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Date: 07/05/2024

DH-DD(2024)518

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Meeting: 1501st meeting (June 2024) (DH)

Communication from an NHRI (Northern Ireland Human Rights Commission) (24/04/2024) concerning the group of cases MCKERR v. the United Kingdom (Application No. 28883/95).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1501^e réunion (juin 2024) (DH)

Communication d'une INDH (Northern Ireland Human Rights Commission) (24/04/2024) relative au groupe d'affaires MCKERR c. Royaume-Uni (requête n° 28883/95) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

DGI

23 AVR. 2024

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH



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: NI Troubles (Legacy
and Reconciliation) Act 2023**

April 2024

Table of Contents

1.0	Introduction	3
2.0	Investigations	5
	Purpose of an investigation	6
	Independent and impartial investigations	12
	Thorough investigations	15
	State’s own motion	16
	Prompt commencement and expedition	16
	Public Scrutiny	17
3.0	Scope of the ICRIR	20
	Definition of offences	20
	Non-duplication	21
4.0	Conditional Immunity Scheme	24
5.0	Cessation of Proceedings	28

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to section 69(1) of the Northern Ireland Act 1998, is required to keep under review the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). The NIHRC is also required, by section 78A(1) of the Northern Ireland Act 1998, to monitor the implementation of Article 2 of the Windsor Framework, to ensure there is no diminution of rights protected in the “Rights, Safeguards and Equality of Opportunity” chapter of the Belfast (Good Friday) Agreement 1998 as a result of the UK’s withdrawal from the EU.¹ In accordance with these statutory duties, the following Rule 9 submission is made to the CoE Committee of Ministers on the NI Troubles (Legacy and Reconciliation) Act 2023 (the 2023 Act).
- 1.2 In February 2024, the High Court of Justice in NI considered the compatibility of the 2023 Act with the European Convention on Human Rights (ECHR) and Windsor Framework Article 2. The facts of the joined cases to which the High Court attached significance are set out in the judgment.² The NIHRC disagrees with the significance attached to some factors (and not others) and is also concerned at the absence of materially relevant factors, such as the investigations of the Police Ombudsman for NI’s office, the appointment process and the independence of the Independent Commission on Reconciliation and Information Recovery (ICRIR). The NIHRC draws particular attention to the following points for consideration by the CoE Committee of Ministers.
- 1.3 The following is welcomed by the NIHRC. The High Court held that the conditional immunity scheme violates Articles 2 and 3 of the ECHR.³ The High Court also held that the conditional immunity scheme was incompatible with the EU Victims Directive and

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

² *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11.

³ *Ibid*, at paras 187 and 710(i).

therefore in breach of Windsor Framework Article 2.⁴ The High Court held that the retrospective limit imposed on civil proceedings already initiated (i.e. proceedings initiated before 18 November 2023) was a disproportionate interference with ECHR rights at Article 6 and Article 1 of Protocol 1.⁵ Further, the High Court held that the provision that renders certain ICRIR evidence inadmissible in all civil proceedings is an interference with Article 6(1) of the ECHR, which cannot be justified.⁶

- 1.4 The NIHRC is disappointed however by a number of other findings. By way of example, the High Court found that the ICRIR was sufficiently independent and had sufficient scope to conduct an effective investigation to comply with the Article 2 of the ECHR procedural obligation.⁷ The NIHRC continues to offer its strong advice that the ICRIR is neither sufficiently independent nor effective to be able to discharge the State's duties under Articles 2 and 3 of the ECHR.⁸ Such failure is, by extension, a clear breach of the UK's Human Rights Act 1998. The High Court did not give adequate consideration to the relevant submissions on independence.
- 1.5 The NIHRC continues to advise in strong terms that the 2023 Act is incompatible with the Belfast (Good Friday) Agreement 1998 and the Northern Ireland Act 1998.⁹ Moreover, the 2023 Act undermines and is incompatible with the Stormont House Agreement 2014,¹⁰ the Fresh Start Agreement 2015¹¹ and the New Decade, New Approach 2020 Agreement.¹²

⁴ Ibid, at paras 608 and 710(ii).

⁵ Ibid, at paras 698 and 710(iii).

⁶ Ibid, at paras 461 and 710(v).

⁷ Ibid, at para 284.

⁸ 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.

⁹ Belfast (Good Friday) Agreement, 10 April 1998, at 5.

¹⁰ The Stormont House Agreement followed talks between the five main political parties in Northern Ireland, the UK Government, and the Irish Government. The 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.

¹¹ This was agreed by the Northern Ireland Executive and the UK and Irish governments to amongst other things "secure the full implementation of the Stormont House Agreement" 'A Fresh Start: The Stormont Agreement and Implementation Plan', 17 November 2015, at 8.

¹² This was an agreement between the UK and Ireland and included commitments to establish as a matter of urgency the Stormont House Agreement institutions. The UK Government agreed "As part of the Government's

1.6 The High Court held, contrary to the submissions of the applicants and intervenors, that strict limitations imposed on civil proceedings not initiated before 18 November 2023 were compatible with Article 6 of the ECHR and were therefore lawful. The NIHRC continues to advise that this limitation is not compatible and is unlawful. A further frustration by the High Court was its failure to apparently consider properly and subsequent inaction to address at all the cessation of other measures of accessing justice regarding Troubles-related cases. Neither did the High Court consider or address adequately the five-year time limit on the ICRIR's work.¹³

2.0 Investigations

2.1 It is clear that the same procedural obligations apply to the right to life and to freedom from torture.¹⁴ By way of summary, that means the investigation must be effective and to be effective it must at least 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.¹⁵ These are the minimum standards. The Explanatory Note to the 2023 Act states that the ICRIR "will conduct investigations into deaths and very serious injuries which resulted from conduct forming part of the Troubles".¹⁶ Yet, the 2023 Act does not refer to 'investigations', but instead 'reviews', which will be much more limited in scope and will only be undertaken in specific

wider legislative agenda, the Government will, within 100 days, publish and introduce legislation in the UK Parliament to implement the Stormont House Agreement, to address Northern Ireland legacy issues. The Government will now start an intensive process with the Northern Ireland parties, and the Irish Government as appropriate, to maintain an abroad-based consensus on these issues, recognising that any such UK Parliament legislation should have the consent of the NI Assembly." This was not complied with.

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

¹³ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at paras 251 and 252.

¹⁴ *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.

¹⁵ *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).

