House of Lords
House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: Northern Ireland Troubles (Legacy and Reconciliation) Bill

Sixth Report of Session 2022–23

Report, together with formal minutes relating to the report

Ordered by the House of Commons to be printed 19 October 2022

Ordered by the House of Lords to be printed 19 October 2022

HC 311
HL Paper 79
Published on 26 October 2022
by authority of the House of Commons and the House of Lords

Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

Current membership

House of Commons

Joanna Cherry KC MP (*Scottish National Party, Edinburgh South West*) (Chair)

Florence Eshalomi MP (*Labour, Vauxhall*)

Harriet Harman KC MP (*Labour, Camberwell and Peckham*)

Angela Richardson MP (*Conservative, Guildford*)

Dean Russell MP (*Conservative, Watford*)

David Simmonds MP (*Conservative, Ruislip, Northwood and Pinner*)

House of Lords

Baroness Chisholm of Owlpen (*Conservative*)

Lord Dubs (*Labour*)

Lord Henley (*Conservative*)

Baroness Ludford (*Liberal Democrat*)

Lord Singh of Wimbledon (*Crossbench*)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publication

Committee reports are published on the Committee's website by Order of the two Houses.

Committee staff

The current staff of the Committee are Zereena Arshad (Commons Second Clerk), Andrea Dowsett (Lords Clerk), Liam Evans (Committee Specialist), Alexander Gask (Deputy Counsel), Samantha Granger (Legal Counsel), Natalia Janiec-Janicki (Committee Operations Manager), Lucinda Maer (Commons Clerk), Aimal Nadeem (Committee Operations Officer), George Perry (Media Officer), and Thiago Simoes Froio (Committee Specialist)

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 4710; the Committee's email address is jchr@parliament.uk.

You can follow the Committee on Twitter using @HumanRightsCtte

Contents

Summary

On 17 May 2022, the Government introduced the Northern Ireland Troubles (Legacy and Reconciliation) Bill ("the Bill") to the House of Commons. The Bill is intended to "address the legacy of the Troubles" in Northern Ireland. The Bill establishes a new Independent Commission for Reconciliation and Information Recovery (ICRIR) which will be responsible for reviewing all outstanding legacy cases concerning Troubles-related deaths and "other harmful conduct". The ICRIR will also be responsible for granting immunity from prosecution to individuals who meet certain conditions (the "conditional immunity scheme"). Meanwhile, all Troubles-related criminal investigations, criminal prosecutions, inquests, civil claims, and police complaints will be subject to prohibitions or restrictions. The existing Early Release Scheme will also be expanded to include offences within a wider temporal scope, whilst removing the requirement for offenders to serve any minimum term.

Since the Good Friday Agreement formally brought an end to the period known as 'The Troubles', governments have sought to support the people and communities of Northern Ireland to address the legacy of the past and to reconcile differences between them. It is clear that progress has been made in many areas, and we acknowledge that the bill has been drafted with a positive intent to support reconciliation and enable often complex and contested matters to come to a conclusion. Our concerns reflect a view that despite the good intent, the operation of the bill as drafted would come into conflict with the government's legal obligations and as such, risk frustrating the intended objectives.

We have serious doubts that this Bill as drafted is compatible with Articles 2 and 3 of the European Convention on Human Rights (ECHR) (the right to life and the prohibition of torture and inhuman and degrading treatment or punishment, respectively), as well as Articles 6 and 13 (the right to a fair trial and the right to an effective remedy). The former Secretary of State for Northern Ireland (SOSNI) made a statement under section 19(1) of the Human Rights Act 1998 that, in his view, the Bill is compatible with Convention rights. We have serious doubts that this view is correct.

Firstly, the cessation of any further criminal investigations, prosecutions (unless already underway or referred by the ICRIR), inquests (beyond 1 May 2023 at the latest), police complaints, and civil claims (as of the date of introduction of the Bill), means that the UK's obligation to discharge its duty to undertake effective investigations into deaths and serious harm will lie almost exclusively with the ICRIR. We are not convinced that the case reviews undertaken by the ICRIR will necessarily comply with the procedural obligation arising from Articles 2 (the right to life) and 3 (the prohibition of torture) of the ECHR to undertake effective investigations which are independent, effective, reasonably prompt and expeditious, subject to public scrutiny, and involve the next-of-kin. Shutting down all other avenues to pursue truth and justice is a high-risk strategy and places the UK at risk of non-compliance with Article 6 (right of access to a court) and Article 13 (right to an effective remedy). Criminal investigations, prosecutions, and inquests should be permitted to continue, and a more reasonable, longer limitation period should be provided for civil claims.

