

Summary Briefing: NI Troubles (Legacy and Reconciliation) Bill

September 2022

1.0 Overview

- 1.1 The Northern Ireland Human Rights Commission (NIHRC)¹ is gravely concerned that the current draft of the NI Troubles (Legacy and Reconciliation) 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 contrary to the Belfast (Good Friday) Agreement 1998³ and the Stormont House Agreement 2014.⁴
- 1.2 The current draft of the Bill does not reflect the views of 17,000 consultees who engaged with the NIO on the previous legacy bill⁵ and is staunchly opposed within NI, including among victims, survivors and their families.⁶ 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.⁷ There is also little evidence that expert views on human rights compliance were meaningfully considered when drafting the present Bill.

¹ The 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).

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

⁴ 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.

⁵ NI Office, 'Addressing the Legacy of NI's Past: Analysis of the Consultation Responses' (NIO, 2019), at 4.

⁶ NI Affairs Committee, 'Oral Evidence: Addressing the Legacy of NI's Past – The UK Government's Proposals – Oral Evidence', 7 June 2022.

⁷ CoE Commissioner for Human Rights, 'Press Release: UK – Backsliding on human rights must be prevented', 4 July 2022.

- 1.3 As outlined below, the NIHRC is also concerned that the Bill may diminish the rights of victims, in breach of the UK's obligations under Article 2 of the Ireland/Northern Ireland Protocol to the UK EU Withdrawal Agreement ('Protocol Article 2').⁸
- 1.4 The NIHRC concludes that the present Bill requires 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 This briefing provides an overview of the NIHRC's comprehensive advice, which is attached and available at www.nihrc.org.

2.0 Reviews of Deaths

Effective investigation

- 2.1 The review of cases undertaken by the Independent Commission for Reconciliation and Information Recovery (ICRIR) do not meet the procedural obligations under Articles 2 and 3 ECHR. Investigations must be in line with the rule of law, transparent, ensure accountability and provide an effective remedy.
- 2.2 The proposed role of the Secretary of State's influence and involvement across the ICRIR's operations raises serious concerns as to whether the ICRIR's work can be sufficiently independent and impartial.⁹
- 2.3 A thorough investigation requires that inquiries be capable of establishing the facts, identifying the perpetrator and follow all lines of inquiry.¹⁰ It is the NIHRC's view that this cannot be achieved by a

⁸ In Protocol Article 2 the UK Government undertakes to "ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union...".

⁹ The Secretary of State is involved in making the rules/guidance, proposing cases for review, determining resources and monitoring the ICRIR. ICRIR's work can be concluded when the "Secretary of State is satisfied that the need for ICRIR" to exercise its functions "has ceased", as opposed to completion of the ICRIR's mandate. See Clauses 2(1), 9(3), 10(2), 32 and 33(1), NI Troubles (Legacy and Reconciliation) Bill.

¹⁰ *Ramsahai and Others v Netherlands* (2007) ECHR 393, at para 324; *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.

light-touch review or producing a basic historical record as is proposed.

- 2.4 The requirement to conduct reasonably prompt and expeditious investigations is not a reason for this legislation to be rushed through without meaningful consultation or the support of victims and survivors.
- 2.5 The ICRIR should be required to publish all 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, safeguards should ensure these are not applied arbitrarily, and the commitment of effective public scrutiny is not illusory.
- 2.6 The proposed definition of 'close family member' is too narrow, and should extend to grandparents, aunts, uncles, nieces or nephews. It should also 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.

3.0 Scope of the ICRIR

Definition of offences

- 3.1 The present Bill proposes that the ICRIR will only consider for review cases that fall within two categories.¹¹ The ICRIR will only be 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,¹² with no alternative mechanism available for such cases. A prescriptive list, limited to extreme injuries and not accommodating rehabilitative injuries, is unlikely to be human rights compliant. It ignores the absolute nature of the right to freedom from torture.¹³ It is also a notable departure from the Victims and Survivors (NI) Order 2006.¹⁴ The Bill should adopt a broad approach

¹¹ 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. See Clauses 1(6), 9 and 10, NI Troubles (Legacy and Reconciliation) Bill.

¹² Clauses 25 and 26, NI Troubles (Legacy and Reconciliation) Bill.

¹³ Article 15(2), ECHR.

¹⁴ Article 3 of the Victims and Survivors (NI) Order 2006 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",

to determining what offences fall within the ICRIR's remit. There should be flexibility to ensure the individual circumstances of each potential case and broader human rights commitments can be considered and are used to inform the determination of whether a case should be considered by the ICRIR.

Non-duplication

3.2 There should be an assessment of all previous investigations into Troubles-related offences, to determine human rights compliance. The NIHRC is concerned that there is no mechanism to assess the compliance of previous investigations, and where not, to determine that they should fall within the ICRIR's remit.