¹⁶ UK Government, 'NI Troubles (Legacy and Reconciliation) Act 2023: Explanatory Notes' (UK Gov, 2023), at para 1.

circumstances. In some individual cases a ‘historical record’ may be produced.¹⁷ The NIHRC has grave concerns that the ICIR is incapable of meeting the minimum standards for effective investigations. 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”.¹⁸ Instead of enabling compliance with the State’s procedural obligations, the 2023 Act provides impunity for human rights abuses, which cannot be justified.

2.2 The following sets out a summary analysis of what is required for effective investigations as against that which is provided by the 2023 Act.

Purpose of an investigation

2.3 The Stormont House Agreement 2014 provides that:

the UK and Irish Governments recognise that there are outstanding investigations and allegations into Troubles-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.¹⁹

2.4 The UN Human Rights Committee,²⁰ UN Committee against Torture (UN CAT Committee),²¹ UN Special Rapporteurs²² and the CoE Commissioner for Human Rights²³ have stressed the need for

¹⁷ Sections 9 and 28, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁸ 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.

¹⁹ 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.

²⁰ 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).

²¹ 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).

²² 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.

²³ Letter from CoE Commissioner for Human Rights, Dunja Mijatovic to Secretary of State for NI, Brandon Lewis MP, 13 September 2021.

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”.²⁴ Multiple independent human rights experts have raised consistent and persistent issues of concern.²⁵

2.5 The 2023 Act establishes a body (the ICRIR), which is to consist of a Chief Commissioner, Commissioner for investigations and up to five other Commissioners, who will be supported by an undisclosed number of ICRIR officers.²⁶ The 2023 Act provides that the ICRIR will conduct reviews, upon request, into deaths and serious injuries resulting from or connected with conduct during the Troubles.²⁷ It also provides that the ICRIR 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 ICRIR).²⁸

2.6 The Explanatory Note to the 2023 Act draws an equivalence between an ICRIR review and a traditional investigation.²⁹ It is notable that the same is not said of the historical record and one can assume therefore that a distinction was intended.³⁰ The UK

²⁴ 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).

²⁵ 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; Office of the UN High Commissioner for Human Rights, ‘Press Release: UK – Flawed NI ‘Troubles’ Bill flagrantly contravenes rights obligations, say UN experts’, 15 December 2022; Office of the UN High Commissioner for Human Rights, ‘Press Release: UK – Rights of victims and survivors should be at centre of legislative efforts to address legacy of NI Troubles - Türk’, 19 January 2023; CoE Commissioner for Human Rights, ‘Press Release: UK – adopting NI Bill will undermine justice for victims, truth seeking and reconciliation’, 20 June 2023; Council of Europe, ‘Press Release: Committee of Ministers recalls concerns about the NI Troubles (Legacy & Reconciliation) Bill’, 25 September 2023.

²⁶ As of 15 April 2024, six appointments have been made to the ICRIR. This includes the roles of Chief Commissioner, Commissioner for Investigations and four Non-Executive Commissioners. An interim Chief Executive Officer and accounting officer has also been appointed until the Board identifies a permanent office holder. See NI Office, ‘Press Release: Appointment of Commissioners to the Independent Commission for Reconciliation and Information Recovery’, 14 December 2023, and Independent Commission for Reconciliation and Information Recovery, ‘ICRIR Board – our Commissioners’. Available at: <https://icrir.independent-inquiry.uk/icrir-board-our-commissioners/>, and Section 2(3)(c) and Paragraph 7 of Schedule 1, NI Troubles (Legacy and Reconciliation) Act 2023.

²⁷ Sections 9-18, NI Troubles (Legacy and Reconciliation) Act 2023.

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

²⁹ UK Government, ‘NI Troubles (Legacy and Reconciliation) Act 2023: Explanatory Notes’ (UK Gov, 2023), at para 1.

³⁰ Ibid.

Government in its response to the CoE Committee of Ministers states that “the term ‘review’ is broad, and encompasses a full, policy-equivalent criminal investigation – which may be needed in some cases to satisfy the Article 2 and 3 procedural obligation”.³¹ This is not what appears in the 2023 Act; quite the opposite. It is essential that the safeguards to ensure compliance with Articles 2 and 3 of the ECHR are contained within the legislation establishing and governing the work of the ICRIR. Any other statements - of policy, intention or hope - could be said to be self-serving, but in any event irrelevant. Such statements, even if contained in policy papers or guidance, do not and cannot correct the clear defects in the 2023 Act.

2.7 Even if the defects could be, in some way, perfected by policy or guidance, it is clear from the UK Government’s interpretation of its procedural obligations and their application, that it does not intend to correct the defects in the 2023 Act. Rather, the defects in the 2023 Act about which the NIHRC is concerned are there by design. For example, during the passage of the 2023 Act, the UK Government stated that cases which require a simpler investigation have “no procedural obligation”.³² That is clearly wrong. A procedural obligation always applies for cases related to Articles 2 and Article 3 of the ECHR, the relevant question is whether the obligation has been fulfilled.

2.8 Furthermore, the UK Government has stated that “it is right that the ICRIR has the flexibility to determine how it can best fulfil the needs of victims and survivors in terms of the provision of information in each specific case”.³³ In response to the CoE Committee of Ministers, the UK Government elaborated that:

an approach requiring a criminal investigation in all cases would remove [the ICRIR’s] flexibility, and significantly increase the likely time needed to complete reviews, further delaying the provision of information for many families. In addition, in cases where the investigative duty under Article

³¹ DH-DD(2022)831, ‘Communication from the Authorities (08/08/2022) Concerning the Case of McKerr v UK (Application No 28883/95)’, 8 August 2022, at 2.

³² Ibid.

³³ Ibid.

2 or 3 of the [ECHR]... applies, a criminal investigation may not be a sufficient means of discharging that duty - for example, where there may have been failings on the part of the State which contributed to a death but these were not themselves criminal in nature.³⁴

2.9 The NIHRC advocates strongly that a victim-centred approach must be taken. However, and this is critical, a victim-centred approach does not absolve the State of its obligations. To comply with Articles 2 and 3 of the ECHR, it remains imperative that the initial investigation satisfies the minimum threshold of effectiveness.³⁵ Thereafter, the process should be victim-centred.