Secondly, the limited scope of the ICRIR's reviews risks non-compliance with Article 3 of the ECHR, as it may only review cases which resulted in death or "serious physical

and mental harm", which is narrowly defined as a list of eight medical conditions. There appears to be no clear rationale for this limited definition. It is therefore possible that individuals who have suffered harm amounting to a violation of Article 3, which falls outside the definition in the Bill, will not be eligible to have their cases reviewed by the ICRIR. Although the Secretary of State for Northern Ireland will have the power to refer cases to the ICRIR for review, there is no guarantee that these cases will be reviewed.

Thirdly, the conditional immunity scheme is in direct conflict with the duty to undertake effective investigations which are capable of identifying and punishing perpetrators. This positive duty arises from Articles 2 and 3 of the ECHR. The case law of the European Court of Human Rights (ECtHR) gives, at the very least, a strong indication that amnesties for grave violations of human rights are not permissible under the Convention. The conditional immunity scheme should be removed from the Bill. If it is retained, the threshold for the granting of immunity must be raised so that the veracity of accounts can be tested. Revocation should also be made possible in circumstances where a false account has been given.

Fourthly, the extension of the Early Release Scheme will allow for certain persons convicted of Troubles-related offences to have their sentences reduced to zero, thereby evading any punishment following conviction. The suspension of sentences, early releases, or leniency in sentencing for causing deaths or serious harm can breach Articles 2 and 3. It is therefore possible that the extinguishing of any requirement to serve a sentence for criminal conduct contrary to Articles 2 and 3 may also amount to a violation of those Articles. The Early Release Scheme should not be broadened to the extent that it removes the possibility of punishing perpetrators of serious human rights violations.

Finally, we note that there are several outstanding adverse judgments of the ECtHR against the UK Government relating to Troubles-related cases in Northern Ireland. **W**e are not convinced that the approach put forward in the Bill will address the long-standing problems identified by these cases. The Council of Europe's Committee of Ministers has urged the UK Government to reconsider its approach and to address its concerns regarding the Bill's compatibility with the Convention. The Bill's current approach risks the UK failing to comply with the outstanding judgments of the ECtHR, which is a breach of the UK's obligations under the Convention.

This Bill attempts to address a situation which is complex and protracted. We acknowledge that there are no easy solutions when it comes to achieving peace, truth, justice, and reconciliation in post-conflict societies. However, our concern lies exclusively with whether the proposals contained within the Bill comply with the UK's human rights obligations. We have concluded that, in our view, this Bill is unlikely to be found compatible with Convention rights. We therefore urge the Government to reconsider its approach and to put forward a Convention-compliant solution.

1 Overview

Context

1. The Troubles in Northern Ireland lasted over three decades until the adoption of the Good Friday Agreement in 1998 (also known as the "Belfast Agreement"). "The Troubles" are defined in the Northern Ireland Troubles (Legacy and Reconciliation) Bill ("the Bill") as meaning "the events and conduct that related to Northern Ireland affairs and occurred during the period beginning with 1 January 1966 and ending with 10 April 1998".[1] According to Government figures, the Troubles resulted in the death of more than 3,500 individuals (over a third were members of the security forces) and the injury of another 40,000. Security forces were responsible for around 10 per cent of Troubles-related deaths, and loyalist and republican paramilitaries for around 90 per cent of all deaths.[2] Since the end of the Troubles, governments have sought to support the people and communities to address the legacy of the past and to reconcile differences between them, and progress has been made in many areas

"Addressing the Legacy of Northern Ireland's past" - Command Paper July 2021

2. On 14 July 2021, the Government published a Command Paper to deal with legacy issues in Northern Ireland.[3] This departed from the mechanisms agreed to under the Stormont House Agreement ("SHA")[4] and instead set out proposals for: a statute of limitations applicable to all Troubles-related offences; a statutory bar on the Police Service and Police Ombudsman prohibiting them from investigating Troubles-related incidents; the cessation of judicial activity across all criminal cases, civil cases and inquests in relation to Troubles-related incidents; and the establishment of an independent body to enable families to seek and receive information regarding deaths and injuries.[5] The proposals in the Command Paper were widely opposed including by the Northern Ireland Assembly,[6] UN Special Rapporteurs,[7] and the Council of Europe's Commissioner for Human Rights.[8] Despite this, many of the proposals in the current Bill are similar to those contained within the Command Paper.