Temporal scope

3.3 The current draft of the Bill proposes defining Troubles-related offences as those between 1 January 1966 and 10 April 1998.¹⁵ While the end date reflects the signing of the Belfast (Good Friday) Agreement, Troubles-related offences continue to occur. To justify the proposed end date, 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.

Jurisdictional scope

3.4 Recognition that the NI conflict extended beyond NI is welcomed.¹⁶ However, the NIHRC is concerned that the ICRIR's mandate and approach to investigations, as proposed, will significantly hinder the ability for other States to satisfy their procedural obligations regarding the NI conflict. The current draft of the Bill includes a list of specified persons or organisations to which disclosure of sensitive information is permitted.¹⁷ 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.

"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".

¹⁵ Clause 52(2), NI Troubles (Legacy and Reconciliation) Bill.

¹⁶ Clause 1(7), NI Troubles (Legacy and Reconciliation) Bill.

¹⁷ Clause 3(2) of Schedule 5, NI Troubles (Legacy and Reconciliation) Bill.

Biometric data

- 3.5 The proposed provisions within the current draft of the Bill relating to the retention and use of biometric data¹⁸ are largely in line with human rights standards. However, to ensure proportionality the Bill should include a requirement that biometric data retained for the purposes of ICIR'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 and other related human rights provisions.¹⁹ This reflects the limited nature of the right to life and absolute nature of freedom from torture.²⁰
- 4.2 Alternative views expressed within ECtHR jurisprudence rely on the amnesty being in the public interest²¹ or an existing effective reconciliation process and/or form of compensation to the victims.²² This is not the case in NI. There is no buy-in from victims, survivors and elected representatives. The Victims Payments scheme is a compromise,²³ but is not an all-encompassing form of compensation.
- 4.3 The UK Government frequently highlights the South Africa Truth and Reconciliation Commission as an example of where a conditional immunity scheme has been used.²⁴ However, there are several differences which mean this comparison is of limited use.²⁵

¹⁸ Clause 32, NI Troubles (Legacy and Reconciliation) Bill.

¹⁹ *Margus v Croatia* (2014) ECHR 523, at para 126; *Abdülşamet Yamana v Turkey* (2004) ECHR 572, at para 55; *Ali and Ayşe 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; 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).

²⁰ Articles 2, 3 and 15(2), European Convention on Human Rights 1950.

²¹ *Duarjdin v France*, Application No 16734/90, Judgment of 2 September 1991; *Tarbuk v Croatia* (2012) ECHR 2049, at para 50.

²² *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.

²³ Victims' Payments Regulations 2020.

²⁴ UK Government, 'NI Troubles (Legacy and Reconciliation) Bill: ECHR Memorandum' (UK Gov, 2022), at paras 48-50.

²⁵ 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. 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.

- 4.4 The proposed conditional immunity scheme appears to arbitrarily distinguish between those eligible for immunity.²⁶ This may constitute a violation of the right to freedom from non-discrimination (Article 14 ECHR).
- 4.5 Within the present Bill, immunity decisions rely solely on information provided by the person requesting immunity.²⁷ This does not include an express requirement that victims or family members are informed of an application for immunity or the outcome of that request. There is also no express requirement for the ICIR to provide reasons on immunity decisions.
- 4.6 The UK Government has recognised the EU Victims' Directive²⁸ as falling within the scope of the 'no diminution of rights' commitment in Protocol Article 2.²⁹ The right to an effective remedy is recognised as a general principle of EU law³⁰, retained under the EU (Withdrawal) Act 2018³¹ and relevant to the interpretation of the Victims' Directive. The mandatory and irrevocable outcome of the immunity decision in preventing prosecutions³², leaves no avenue for a victim to be heard, or request a review of a decision not to prosecute, as required under the Directive and general principles.³³ This may therefore breach Protocol Article 2.
- 4.7 The welcomed exclusion of Troubles-related sexual offences from the immunity scheme is insufficient to overcome these broader concerns about the immunity scheme proposed by the present Bill.

²⁶ Clauses 18 and 21(1), NI Troubles (Legacy and Reconciliation) Bill.

²⁷ Clause 18, NI Troubles (Legacy and Reconciliation) Bill.

²⁸ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

²⁹ NI Office, 'UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What does it Mean and How will it be Implemented?' (NIO, 2020), at para. 13. See also footnote 8 for a summary of Protocol Article 2.

³⁰ See for example, *Gaviero* Joined Cases C-444/09 and C-456/09.

³¹ Section 5(5), EU Withdrawal Act 2018.

³² Clauses 36 and 37, NI Troubles (Legacy and Reconciliation) Bill.

³³ Articles 6 and 11 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

5.0 Cessation of Proceedings

5.1 The present Bill proposes to immediately cease criminal investigations (other than those referred by the ICIR to the prosecutor), police complaints, civil proceedings and inquests/inquiries. 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 ICIR and is therefore incompatible with human rights and the Belfast (Good Friday) Agreement.

For queries please contact: Rhyannon.Blythe@nihrc.org