2.10 Within the criminal justice system, the word review is well-known and commonly used to mean an evaluation of the conduct of an enquiry. Similarly, an investigation is well-known and commonly used to mean an independent, effective investigation by law enforcement capable of holding perpetrators to account.³⁶ The ECHR requires an investigation. 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.³⁷ An investigation’s conclusions “must be based on thorough, objective and impartial analysis of all relevant elements” and follow “an obvious line of inquiry”.³⁸ Depending on the investigation that has gone before, if any, there may be more examination and inquiry required for one case than another, but the end goal remains the same. The investigation should seek to establish what happened,³⁹ identify the perpetrator and hold the perpetrator to account,⁴⁰ with a view to preventing future violations.⁴¹

³⁴ DH-DD(2023)900, ‘Communication from the Authorities (28/07/2023) Concerning the Case of McKerr v UK (Application No 28883/95)’, 31 July 2023, at 2.

³⁵ Mustafa Tunç and Fecire Tunç v. Turkey (2013) ECHR 587, at para 133; Nicolae Virgiliu Tănase v. Romania (2019) ECHR 491, at paras 160-164.

³⁶ Ministry of Justice, ‘Criminal Procedure and Investigations Act 1996 (Section 23(1)) Code of Practice’ (MoJ, 2020), at para 2.1. See also: College of Policing, ‘Authorised Professional Practice – Investigation’. Available at: <https://www.college.police.uk/app/investigation>.

³⁷ *Hugh Jordan v UK* (2001) ECHR 327, at para 107.

³⁸ *Kolevi v Bulgaria* (2009) ECHR 1838, at para 201; *Armani da Silva v UK* (2016) ECHR 314, at para 234.

³⁹ 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).

⁴⁰ *Kaya v Turkey* (1998) ECHR 10, at para 87.

⁴¹ *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) ECHR 314, at para 230.

2.11 It was a welcome amendment to the 2023 Act that the Commissioner for Investigations has the powers and privileges of a constable and can designate others,⁴² but there is nothing in the 2023 Act as to how this will occur. While it is acknowledged that recent policy documents published by the ICRIR indicate it “is seeking ways to ensure compliance with the [ECHR]”,⁴³ the NIHRC is concerned by the lack of express requirement that these powers are designated and exercised as required to ensure an investigation is compliant with Articles 2 and 3 of the ECHR. The High Court of Justice NI noted that “the difficulty for the court is that much is left unsaid in the [2023] Act”, further remarking that the Commissioner for Investigations “enjoys a very wide discretion” as to the conduct of reviews.⁴⁴

2.12 Furthermore, the High Court stated that:

focusing on the question of the reviews, they stand in contrast to the current inquest system where hearings are conducted in public, in the context of full legal representation of all those involved, including the next of kin, who have access to materials, who can engage expert evidence, who can call and cross-examine witnesses and who ultimately obtain a detailed narrative verdict from a coroner.⁴⁵

2.13 Despite ultimately finding that the 2023 Act leaves sufficient scope for the ICRIR to conduct ECHR compliant investigations,⁴⁶ Justice Colton specifically noted that:

I am also sensitive to the fact that many families have been promised inquests as a means to an Article 2 [of the ECHR] compliant investigation into the death of their loved ones. For

⁴² Section 6, NI Troubles (Legacy and Reconciliation) Act 2023.

⁴³ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 369. See also Independent Commission for Reconciliation and Information Recovery, ‘Ideas for How the Commission Could

Approach its Work to Produce Reports’, (ICRIR, 2023); Independent Commission for Reconciliation and Information Recovery, ‘Possible Principles for Design of ICRIR Investigations’ (ICRIR, 2023); Independent Commission for Reconciliation and Information Recovery, ‘Ideas for How ICRIR Could Approach Investigations Linked to Advanced Stage Inquests’ (ICRIR, 2023).

⁴⁴ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 338.

⁴⁵ *Ibid*, at para 361.

⁴⁶ *Ibid*, at paras 367-370.

many that promise will be broken. Their much sought after opportunity, in the form of an inquest, will be denied.⁴⁷

2.14 As above, the NIHRC refutes the suggestion that policy or intention can cure defects in the legislation, which make the ICRIR incapable as a matter of law of carrying out effective investigations.

2.15 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.⁴⁸

2.16 The NIHRC knows that truth and accountability are also important for family members from later generations.⁴⁹ 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".⁵⁰

2.17 In February 2024, the UN Human Rights Committee highlighted its concern with "the weakness of the 'review' function" of the ICRIR" because it had the potential to undermine the right to truth for victims, and "the procedural barriers and obstacles to criminal investigations, civil suits, and other remedies, effectively stifling any criminal or civil proceedings connected to the troubles".⁵¹ The UN Human Rights Committee recommended that the UK Government:

⁴⁷ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 363.

⁴⁸ Stephanie Burns et al, 'Intergenerational Aspects of the Conflict in NI' (QUB, 2010), at 78.

⁴⁹ 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.

⁵⁰ 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.

⁵¹ CCPR/C/GBR/CO/8, 'UN Human Rights Committee Concluding Observations on the Eighth Periodic Report of UK of Great Britain and NI', 28 March 2024, at para 10.

repeal or reform the NI Troubles (Legacy and Reconciliation) Act 2023 and to adopt proper mechanisms with guarantees of independence, transparency, and genuine investigation power that discharge the State party's human rights obligations and deliver truth, justice and effective remedies, including reparations to victims of the NI conflict.⁵²

2.18 The immunity aspect of the 2023 Act raises concerns regarding accountability and prevention of future violations, which is discussed further in Section 4.0.

2.19 The NIHRC advises that the 2023 Act renders the ICRIR incapable of discharging the State's obligations to undertake effective investigations in compliance with the rule of law, including expressly Articles 2 and 3 of the ECHR.

Independent and impartial investigations

2.20 The NIHRC advises that the 2023 Act prevents the ICRIR from being sufficiently independent in all aspects: hierarchically, operationally and practically. By way of example, the Secretary of State: appoints Commissioners,⁵³ determines the number of Commissioners,⁵⁴ issues guidance and mandatory regulations,⁵⁵ proposes cases for review,⁵⁶ regulates information management,⁵⁷ regulates the handling of biometric material,⁵⁸ determines resources⁵⁹ and reviews the performance of the ICRIR.⁶⁰

2.21 Critically, the 2023 Act provides 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".⁶¹ This is likely to mean that the Secretary of State can prevent the

⁵² CCPR/C/GBR/CO/8, 'UN Human Rights Committee Concluding Observations on the Eighth Periodic Report of UK of Great Britain and NI', 28 March 2024, at para 11.

⁵³ Paragraph 8(1) of Schedule 1, NI Troubles (Legacy and Reconciliation) Act 2023.

⁵⁴ Paragraph 7 of Schedule 1, NI Troubles (Legacy and Reconciliation) Act 2023.