1 Clause 1
2 Addressing the Legacy of Northern Ireland's Past, Command Paper 498, July 2021, p20
3 Ibid., p20
4 The Stormont House Agreement (SHA) 2014 was completed after negotiations with the Irish government and the five main local political parties in Northern Ireland. The SHA set out various mechanisms for dealing with the legacy issues including a Historical Investigations Unit to investigate outstanding cases related to the Troubles.
5 Addressing the Legacy of Northern Ireland's Past, Command Paper 498, July 2021
6 On 20 July 2021 the Northern Ireland Assembly was recalled from summer recess to debate a motion to reject the UK proposals and call for the withdrawal of the Command Paper. The motion stated that the proposals "do not serve the interests, wishes or needs of victims and survivors nor the requirements of truth, justice, accountability, acknowledgement and reconciliation". This was passed unanimously.
7 On 10 August 2021, UN Special Rapporteurs expressed, "grave concern that the plan outlined in July's statement forecloses the pursuit of justice and accountability for the serious human rights violations committed during the troubles and thwarts victims' rights to truth and to an effective remedy for the harm suffered, placing the United Kingdom in flagrant violation of its international obligations."
8 In September 2021, the Council of Europe Commissioner for Human Rights, Dunja Mijatović, raised concerns that the Command Paper proposals would "lead to impunity" and conflicted with obligations under the ECHR.

Timetable of the Bill

3. The Government introduced the Northern Ireland Troubles (Legacy and Reconciliation) Bill ("the Bill") to the House of Commons on 17 May 2022. The Bill completed its passage through the House of Commons on 4 July and remained largely unamended. The date for the Second Reading of the Bill in the Lords is yet to be announced at the date of agreement of this report.

Overview of the Bill

4. Part 1 of the Bill defines the "Troubles" and other key expressions.[9] Part 2 of the Bill establishes the Independent Commission for Reconciliation and Information Recovery (ICRIR). The ICRIR will have the following four duties:

a) To conduct reviews into Troubles-related deaths[10] and "other harmful conduct"[11] upon the request of victims,[12] certain family members,[13] or certain holders of public office[14] (including the Secretary of State),[15] and to publish a report of its findings.[16] The ICRIR may also open an investigation into a death or other harmful conduct if an individual comes forward seeking immunity in relation to that specific death or injury.[17]

b) To consider applications for immunity from prosecution for Troubles-related offences relating to a death or serious injury, and to grant immunity to the applicant where certain conditions are met (the conditional immunity scheme - **explained further below at paragraph 6**).[18]

c) To refer its findings to prosecutors following a review, in cases of suspected offences where immunity from prosecution is not granted.[19]

d) To produce a historical record of all deaths that were caused by conduct forming part of the Troubles.[20]

5. In order to carry out these functions, the Commissioner for Investigations (and any other designated officers) will have the powers and privileges of constables[21] and the power to require the provision of statements and other information from individuals,[22] for the purposes of carrying out reviews. Relevant authorities[23] are under a duty to disclose information to the ICRIR as the Commissioner "may reasonably require".[24]

9 References are to the Bill as brought from the Commons introduced in the Lords: HL Bill 37 of 2022–23
10 Clause 9
11 Defined in clauses 10 – 13
12 Clause 10(1)
13 Clause 9(1)
14 Clause 9(4–6)
15 Clause 9(3) and 10(2)
16 Clause 15
17 Clause 12
18 Clause 18
19 Clause 23. Note that referrals to a prosecutor are discretionary rather than mandatory.
20 Clause 24
21 Clause 6(1)
22 Clause 14
23 Defined in clause 54
24 Clause 5

6. Part 2 of the Bill also provides for a scheme for immunity from prosecution. This will allow those who cooperate with the ICRIR to receive immunity from prosecution for offences resulting in, or connected with, Troubles-related deaths and serious injuries.[25] The ICRIR will be under a duty to grant immunity where certain conditions are met.[26] In the event that immunity is not granted to an individual, the ICRIR can continue its investigation and if the evidence permits, produce a file for prosecution which will be submitted to the relevant prosecutor.[27] If a decision to prosecute has already been made prior to the application for immunity, individuals will not be eligible for a grant of immunity.[28]

