³²⁰ Ibid, at 8.

³²¹ Ibid.

³²² Ibid, at 11.

and 'dealing with the past' would be confined by four important principles.

1.21 Those principles were as follows:

first, and foremost, any way forward must seek to meet the needs of victims and survivors. Second, it must promote reconciliation so that, in coming to terms with the past, we enable the people of Northern Ireland to move on to build a better future. Third, in order to build a shared future for all, the proposals must reflect broad political consensus and be balanced, fair, equitable, and crucially proportionate. Fourth, the proposals must follow the rule of law.³²³

1.22 The Secretary of State for NI recorded "as the manifesto for NI at the 2017 General Election made clear", the UK Government "continue to believe that any approach to the past must be fully consistent with the rule of law. Conservatives in government have consistently said that we will not introduce amnesties or immunities from prosecution".³²⁴ It continued "this Government has always shared the view that amnesties are not the right approach and believes that justice should be pursued."³²⁵

1.23 In August 2018, the NIHRC provided advice.³²⁶ The NIHRC noted the importance of the recognition by both the UK and Irish Governments of outstanding investigations and allegations into Troubles-related incidents. They committed to co-operation with all relevant bodies for their effective operation and to bring forward legislation, where necessary, to better enable them. The NIHRC's advice, however, raised a number of concerns and made a number of recommendations to ensure that the Stormont House Agreement Bill was human rights compliant. There was a deficit found between the Stormont House Agreement Bill and the Human Rights Act 1998, but the NIHRC resolved that with certain amendments human rights compliance could be achieved.

³²³ NI Office, 'Addressing the Legacy of NI's Past: Analysis of the Consultation Responses' (NIO, 2019), at 4.

³²⁴ NI Office, 'Addressing the Legacy of NI's Past: Consultation Paper' (NIO, 2018), at 4.

³²⁵ Ibid.

³²⁶ NI Human Rights Commission, 'Submission to NI Office's Consultation on Addressing the Legacy of Northern Ireland's Past' (NIHRC, 2018).

1.24 The UK Government did not respond to the NIHRC's advice.

Consultation Responses Analysis

1.25 There were 17,000 responses to the NI Office's consultation on addressing NI's past. A report by the NI Office analysing these responses was published in July 2019. The report noted "as the Secretary of State has made clear, new ways to address the legacy of the past will only succeed if the institutions can command broad support and trust from the community".³²⁷

1.26 In the analysis it states:

the overarching message from the vast majority of those who have responded to the consultation is clear: the current system needs to be reformed and we have an obligation to seek to address the legacy of the past in a way that builds for the future. This means ensuring that the way forward will contribute to a better future and further reconciliation across society. The Government remains fully committed to the implementation of the Stormont House Agreement and it is essential that our work continues.³²⁸

1.27 As is clear, this consultation "provided everyone with an opportunity to comment on the proposals set out in the 2014 Stormont House Agreement including the establishment of the four new legacy institutions".³²⁹ Prominent among the institutions was the Historical Investigations Unit.

1.28 Regarding engagement, the analysis says:

throughout the consultation period, officials attended a range of engagements and public meetings in NI, Great Britain and Ireland in order to discuss and provide further detail on the proposals. Officials also answered questions and heard suggestions and opinions from those present - victims, survivors and many others. We are grateful to all those who took the time to contribute to this important and sensitive discussion. For many, it represented a first

³²⁷ NI Office, 'Addressing the Legacy of NI's Past: Analysis of the Consultation Responses' (NIO, 2019), at 3.

³²⁸ Ibid, at 4.

³²⁹ Ibid, at 6.

opportunity to contribute to the debate around addressing the legacy of the past. It was extremely informative and important to hear directly from victims, survivors and others, and to listen to their experiences and views on the proposals. These views are essential in helping us to build support and confidence from across the community, to arrive at a way forward for dealing with the past, that has the potential to provide better outcomes for: victims; survivors; former police officers and veterans, and for all those affected by the Troubles.³³⁰

New Decade, New Approach

1.29 The New Decade, New Approach Deal, which restored the NI devolved institutions, contains commitments from the UK Government and the Government of Ireland. Parties to New Decade, New Approach:

reaffirmed their commitment to the Declaration of Support contained in the Belfast (Good Friday) Agreement and successor agreements. In doing so, they recognise that the Programme for Government must provide a sustainable basis for the Executive to work together in partnership to serve and deliver for all on the basis of demonstrable and objectively measured need. Reconciliation will be central to the Executive's approach, and there will be a focus on building a united community in a way that has equality and mutual respect to the fore.³³¹

1.30 New Decade, New Approach stated:

in moving to a better, more prosperous and shared future the parties recognise the need to address the legacy of the past. To that end, the parties are committed to working together and to doing everything possible to heal wounds and eliminate the issues that divide us.³³²

1.31 The UK Government expressly committed to:

³³⁰ Ibid, at 7.