⁵⁵ Sections 33, 34(1), 35(1), 37(1), 56(1), 58(1), Paragraph 2(4) of Schedule 5 and Paragraph 2(6) of Schedule 13, NI Troubles (Legacy and Reconciliation) Act 2023.

⁵⁶ Sections 9(3) and 10(2), NI Troubles (Legacy and Reconciliation) Act 2023.

⁵⁷ Section 34(1), NI Troubles (Legacy and Reconciliation) Act 2023.

⁵⁸ Section 35, NI Troubles (Legacy and Reconciliation) Act 2023.

⁵⁹ Section 2(11), NI Troubles (Legacy and Reconciliation) Act 2023.

⁶⁰ Section 36, NI Troubles (Legacy and Reconciliation) Act 2023.

⁶¹ Section 37(1), NI Troubles (Legacy and Reconciliation) Act 2023.

ICRIR from completing its work generally or in respect of individual cases. The High Court of Justice in NI was content that the requirement for Parliamentary approval through the Affirmative Procedure was a sufficient safeguard.⁶² The NIHRC disagrees. The High Court also considered it appropriate that the Secretary of State was empowered to request reviews.⁶³ Again, the NIHRC respectfully disagrees. In any event, this should not be considered in isolation. While the NIHRC accepts that the Secretary of State will require high-level involvement in setting up and maintaining the ICRIR, the extent of the Secretary of State's involvement in ICRIR's operations and monitoring in the 2023 Act goes significantly beyond that and renders the ICRIR incapable of sufficient independence.

2.22 The UK Government explains that the 2023 Act, by limiting Commissioners' term of appointment to five years and enabling the appointment of up to five,⁶⁴ are intended to ensure that the ICRIR has an appropriate range of skills, experience and independent scrutiny.⁶⁵ Also, that the ICRIR maintains a form of continuity while also obtaining fresh perspective, impetus, views and specialist expertise.⁶⁶ Despite that, the 2023 Act expressly provides that the Secretary of State may limit the number of Commissioners to as few as one, in addition to the Chief Commissioner and Commissioner for Investigations.⁶⁷ It is also notable that the 2023 Act does not place any restriction on the nature nor identity of Commissioners. This is particularly important given the need for independence. This contrasts starkly with for example, "personnel who are serving or have previously served in the Royal Ulster Constabulary, Police Service of NI, Ministry of Defence or Security Services" were prohibited from being appointed to Operation Kenova.⁶⁸

2.23 The NIHRC suggests that a proper requirement for independence in the appointment of Commissioners would at least exclude any person who had served with the Royal Ulster Constabulary, the

⁶² *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 265.

⁶³ *Ibid*, at para 261.

⁶⁴ Section 2(3)(c) and Paragraph 7 of Schedule 1, NI Troubles (Legacy and Reconciliation) Act 2023.

⁶⁵ UK Parliament Hansard, 'House of Lords: NI Troubles (Legacy and Reconciliation) Bill – Lord Caine - Volume 831: debated on Wednesday 21 June 2023', (UK Parliament, 2023).

⁶⁶ *Ibid*.

⁶⁷ Section 2(3)(c) and Paragraph 7 of Schedule 1, NI Troubles (Legacy and Reconciliation) Act 2023.

⁶⁸ Operation Kenova, 'ECHR: Fundamental Freedoms Compliance – Version 3' (OK, Date Unknown), at 9.

Security Services or the British Army. There is such obvious conflict that such appointments are incapable of mitigation by way of recusal or declaration. Even if such appointments were capable in particular cases of being hierarchically independent, they must also be practically independent. No person who has served with those organisations against which credible allegations are made can satisfy the requirement for practical independence. To take the first example of appointment - the Commissioner for Investigations. The centrality of that appointment to the overall independence of the ICRIR should be apparent. He has significant decision-making power within the ICRIR. He has responsibility for specifying the terms of disclosure to the ICRIR;⁶⁹ he determines the operational powers of the ICRIR officers (including whether they are provided with powers and privileges of a constable and whether to use these);⁷⁰ he determines whether it is appropriate for a non-close family member to make a request for review;⁷¹ he determines how reviews are requested, whether they satisfy requirements, and whether they are dealt with;⁷² and he determines whether reviews linked to immunity decisions take place.⁷³ While it may be required that the Commissioner for Investigations complies with the Human Rights Act 1998,⁷⁴ this does not provide sufficient protection of independence. This is particularly so given the provisions of the 2023 Act (primary legislation), which clearly dictate a departure from the Human Rights Act 1998.

2.24 The NIHRC does not make any allegations or suggestion as to the actual intentions or integrity of the Commissioner for Investigations that has already been appointed. However, the NIHRC must make comment upon the fact that he served with the Royal Ulster Constabulary and Police Service of NI throughout much of the relevant period. He rose to the rank of Assistant Chief Constable (Crime) whose responsibilities included organised crime and terrorism investigations and for intelligence branch.⁷⁵ This is a conflict that cannot, in the NIHRC's respectful view, be overcome by

⁶⁹ Section 5, NI Troubles (Legacy and Reconciliation) Act 2023.

⁷⁰ Section 6, NI Troubles (Legacy and Reconciliation) Act 2023.

⁷¹ Section 9(7), NI Troubles (Legacy and Reconciliation) Act 2023.

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

⁷³ Section 12, NI Troubles (Legacy and Reconciliation) Act 2023.

⁷⁴ Section 13(1), NI Troubles (Legacy and Reconciliation) Act 2023.

⁷⁵ Independent Commission for Reconciliation and Information Recovery, 'Press Release: Commissioner for Investigations identified to lead ICRIR work', 14 September 2023.

a requirement to declare an interest in a specific case. Even if it could, it is clear from the 2023 Act that a declaration of interest is not of any necessary consequence.⁷⁶ There is no requirement for example for any action to be taken to address a conflict when it arises. How this could be delivered in practice is difficult to contemplate. More significantly, *McKerr* has made it clear that the persons responsible for and carrying out investigations must be “independent from those implicated in the events... means not only that there should be no hierarchical or institutional connection but also clear independence”.⁷⁷ In *Armani da Silva v the UK* (2016), the ECtHR elaborated that “what is at stake here is nothing less than public confidence in the State’s monopoly on the use of force”.⁷⁸ The ECtHR has found that independence is lacking in investigations where the investigators are potential suspects,⁷⁹ or are direct colleagues of the persons subject to investigation, or likely to be so.⁸⁰

2.25 The NIHRC advises that the extent of the Secretary of State’s influence and involvement across the ICRIR’s operations as referred to above prevents the ICRIR from being sufficiently independent and impartial, as required by the ECHR.