7. Part 3 of the Bill creates prohibitions and restrictions which apply to police investigations, criminal proceedings, civil proceedings, inquests (inquiries in Scotland), and police complaints arising out of the Troubles. In particular, it will:

a) Prohibit criminal investigations into Troubles-related incidents except where they are being carried out in support of a prosecution which began before the Bill enters into force (pre-commencement prosecutions) or where referred by the ICRIR to the prosecutor.[29]

b) Prohibit prosecutions for Troubles-related offences not involving death or serious injury, or which are not connected to offences involving death or serious injury.[30] A person may only be prosecuted for a Troubles-related offence connected with a death or serious injury if they have not been granted immunity by the ICRIR immunity requests panel, and the case has been referred by that body to a prosecutor, following a review of the death or conduct causing the injury.

c) Prohibit civil claims arising from conduct forming part of the Troubles and events between 1 January 1966 and 10 April 1998, where a claim has yet to be filed by the date of the Bill's introduction.[31] Those which have been filed before the Bill's introduction will continue.

d) Cease inquests which have not yet reached the stage of a substantive hearing by 1 May 2023 or the date on which the ICRIR becomes operational (whichever comes first), but such cases can be referred by families or coroners to the ICRIR for investigation.[32]

8. Part 3 of the Bill also amends the early release scheme in the Northern Ireland (Sentences) Act 1998, which was enacted to implement the prisoner release provisions in the Belfast/Good Friday Agreement.[33] The Bill extends the scheme in a number of ways:

25 Defined in clause 1(5)
26 Clause 18(1)
27 Clause 23(2)
28 Clause 38(3)
29 Clause 34 and 38
30 Clause 37
31 Clause 39
32 Clause 40
33 The scheme currently applies to persons serving life sentences or determinate sentences of 5 years or more for certain types of offences. It enables prisoners to apply to the Sentences Review Commissioners for early release on licence, with those Commissioners considering whether the prisoner meets certain criteria demonstrating that they do not present a risk of engaging in terrorism. The scheme currently applies to persons serving a sentence in Northern Ireland for a scheduled offence committed between 1973 and 1998 (as required by the Belfast/Good Friday Agreement).

a) it will include a broader spectrum of Troubles-related offences;

b) it will extend the temporal scope of the scheme to include offences which were committed on or after 1 January 1966 (it currently extends back to 8 August 1973);

c) it will enable a person to apply for early release on licence immediately (whereas they are currently required to serve a minimum proportion of their sentence);

d) it will extend the scheme to those with a determinate sentence of less than 5 years.[34]

9. Part 4 of the Bill requires designated persons to carry out a programme of memorialisation work, including an oral history initiative.

JCHR Inquiry

10. On 26 May 2022, we launched an inquiry into the human rights compatibility of the Bill. We are grateful to each of the seven organisations which submitted written evidence to our inquiry.[35] On 7 June 2022, the Chair of the Joint Committee on Human Rights was invited by the Northern Ireland Affairs Committee to attend an evidence session on the Bill.[36]

11. We note the strength of opposition to this Bill as drafted expressed by all those who submitted evidence to us, including an overwhelming consensus regarding the incompatibility of the Bill with Convention rights. The Northern Ireland Human Rights Commission (NIHRC), a key stakeholder and expert body on rights-compliance, submits that "the Bill is incompatible with Articles 2 (right to life) and 3 (freedom from torture) of the European Convention on Human Rights (ECHR). This Bill is fatally flawed, it is not possible to make it compatible with the ECHR."[37] The Law Society of Northern Ireland states that the Bill "fundamentally undermines the rule of law, is incompatible with the Human Rights Act 1998, the UK's international human rights obligations, and the Belfast/Good Friday Agreement."[38] Rights and Security International states that the "Bill would violate the ECHR".[39] In its submission to the Council of Europe's Committee of Ministers,[40] the Committee on the Administration of Justice (an NGO in Northern Ireland) states that "the breaches of human rights standards are so egregious and the principles of the Bill so conflictive to the rule of law, that no detailed amendments could produce human rights compliance."[41]

34 Clause 42

35 The Bar Council of Northern Ireland, The Law Society of Northern Ireland, Amnesty International UK, the Northern Ireland Human Rights Commission, Rights and Security International, Quaker Concern for the Abolition of Torture, The Committee on the Administration of Justice.