³³¹ NI Office, 'New Decade, New Approach' (NIO, 2020), at Part 2, para 20.

³³² Ibid, at Part 2, para 24.

within 100 days, publish and introduce legislation in the UK Parliament to implement the Stormont House Agreement, to address NI legacy issues. The [UK] Government will now start an intensive process with the Northern Ireland parties, and the Irish Government as appropriate, to maintain a broad-based consensus on these issues, recognising that any such UK Parliament legislation should have the consent of the NI Assembly.³³³

1.32 In respect of legacy, New Decade, New Approach states that “the [UK] Government will provide funding to support the implementation of the Stormont House Agreement proposals on legacy”.³³⁴ The Government of Ireland:

affirms its commitment to working with the UK Government to support the establishment of the Stormont House Agreement legacy institutions as a matter of urgency, including by introducing necessary implementing legislation in the Oireachtas, to deal with the legacy of the Troubles and support reconciliation, meeting the legitimate needs and expectations of victims and survivors.³³⁵

1.33 The UK commitments made to veterans were stated expressly to:

introduce UK-wide legislation to further incorporate the Armed Forces Covenant into law and support full implementation of the Armed Forces Covenant. 19. Appoint a NI Veterans' Commissioner to act as an independent point of contact to support and enhance outcomes for veterans in NI. Initiate a review of the Aftercare Service in NI which will consider whether the remit of the Aftercare Service should be widened to cover all HM Forces veterans living in Northern Ireland with service-related injuries and conditions. Ensure that the work of the War Memorials Trust who protect and conserve war memorials across the UK is better promoted and understood in NI.³³⁶

³³³ Ibid, at Annex A, para 16.

³³⁴ Ibid, at Annex A.

³³⁵ Ibid, at Annex B.

³³⁶ Ibid, at Annex A, paras 18-21.

Ministerial Statement 2020

1.34 In March 2020, the former Secretary of State for NI, Brandon Lewis MP, laid a Written Ministerial Statement which said:

we are setting out how we propose to address the legacy of the past in NI in a way that focuses on reconciliation, delivers for victims, and ends the cycle of reinvestigations into the Troubles in NI that has failed victims and veterans alike - ensuring equal treatment of NI veterans and those who served overseas...

While there must always be a route to justice, experience suggests that the likelihood of justice in most cases may now be small, and continues to decrease as time passes. Our view is that we should now therefore centre our attention on providing as much information as possible to families about what happened to their loved ones - while this is still possible.

Our proposals have therefore evolved to remain true to the principles of the Stormont House Agreement but with a greater emphasis on gathering information for families; moving at a faster pace to retrieve knowledge before it is lost; and doing more to help individuals and society to share and understand the tragic experiences of the past.

It is proposed that these measures should be carried out by one independent body to ensure the most efficient and joined-up approach, putting the needs of the individuals most affected at the heart of the process. This body will oversee and manage both the information recovery and investigative aspects of the legacy system, and provide every family with a report with information concerning the death of their loved one...

The [UK] Government will ensure that the investigations which are necessary are effective and thorough, but quick, so we are able to move beyond the cycle of investigations that has, to date, undermined attempts to come to terms with the past. Only cases in which there is a realistic prospect of a prosecution as a result of new compelling evidence would proceed to a full police investigation and if necessary, prosecution. Cases which do not reach this threshold, or subsequently are not referred for prosecution, would be closed and no further investigations or

prosecutions would be possible - though family reports would still be provided to the victims' loved ones. Such an approach would give all participants the confidence and certainty to fully engage with the information recovery process.³³⁷

1.35 The Ministerial statement concluded that the:

[UK] Government believes that this approach would deliver a fair, balanced, and proportionate system that is consistent with the principles of the Stormont House Agreement and deliver for all those who have been affected by the events of the past; striking a balance in enabling criminal investigations to proceed where necessary, while facilitating a swift transition to an effective information recovery mechanism before this information is lost forever.

The [UK] Government is committed to introducing legislation in line with our commitments in 'New Decade, New Approach', to move forward and deliver for all communities in Northern Ireland and beyond.³³⁸

Queen's Speech 2021

1.36 In May 2021, the Queen's Speech signalled an intention to address the legacy of the past in NI. The Queen stated that "my Ministers will promote the strength and integrity of the union. Measures will be brought forward to strengthen devolved Government in NI and address the legacy of the past".³³⁹

Command Paper on Addressing Legacy of the NI's Past

1.37 The former Secretary of State for NI, Brandon Lewis MP, published a Command Paper on addressing the legacy of NI's past in July 2021. The Command Paper states that:

the intense focus on divisive legal processes continues to drive wedges between communities and undermine public confidence in the police as they go about their work today.

³³⁷ NI Office, 'Press Release: UK Government sets out way forward on the legacy of the past in NI', 18 March 2020.