Thorough investigations

2.26 The 2023 Act provides that the ICRIR’s functions will be limited to a review (which when read with the provisions of the 2023 Act will be a ‘light-touch’)⁸¹ or the establishment of a historical record.⁸² The effectiveness of an investigation is largely dependent upon the Commissioner for Investigations exercising his discretion effectively. For a number of reasons including the issue of independence, the NIHRC doubts that a thorough and effective investigation is possible in any case.⁸³

⁷⁶ Paragraph 11 of Schedule 1, NI Troubles (Legacy and Reconciliation) Act 2023.

⁷⁷ *McKerr v UK* (2001) ECHR 329, at para 112.

⁷⁸ *Armani da Silva v UK* (2016) ECHR 314, at para 232.

⁷⁹ *Bektaş and Özalp v Turkey* (2010) ECHR 617, at para 66; *Orhan v. Turkey* (2002) ECHR 497, at para 342.

⁸⁰ *Ramsahai and Others v Netherlands* (2007) ECHR 393, at para 335-341; *Emars v Latvia* (2014) ECHR 1302, at para 85 and 95.

⁸¹ NI Human Rights Commission, ‘Advice on NI Troubles (Legacy and Reconciliation) Bill’ (NIHRC, 2022), at paras 2.47 and 2.48.

⁸² Sections 9-18 and 28-29, NI Troubles (Legacy and Reconciliation) Act 2023.

⁸³ This is compounded by concerns about compellability below.

2.27 The NIHRC advises that a thorough investigation cannot be achieved by a light-touch review or producing a historical record.

State's own motion

2.28 Within the 2023 Act, a range of State actors 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.⁸⁴ Amongst other things as outlined investigations must be of the State's own motion, which means the State cannot leave it for example to the relatives of the deceased to initiate legal proceedings.⁸⁵ That is a requirement as per the ECHR. That is a different issue however to the provision in the 2023 Act, providing that a review in a particular case can be requested by a number of State actors. Providing that State actors can request the ICIR to carry out a review is simply part of the domestic mechanism for initiating reviews. The High Court of Justice in NI found that the 2023 Act sufficiently enables the State to act of its own accord.⁸⁶

2.29 The NIHRC advises that the State is not permitted to act of its own accord (especially within a flawed framework), it is required to act of its own accord. The fact that certain actors can request a review is not problematic, but it is not the same as a requirement on the State to conduct investigations when required by law.

Prompt commencement and expedition

2.30 The undue delays in commencing and progressing human rights compliant investigations regarding the Troubles already constitute ongoing violations of Articles 2 and 3 of the ECHR.⁸⁷ The main way to address these violations although it is too late to cure entirely, is to commence human rights compliant investigations as soon as possible. The 2023 Act does not do that.

⁸⁴ Section 9, NI Troubles (Legacy and Reconciliation) Act 2023.

⁸⁵ *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.

⁸⁶ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 261.

⁸⁷ CM/Notes/1436/H46-35, 'CoE Committee of Ministers Decision on McKerr Group v UK (Application No 28883/95), 10 June 2022.

2.31 The Explanatory Note to the 2023 Act states that the legislation “builds on the principles and other aspects of the Stormont House Agreement.”⁸⁸ The 2023 Act bears little or no resemblance to the Stormont House Agreement; quite the contrary. What is however clear is that the consultation that was undertaken (albeit on a previous legacy Bill), which received a response from 17,000 stakeholders rejected wholesale the approach now taken in this Act.

2.32 The NIHRC advises that immediate concrete steps have not been taken to address the reasons for historical delay. In any event, the speed of the process hereafter is irrelevant if the process itself is not compliant with the State’s obligations.

Public Scrutiny

Non-disclosure

2.33 The requirements for involvement of the next of kin and for public scrutiny are as important to compliance as the other elements. Both are dealt with separately below.

2.34 An investigation into a suspicious death and its results must be subject to sufficient public scrutiny,⁸⁹ the degree of which varies from case to case.⁹⁰ The purpose of this requirement is to ensure public confidence in the process.⁹¹ It is beyond doubt that public confidence is lacking. Not only did the UK Government fail to consult, it ignored the response to previous consultation and to the universal rejection of the 2023 Act within Northern Ireland.⁹² It is also clear that the advice of relevant experts has been ignored. For example, 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

⁸⁸ UK Government, ‘NI Troubles (Legacy and Reconciliation) Act 2023: Explanatory Notes’ (UK Gov, 2023), at para 6.

⁸⁹ *McCann v UK* (1995) 21 EHRR 97, at para 159.

⁹⁰ *McKerr v UK* (2001) ECHR 329, at para 115.

⁹¹ *Ibid*, at para 114.

⁹² See also CoE Commissioner for Human Rights, ‘Press Release: UK – Backsliding on human rights must be prevented’, 4 July 2022.

proposals garner public trust and confidence by engaging fully with all stakeholders".⁹³ These concerns have been echoed by independent human rights experts.⁹⁴ 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 [by victims and survivors] as a major source of concern" and did not equate to a "victim-centred approach".⁹⁵

2.35 The 2023 Act provides that a draft review report must be given to an interested person (e.g. an individual mentioned in the report, the person who requested the review, or a family member) and that person will have the chance to make representations on the report.⁹⁶ The same does not apply to the historical record.

2.36 Importantly, the 2023 Act provides that the ICRIR "may", not 'must', publish the final report of any review, thus limiting the opportunity for public scrutiny.⁹⁷ In contrast, the 2023 Act provides that the ICRIR "must publish the historical record".⁹⁸ However, even this provision is not absolute. The 2023 Act provides that disclosures or any actions by the ICRIR are subject to certain conditions and can be prohibited if the action or disclosure threaten life or national security, or have a prejudicial effect on criminal proceedings.⁹⁹ In determining if a disclosure takes place, including in ICRIR reports, consideration should also be given to whether the disclosure contains sensitive evidence or protected international information, is in the public interest or is subject to data protection legislation.¹⁰⁰ The NIHRC suggests that this is much too broad and goes way beyond what is appropriate to protect national security.

⁹³ 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.

⁹⁴ 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.

⁹⁵ Letter from CoE Commissioner for Human Rights, Dunja Mijatovic to Secretary of State for NI, Brandon Lewis MP, 13 September 2021.

⁹⁶ Section 16, NI Troubles (Legacy and Reconciliation) Act 2023.