36 Oral evidence taken before the Northern Ireland Affairs Committee on 7 June 2022, HC 284 (2022–23)

37 Northern Ireland Human Rights Commission (NIB0003) para 1.2

38 The Law Society of Northern Ireland (NIB0005) p1

39 Rights and Security International (NIB0002) para 15

40 The Committee of Ministers is the Council of Europe's statutory decision-making body. Its role and functions are broadly defined in Chapter IV of the Statute. It is made up of the Ministers for Foreign Affairs of member States. The Committee meets at Ministerial level once a year and at Deputy level (Permanent Representatives to the Council of Europe) weekly.

41 Committee on the Administration of Justice, Submission to the Council of Europe's Committee of Ministers in relation to the supervision of the cases concerning the actions of the security forces in Northern Ireland, para 47

12. We have serious doubts that this Bill as drafted is compatible with Articles 2 and 3 of the European Convention on Human Rights (ECHR) (the right to life and the right to be free from torture and inhuman and degrading treatment or punishment, respectively), as well as Articles 6 and 13 (the right to a fair trial and the right to an effective remedy). Our analysis of the Bill raises serious questions as to the accuracy of the section 19(1) HRA statement of compatibility which was made by the former Secretary of State for Northern Ireland (SOSNI) on publication of the Bill.

13. **We agree with various stakeholders that this Bill as drafted is unlikely to comply with the Convention. Whilst we put forward a series of amendments within this report which are intended to strengthen rights compliance, we acknowledge that some of these amendments would fundamentally alter the entire approach of the Bill. While we support the aim of reconciliation, we urge the Government to reconsider its whole approach and put forward legislation which ensures (i) investigations are independent, effective, timely, involve next of kin, and are subject to public scrutiny; (ii) perpetrators of serious human rights violations are held to account; and (iii) that all possible avenues for the pursuit of justice and the provision of an effective remedy are available to victims and their families.**

2 The ICRIR and the duty to undertake effective investigations

14. Various provisions in the Bill engage the UK's obligations under Articles 2 (the right to life) and 3 (the prohibition of torture and inhuman and degrading treatment or punishment) of the Convention as they concern the investigation of offences arising out of Troubles-related deaths, life-threatening injuries or serious harm, and the placing of restrictions or prohibitions on such investigations.[42] The crucial question is whether the transfer of legacy cases to the ICRIR, the conditional immunity scheme, and the prohibitions and restrictions on legal proceedings, as a package of measures, is capable of fulfilling the State's obligations under Articles 2 and 3.

The duty to undertake effective investigations under Articles 2 and 3 ECHR

15. Article 2 imposes two substantive obligations upon states: the prohibition of intentional deprivation of life and the obligation to protect the right to life. In addition, Article 2 imposes a procedural obligation upon states to carry out independent, effective, and prompt investigations when individuals have been killed (or sustained life-threatening injuries)[43] as a result of the use of force by agents of the State,[44] as well as by private persons.[45] This stems from the duty upon states to put in place effective criminal laws and law enforcement machinery for the prevention and punishment of breaches. Even where the suspected perpetrator of a breach is not an agent of the State, the State is nevertheless required to undertake official investigations. The jurisprudence of the European Court of Human Rights (ECtHR) has set out what is required under Article 2 to comply with the obligation to conduct effective investigations: "The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances."[46] ECtHR case law has determined that the investigation must be independent, effective, reasonably prompt and expeditious, include a sufficient element of public scrutiny, must adequately involve the next-of-kin, and it must be initiated by the State rather than be solely dependent on being raised by the next-of-kin.[47] Although there is no right to a guaranteed prosecution or conviction,[48] in order

42 Clauses 2, 9 – 17 (reviews by the ICRIR into Troubles-related deaths and other harmful conduct); clauses 19 – 21 (conditional immunity scheme); clauses 33 to 37 (prohibitions and restrictions on criminal investigations and prosecutions for Troubles-related offences); clause 39 (inquests, investigations and inquiries); clause 40 (police complaints); and clause 41 (amendment of the Northern Ireland (Sentences) Act 1998), as set out in the Government's ECHR memorandum accompanying the Bill.