³³⁸ Ibid.

³³⁹ UK Government, 'Queen's Speech 2021', 11 May 2021.

Lengthy, drawn out and complex legal processes stifle the critical information recovery and reconciliation measures that could help many families and frequently lead to years of uncertainty for those under scrutiny. In addition to the grave impact on individuals, this also prevents wider society from moving forward...

We are taking forward an intensive and time-limited period of engagement and have committed to bringing forward legislation to address the legacy of the past as soon as possible in this parliamentary session. We are committed to working closely with the Government of Ireland as we progress these proposals. The purpose of this paper is to set out a series of proposed measures for addressing the past that will be considered as part of the ongoing engagement process with a view to informing discussion and subsequent legislation.³⁴⁰

NI Troubles (Legacy and Reconciliation) Bill

1.38 The stated intention of the NI Troubles (Legacy and Reconciliation) Bill is to “provide better outcomes for victims, survivors and their families, giving veterans the protections they deserve and focusing on information recovery and reconciliation”.³⁴¹ The Bill “proposes to end legal proceedings concerning Troubles-related conduct and provide conditional immunity from prosecution for those who cooperate with investigations conducted by a newly established Independent Commission for Reconciliation and Information Recovery”.³⁴²

Equality Impact Assessment of NI Troubles (Legacy and Reconciliation) Bill

1.39 The Equality Impact Assessment of the NI Troubles (Legacy and Reconciliation) Bill states that “the policy intent is to help NI’s wider society to look forward rather than back by delivering measures intended to facilitate reconciliation”.³⁴³ It states “these legacy proposals would have a significant positive impact insofar as the

³⁴⁰ Secretary of State for NI, ‘Command Paper: Addressing the Legacy of NI’s Past’ (UK Gov, 2021), at 6.

³⁴¹ Joanna Dawson et al, ‘NI Troubles (Legacy and Reconciliation) Bill 2022-2023’ (HoC, 2022), at 6.

³⁴² Ibid.

³⁴³ NI Office, ‘Equality Impact Assessment: Proposals for Addressing the Legacy of NI’s Past’ (NIO, 2022), at para 2.

proposals are for the benefit of all victims and families wishing to seek information about Troubles related deaths or very serious injuries, as well as wider society which would benefit from collective truth recovery and the promotion of reconciliation".³⁴⁴

Second Reading of NI Troubles (Legacy and Reconciliation) Bill

1.40 During second reading of the NI Troubles (Legacy and Reconciliation) Bill the former Secretary of State for NI, Brandon Lewis MP, noted that the legislation "marks a definitive shift in focus to put information recovery for families at its core in recognition of that".³⁴⁵ The Secretary of State for NI explained that because most Troubles cases were more than 40 years old the chances of success were "vanishingly small".³⁴⁶

1.41 The Secretary of State for NI said:

the Troubles continues to cast a long shadow over all those impacted and wider society. Community tensions and divisive politics undermine stability. This legacy of the Troubles is an issue that successive governments have attempted but ultimately failed to resolve - bluntly, because it concerns one of the most complex, sensitive and difficult periods of our history.³⁴⁷

1.42 The Secretary of State for NI added:

faith in the criminal justice model to deal with legacy cases has been undermined. The high standard of proof required to secure a successful prosecution, combined with the passage of time and difficulty in securing sufficient evidence, means that victims and their families very rarely, if ever, obtain the outcome they seek from that process...

Drawing its core principles from the important work of the Stormont House Agreement, this legislation is focused on effective and timely information recovery, providing

³⁴⁴ NI Office, 'Equality Impact Assessment: Proposals for Addressing the Legacy of NI's Past' (NIO, 2022), at para 5.

³⁴⁵ NI Office, 'NI Troubles (Legacy and Reconciliation) Bill: Second Reading Opening Speech by Secretary of State for NI, Brandon Lewis MP', 24 May 2022.

³⁴⁶ Ibid.

³⁴⁷ Ibid.

answers and accountability to families and survivors and aiding reconciliation, to help society move forward.

And it will deliver on our manifesto commitment to the veterans of our armed forces, security services and the Royal Ulster Constabulary. It will provide the men and women who served in NI, to protect life, with the certainty they deserve.

No longer will our veterans, the vast majority of whom served in NI with distinction and honour, have to live in perpetual fear of getting a knock at the door for actions taken in protection of the rule of law many decades ago. With this Bill, our veterans can have the certainty they deserve - and we will fulfil our manifesto pledge to end the cycle of investigations that has plagued too many of them for too long.

My message to victims and survivors, many of whom have engaged with us since we published the Command Paper last year, is that we have listened carefully. We understand that no matter how small the prospects are of successful criminal justice outcomes, that possibility should not be removed entirely.³⁴⁸

³⁴⁸ Ibid.

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