⁹⁷ Section 17(3), NI Troubles (Legacy and Reconciliation) Act 2023.

⁹⁸ Section 29(1), NI Troubles (Legacy and Reconciliation) Act 2023.

⁹⁹ Sections 4(1), 16(7), 29(2), 29(3), 30(2) and 30(3), NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁰⁰ Sections 4(1), 16(7), 29(2), 29(3), 30(2) and 30(3), NI Troubles (Legacy and Reconciliation) Act 2023.

2.37 The 2023 Act provides that if a report does not include specific information, it must contain a statement that the Secretary of State decided to prohibit disclosure and why this was the case.¹⁰¹ The 2023 Act further provides that the Secretary of State's decision can be appealed.¹⁰² This only applies however to published reports. The 2023 Act does not propose expressly requiring that reasons be provided nor that there is a right of appeal if the final report of a review is not published.

2.38 The NIHRC advises the ICRIR should publish all of its reports, subject only to very with limited and precise exception. All exceptions must be lawful and proportionate and include safeguards that ensure these are not applied arbitrarily and that the commitments aimed at enabling effective public scrutiny are not illusory.

Family Members

2.39 The 2023 Act's inclusion of an express provision for keeping family members informed is welcomed.¹⁰³ Yet, the 2023 Act creates a two-tiered approach. A 'close family member' has precedence over 'other family members'.¹⁰⁴ This is not dissimilar to the ECtHR's definition of next of kin, but the 2023 Act's interpretation of a close family member is narrower.¹⁰⁵ The 2023 Act limits a close family member to a victim's spouse, civil partner, cohabitee, child, parent, brother, sister, step-child, step-parent, half-brother, half-sister, step-brother or step-sister.¹⁰⁶ In right to life cases, the ECtHR has accepted married partners,¹⁰⁷ unmarried partners,¹⁰⁸ parents,¹⁰⁹ siblings,¹¹⁰ children,¹¹¹ and nephews.¹¹² The ECtHR has also indicated that nieces, aunts, uncles and grandparents could be categorised as a close family member.

¹⁰¹ Paragraph 4 of Schedule 5, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁰² Paragraphs 4 9-11 of Schedule 5, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁰³ Sections 17 and 18, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁰⁴ Sections 9(1), 9(2) and Schedule 3, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁰⁵ *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.

¹⁰⁶ Paragraph 1(2) of Schedule 3, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁰⁷ *McCann v UK* (1995) 21 EHRR 97; *Salman v Turkey* (2000) ECHR 357.

¹⁰⁸ *Velikova v Bulgaria* (2000) ECHR 198.

¹⁰⁹ *Ramsahai and Others v the Netherlands* (2007) ECHR 393; *Giuliani and Gaggio v Italy* (2011) ECHR 513.

¹¹⁰ *Andronicou and Constantinou v Cyprus*, Application No 86-1996-705-897, Judgment of 9 October 1997.

¹¹¹ *McKerr v UK* (2001) ECHR 329.

¹¹² *Yasa v Turkey* (1998) ECHR 83.

2.40 In recent years, the ECtHR has included a person with “close personal links” and who “provides care”¹¹³ for a victim that “has no capacity of discernment” to take an action.¹¹⁴

2.41 The NIHRC advises that the definition of ‘close family member’ is too narrow. To comply, it should at least extend to grandparents, aunts, uncles, nieces or nephews.

2.42 The NIHRC advises that the definition of ‘other family member’ fails to permit situations in which a non-familial person, with close personal links and who provides care for a victim, can seek remedy on the victim’s behalf.

3.0 Scope of the ICRIR

Definition of offences

3.1 The 2023 Act recognises as a direct victim for the purposes of the ICRIR’s work someone who has died or someone who has suffered very specific serious physical or mental harm due to a Troubles-related offence.¹¹⁵ The 2023 Act provides 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 2023 Act. The 2023 Act provides that the ICRIR is only able to create a historical record for Troubles-related deaths; its mandate does not include creating a historical record for serious physical or mental harm,¹¹⁶ 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 provided for within the 2023 Act, is unlikely to be human rights compliant. Not least because it ignores the absolute nature of the right to freedom from torture.¹¹⁷ ECtHR jurisprudence makes clear that each potential case should be

¹¹³ *Guberina v Croatia* (2016) ECHR 287, at paras 77-79.

¹¹⁴ *Belli and Arquier-Martinez v Switzerland* (2018) ECHR 1012, at para 97.

¹¹⁵ Sections 1(6), 9 and 10, NI Troubles (Legacy and Reconciliation) Act 2023.

¹¹⁶ Sections 28 and 29, NI Troubles (Legacy and Reconciliation) Act 2023.

¹¹⁷ Article 15(2), ECHR.

assessed on its own circumstances,¹¹⁸ 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”.¹¹⁹

3.3 The NIHRC advises that there is not sufficient flexibility built in to the 2023 Act 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 ICIR.

Non-duplication

3.4 The ECtHR has previously determined that the UK Government failed to implement a number of 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.¹²⁰ The CoE Committee of Ministers has expressed deep regret that the implementation of the judgments has not occurred.¹²¹ 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”.¹²²

3.5 There is required some historical context setting, for completeness. 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-

¹¹⁸ *Mursic v Croatia* (2016) ECHR 927, at para 97.

¹¹⁹ Article 3, Victims and Survivors (NI) Order 2006.

¹²⁰ *Hemsworth v UK* (2013) ECHR 683.

¹²¹ ‘CoE Committee of Ministers Item H46-42 McKerr Group v UK (Application No. 28883/95)’, 7-8 June 2016.

¹²² 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.

compliant with Article 2 of the ECHR due to inconsistencies and lack of independence.¹²³

- 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 cannot itself satisfy the requirements of Article 2 of the ECHR because of its lack of independence from the police service”.¹²⁴
- 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”.¹²⁵ 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.¹²⁶ 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 ICRIR is empowered 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,

¹²³ Her Majesty’s Inspectorate of Constabulary, ‘Inspection of the Police Service NI Historical Enquiries Team’ (HMIC, 2013), at 28.

¹²⁴ UK Joint Committee on Human Rights, ‘HL Paper 130, HC 1088: Human Rights Judgments Seventh Report of Session 2014-15’, 11 March 2015.

¹²⁵ Police Ombudsman NI, ‘Historical Investigations’. Available at: <https://policeombudsman.org/About-Us/Historical-Investigations>

¹²⁶ Ibid.