43 Igor Shevchenko v Ukraine [2008] ECHR 837

44 McCann and Others v. the United Kingdom, [1995] ECHR 18984/9, para 161

45 Mustafa Tunç and Fecire Tunç v. Turkey [GC], [2015] ECHR 383, para 171

46 Jordan v United Kingdom [2001] ECHR 327, para 105

47 Ibid.

48 Giuliani and Gaggio v. Italy [GC], [2009] ECHR 23458/02, para 306

to be Convention-compliant, an investigation must be capable of determining whether the force used was justified in the circumstances[49] and it must be capable of leading to the identification and punishment of those responsible.[50]

16. The prohibition of torture, inhuman and degrading treatment or punishment also requires states to undertake effective investigations where allegations of Article 3 violations have been made.[51] As with Article 2, any investigation must be sufficiently adequate, prompt, independent, be subject to public scrutiny, and involve the victim. The duty can be discharged via criminal investigations, prosecutions, inquests, or inquiries, as long as the above-mentioned criteria are satisfied.[52]

Is it independent?

17. In order to comply with the procedural requirements under Articles 2 and 3, it is necessary for the persons responsible for carrying out the investigation to be independent from those implicated in the events.[53] In the current context, those who are implicated in the events include the British Government, British service personnel and veterans, British agents, and loyalist and republican paramilitary organisations.

18. The ICRIR will be a statutory body headed by a panel of Commissioners appointed by the Secretary of State. The Chief Commissioner (who must be a current or former member of the judiciary) and the Commissioner for Investigations, are roles which are set out in the Bill.[54] The Bill provides that the Commission will consist of between three and five Commissioners. The ICRIR will conduct reviews in response to requests from certain family members, victims of serious injuries, the Secretary of State for Northern Ireland (SOSNI), the Attorney or Advocate General for Northern Ireland or a Coroner with conduct of an ongoing inquest.[55] Equivalent provision is made for relevant office holders in Scotland and in England and Wales.[56]

19. There are concerns as to whether the ICRIR will be sufficiently independent from the Government which may, in some cases, be implicated in the events under investigation. The SOSNI will appoint the Commissioners,[57] make regulations and issue guidance governing the ICRIR's work, for example on the immunity process,[58] may prohibit the disclosure of sensitive information on the grounds of national security,[59] may request reviews,[60] direct a response to historical findings, undertake monitoring,[61] and control the

49 Armani Da Silva v. the United Kingdom [GC], Application No. 5878/08, 2016, para 243
50 Hugh Jordan v. the United Kingdom, Application no. 24746/94, para 105; Nachova and Others v. Bulgaria [GC], (2006) 42 EHRR 43 para 110; Al-Skeini and Others v. the United Kingdom [GC], para 163, In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland) [2019] UKSC 7 (para 128)
51 Assenov and Others v. Bulgaria [1998] ECHR 98, para 102 and El-Masri v. the former Yugoslav Republic of Macedonia [GC], [2012] ECHR 2067, para 182
52 R (Middleton) v HM Coroner for West Somerset [2004] UKHL 10; Ali Zaki Mousa v Secretary of State for Defence [2013] EWHC 1412
53 Gulec v. Turkey ECHR 1998-IV, paras 81–82; Oğur v. Turkey, [GC] no. 21954/93, [1999] ECHR, paras 91–92
54 Clause 2(3)
55 Clause 9 and 10
56 Clause 9(6)
57 Schedule 1, Part 2, paragraph 7(1)
58 Clauses 20(3), 21(6), 21(7), 21(7), 21(8), 29, 30, 31, 52, Schedule 1
59 Clause 26 and Schedule 5
60 Clause 9(3) and 10(2)
61 Clause 32

resources.[62] There is, therefore, a concern amongst stakeholders that the Government will retain a significant degree of control over the mechanism. Further, clause 33(1) also allows the Secretary of State to shut down the ICRIR.[63] We note the concerns of the Delegated Powers and Regulatory Reform Committee that it is undesirable for Ministers to have the power to abolish a body created by Parliament: "what Parliament has created should be for Parliament to abolish".[64]

20. **There are concerns as to whether the ICRIR is sufficiently independent from the Secretary of State for Northern Ireland. Independence is essential not only to instil public confidence in the proposed new mechanism, but also to ensure compliance with the obligation to undertake independent investigations under Articles 2 and 3 ECHR. The Government should consider convening an appointments panel to make recommendations relating to the appointment of Commissioners. Guidance on the immunity scheme should be included within the Bill so it can be subject to proper scrutiny.**

Is it effective?

21. To comply with the Convention, an investigation "must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances… and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness 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."[65] In the absence of inquests, criminal, or civil proceedings, the ICRIR must be capable of achieving these requirements in order to be effective.