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.¹²⁷

- 3.9 The 2023 Act provides that the ICRIR “must take into account” a review or investigation that has already been carried out and “in particular, must ensure that the ICRIR does not do anything which duplicates any aspect of that review unless, in the ICRIR’s view, the duplication is necessary”.¹²⁸ The 2023 Act does not propose that the ICRIR considers whether all previous investigations into Troubles-related offences were or were not human rights compliant. The High Court of Justice in NI recognised:

the concerns in relation to the lack of effective handover processes for outstanding police complaints. It is striking that whilst under section 38(3) [of the 2023 Act], there is an obligation on the Chief Constable of the Police Service of NI to notify the Secretary of State of any outstanding criminal investigations before 1 May 2024, no such similar obligation is made for policy complaints which will be brought to an end under section 45 [of the 2023 Act]. It is the court’s view that in order for the [2023] Act to be read compatibly with the... [ECHR] and to satisfy the State’s ‘own motion’ obligations under Articles 2 and 3 of the ECHR... the Secretary of State must inform himself of all outstanding Troubles-related police complaints and submit them to the ICRIR pursuant to its powers under sections 9 and 10 of the 2023 Act.¹²⁹

- 3.10 However, this suggestion only covers one aspect and is specific to police complaints. The shortcomings exposed in case law from the ECtHR¹³⁰ and findings of the CoE Committee of Ministers¹³¹ make it clear that, in many circumstances, previous Troubles-related investigations were not human rights compliant. There are many

¹²⁷ Ibid.

¹²⁸ Section 13(8), NI Troubles (Legacy and Reconciliation) Act 2023.

¹²⁹ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 365.

¹³⁰ *McKerr v UK* (2001) ECHR 329; *Kelly and Others v UK* (2001) ECHR 328; *Shanaghan v UK* (2001) ECHR 330.

¹³¹ 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.

cases that are deemed closed that require reconsideration. There are also many Troubles-related offences that have not been subject to any form of investigation and require at least a basic analysis to see if this can be remedied.

3.11 The NIHRC advises that the 2023 Act fails to provide any mechanism to assess whether previous investigations were effective as required by the ECHR. Such a requirement - to accept previous investigations for fear of duplication - is contrary to the requirements of ECHR.

4.0 Conditional Immunity Scheme

4.1 The High Court of Justice in NI has held that those provisions of the 2023 Act that amount to a conditional immunity scheme violate Articles 2 and 3 of the ECHR and are unlawful.¹³²

4.2 The 2023 Act provides that a person who has committed a serious Troubles-related crime “must” be granted 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.¹³³ 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 scheme and satisfy the conditions under the 2023 Act.

4.3 Removing the possibility of immunity for an on-going case or in respect of a previous conviction¹³⁴ 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

¹³² *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 710.

¹³³ Section 19, NI Troubles (Legacy and Reconciliation) Act 2023.

¹³⁴ Paragraph 3 of Schedule 5, NI Troubles (Legacy and Reconciliation) Act 2023.

those who have been convicted or under active investigation cannot.¹³⁵ In *Dillon*, Mister Justice Colton stated that “I am satisfied that the applicants in this case satisfy the requirements of establishing ‘other status’ within the meaning of Article 14 [of the ECHR]”, with such status being “succinctly stated as being either a victim or a relative of a victim of the Troubles as defined in the [2023] Act”.¹³⁶ Colton J also acknowledged that there was a difference in treatment of persons in analogous, or relatively similar situations. In terms of whether this treatment was justified regarding immunity, there is no definitive ruling with it being stated that:

the court has already determined that those provisions which relate to immunity from prosecution (sections 19 and 41 [of the 2023 Act]), the retrospective prohibition on existing civil proceedings, and the restriction of use of protected material in civil proceedings, are in breach of Articles 2 and 3 of the ECHR. That being so, it is not necessary to consider whether there has been a breach of Article 14 [of the ECHR] in relation to those provisions.¹³⁷

4.4 However, Colton J commented that:

I am satisfied that the difference of treatment identified by the court in this case is compliant with Article 14 [of the ECHR] taken together with substantive rights relied upon by the applicants. This, of course, does not apply to the breaches which have been identified earlier in this judgment. The Article 14 consideration is confined to those provisions in respect of which a breach has not been established.¹³⁸

4.5 Alleged paramilitary offenders are more likely to be affected by the 2023 Act’s exclusions from immunity than State agents, with no existing legal basis or ECHR-compliant justifiable reason. For example, granting of immunity is prohibited where the individual

¹³⁵ Ibid.

¹³⁶ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 481.

¹³⁷ Ibid, at para 471.

¹³⁸ Ibid, at para 516.

seeking immunity has a conviction or is subject to ongoing prosecution.¹³⁹ There is a higher probability of an alleged paramilitary offender having an existing conviction. Furthermore, the UK Government has indicated in its commentary on the 2023 Act 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”.¹⁴⁰

4.6 Victims must not be denied access to information “for no valid reason”.¹⁴¹ The next-of-kin must be informed of a decision regarding prosecution,¹⁴² provided with reasons for that decision¹⁴³ and given the opportunity to tell the court their version of events.¹⁴⁴ Public scrutiny is necessary to ensure public confidence in the process.¹⁴⁵

4.7 Under the 2023 Act, immunity decisions rely solely on information provided by the person requesting immunity.¹⁴⁶ The 2023 Act does not enable victims, family members or interested persons to provide information to inform the ICIR’s immunity decisions. The 2023 Act 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. The UK Government, in its response to the CoE Committee of Ministers, stated that “though not explicit in the [then] Bill, we would expect the ICIR to inform families if an individual has been granted immunity from prosecution in their case, and indeed to keep them informed of the process as it progresses”.¹⁴⁷ The UK Government

¹³⁹ Paragraph 3, Schedule 5, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁴⁰ Brandon Lewis, ‘My NI legacy plan. No longer will our veterans be hounded about events that happened decades ago’, *Conservative Home*, 9 June 2022.

¹⁴¹ *Eremiášová and Pechová v Czech Republic*, Application No 23944/04, Judgment of 16 May 2012, at para 149.

¹⁴² *Gülec v Turkey*, Application No 21593/93, Judgment of 27 July 1998, at para 82.

¹⁴³ *Finucane v UK* (2003) ECHR 328, at paras 82 and 83.

¹⁴⁴ *Gül v Turkey*, Application No 22676/93, Judgment of 14 December 2000, at para 93.

¹⁴⁵ *McKerr v UK* (2001) ECHR 329, at para 114; *Finucane v UK* (2003) ECHR 328, at paras 82 and 83.

¹⁴⁶ Section 19, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁴⁷ DH-DD(2022)831, ‘Communication from the Authorities (08/08/2022) Concerning the Case of McKerr v UK (Application No 28883/95)’, 8 August 2022, at 6; UK Government, ‘UK Government Response to the NIHR’s 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’ (UK Gov, 2022), at 10.

continued “information regarding the granting of immunity should also be included in the published family reports, including the naming of individuals subject to safeguards around safety to life”.¹⁴⁸

- 4.8 There is no requirement within the 2023 Act for the ICRIR to provide reasons for why it is or is not granting immunity. The UK Government, in its response to the CoE Committee of Ministers, stated that it “would expect the ICRIR to include reasons for the granting of immunity in each instance”.¹⁴⁹ There is no proposed option for an individual requesting immunity or an interested person to appeal a decision on immunity made by the ICRIR.
- 4.9 The mandatory and irrevocable outcome of the immunity decision in preventing prosecutions,¹⁵⁰ leaves no avenue for a victim to request a review.
- 4.10 As the High Court of Justice NI concluded in relation to the conditional immunity scheme provided for in the 2023 Act:

the victims have no role or say in these decisions. Victims may be confronted with a situation where an applicant for immunity does so at the last minute, in circumstances where a recommendation for prosecution is imminent or inevitable. I accept that the provision of information as to the circumstances in which victims of the Troubles died or were seriously injured is clearly important and valuable. It is arguable that the provision of such information could contribute to reconciliation. However, there is no evidence that the granting of immunity under the 2023 Act will in any way contribute to reconciliation in NI, indeed, the evidence is to the contrary.¹⁵¹

¹⁴⁸ DH-DD(2022)831, ‘Communication from the Authorities (08/08/2022) Concerning the Case of McKerr v UK (Application No 28883/95)’, 8 August 2022, at 6; UK Government, ‘UK Government Response to the NIHRC’s 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’ (UK Gov, 2022), at 10.

¹⁴⁹ DH-DD(2022)831, ‘Communication from the Authorities (08/08/2022) Concerning the Case of McKerr v UK (Application No 28883/95)’, 8 August 2022, at 6; UK Government, ‘UK Government Response to the NIHRC’s 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’ (UK Gov, 2022), at 10.

¹⁵⁰ Sections 39 and 40, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁵¹ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 187.

4.11 The NIHRC advises that provisions on immunity and restrictions on criminal enforcement action are unlawful.

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,¹⁵² enabling any claim relating to a person's civil rights and obligations to be brought before a court or tribunal.¹⁵³ 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".¹⁵⁴
- 5.2 It is well established that 'possessions', as provided for within the right to property,¹⁵⁵ can encompass legal claims provided that the individual invoking the right can establish that the claim has sufficient basis in domestic law.¹⁵⁶
- 5.3 Article 13 of the ECHR (right to an effective remedy) has a close relationship with Articles 2 and 3 of the ECHR.¹⁵⁷ 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.¹⁵⁸ In other words, it must be available, sufficient, and effective in theory and practice, having regard to the individual circumstances of the case.¹⁵⁹
- 5.4 The Belfast (Good Friday) Agreement 1998 required the UK Government to complete incorporation of the ECHR into NI law and to provide people with "direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule

¹⁵² Article 6(1), European Convention on Human Rights 1950; Article 14(1), UN International Covenant on Civil and Political Rights 1966.

¹⁵³ *Golder v UK* (1975) 1 EHRR 524, at para 28.

¹⁵⁴ *Philis v Greece* (1991) 13 EHRR 741, at para 59.

¹⁵⁵ Article 1, Protocol No 1 of the European Convention on Human Rights 1952

¹⁵⁶ *Vilho Eskelinen v Finland* (2007) ECHR 314.

¹⁵⁷ *Isayeva v Russia* (2005) ECHR 128, at para 229.

¹⁵⁸ *Bitiyeva and Others v Russia* (2009) ECHR 672, at para 121; *Akhmadova and Akhmadov v Russia* (2008) ECHR 869, at para 103.

¹⁵⁹ *El-Masri v The Former Yugoslav Republic of Macedonia* (2012), Application No 39630/09, Judgment of 13 December 2012, at para 255.

Assembly legislation on grounds of inconsistency".¹⁶⁰ This is undermined fundamentally by the 2023 Act.

- 5.5 The 2023 Act immediately ceases criminal investigations (other than those referred by the ICIR to the Public Prosecution Service), police complaints, and civil proceedings linked to Troubles-related offences.¹⁶¹ Inquests/inquiries linked to Troubles-related offences are to cease from 1 May 2024, "unless, on that day, the only part of the inquest that remains to be carried out is the coroner or any jury making or giving the final determination, verdict or findings, or something subsequent to that".¹⁶² 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.¹⁶³ ECtHR judgments are not enforceable, instead relying on State-initiated compliance. Considering the UK Government's approach to existing Troubles-related judgments,¹⁶⁴ there is a real risk that any related ECtHR ruling would be disregarded or only partially adhered to.
- 5.6 The UK Government's justification for ceasing other avenues of remedy is "that the current system has not been delivering for victims as we think they deserve".¹⁶⁵ 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".¹⁶⁶ He 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

¹⁶⁰ The Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

¹⁶¹ Sections 38-43 and 45, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁶² Section 44, NI Troubles (Legacy and Reconciliation) Act 2023.

¹⁶³ Protocol No 15 of the European Convention on Human Rights, 24 June 2013.

¹⁶⁴ '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.

¹⁶⁵ 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.

¹⁶⁶ NI Office, 'NI Troubles (Legacy and Reconciliation) Bill: Second Reading Opening Speech by Secretary of State for NI, Brandon Lewis MP', 24 May 2022.

evidence, means that victims and their families very rarely, if ever, obtain the outcome they seek from that process.¹⁶⁷

5.7 The NIHRC does not accept the basic premises on which the Secretary of State proceeds. The UK Government's ignores the progress that has in fact 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,¹⁶⁸ 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 2023 Act by no means remedies this and instead is viewed as "perpetrator focused".¹⁶⁹ 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 [Act] 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 the 2023 Act].¹⁷⁰

5.8 The NIHRC advises that the immediacy of the proposed changes to a victim's access to justice closes off any pursuit of justice outside of the ICRIR, which is directly contrary to the ECHR and the Belfast (Good Friday) Agreement.

¹⁶⁷ Ibid.

¹⁶⁸ 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).

¹⁶⁹ 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.

¹⁷⁰ Ibid, at 422.

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