Overview of powers

22. We note that the ICRIR's Commissioner for Investigations will be given the powers and privileges of a constable anywhere in the UK.[66] The Commissioner will be able to confer, through designation, all or some of these powers on individual officers of the ICRIR.[67] We also note that the "relevant authorities", which includes Government departments, devolved bodies, the police and the intelligence agencies,[68] will be under a legal duty to provide full disclosure to the ICRIR.[69] The Commissioner for Investigations will also have the power to issue a notice requiring an individual to attend a place to provide information, documents, or anything else in the person's custody, or to produce a written statement of evidence.[70] The Government notes that these powers are in similar

62 Clause 2(7)
63 Clause 33
64 Delegated Powers and Regulatory Reform Committee, Ninth Report of Session 2022–23, Northern Ireland Troubles (Legacy and Reconciliation) Bill, HL Paper 55, para 12
65 McKerr v. the United Kingdom (application no. 28883/95, judgment of 4 May 2001), para 113, and Jordan v UK, para 107
66 Clause 6(1)
67 Clause 6. Note that such powers may be exercised in relation to any of the functions of the ICRIR, except the function of producing the historical record.
68 Clause 54
69 Clause 5
70 Clause 14

terms to those conferred on coroners in inquest proceedings, with the sanction for non-compliance being a financial penalty.[71] The ICRIR will be required to write a report following any review which was requested, which will be published[72] unless publication would be contrary to the ICRIR's overarching duties.[73] Where immunity is not granted, referrals may be made for prosecution.[74]

Deficiencies

23. We are concerned that the case reviews may not meet the standard of effective investigations required by the ECHR. The original proposals contained in the Command Paper of July 2021 suggested that the new legacy body would only have the power to conduct desk-based reviews and that testimony was voluntary. It is welcome that the Bill provides for stronger powers to allow the exercise of police powers and the compulsion of testimony. However, it will be for the Commissioner for Investigations to decide "how and when" reviews are to be carried out, including what steps are necessary.[75] This allows considerable discretion and does not guarantee that reviews will be carried out to meet the requirements of Articles 2 and 3. We note that, in conducting a review, the Commissioner for Investigations must ensure the review "looks into all the circumstances of the death or other harmful conduct, including any Troubles-related offences",[76] however, this does not in itself met the requisite standards.

24. Further, whilst there is a duty of full disclosure upon relevant authorities, there is no duty upon the ICRIR to make requests to relevant authorities for all information that may be relevant to a case review, nor is there a duty to engage with all relevant witnesses who may be able to assist with the identification of perpetrators, for example.

25. **We are concerned that the efficacy of the ICRIR's case reviews might not reach the standard of effective investigations as required by the Convention. In order to improve the efficacy of the case reviews, there should be an explicit duty on the Commissioner for Investigations to conduct investigations in accordance with the requirements under the Convention. In particular, the Commissioner must be under a duty to take whatever reasonable steps they can to secure the evidence concerning the incident, including eyewitness 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. The Commissioner must also take reasonable steps to determine whether any force used was or was not justified in the circumstances and seek to identify those responsible for any unlawful conduct. The Bill should be amended to this effect (see Annex, Amendment 1).**

Non-duplication

26. The Bill provides that the Commissioner for Investigations must ensure that the ICRIR does not duplicate any aspect of a previous investigation unless the ICRIR believes

71 Explanatory Notes to the Northern Ireland Troubles (Legacy and Reconciliation) Bill [Bill 0010 (2022–23) - EN], para 28. Clause 14 and Schedule 4.
72 Clause 16 (2)
73 Clause 17(4), clause 4(1) and clause 25(2) of the Bill
74 Clause 23(2)
75 Clause 13(4)
76 Clause 13(3)(b)

it is necessary to do so.[77] This restrictive provision could be problematic as a previous investigation may not have been Convention-compliant. The Bill should include a further exception to this prohibition of duplication to allow for reviews of cases where previous investigations fell short of the Convention's requirements.

27. **The scope of discretion available to the ICRIR should be broadened to allow it to duplicate any aspect of previous investigations where required to ensure compliance with the procedural requirements of Articles 2 or 3 of the ECHR (see Annex, Amendment 2).**

Reporting

28. Although the Bill places a duty on the ICRIR to produce a final report on the findings of reviews[78] and to publish these reports[79] (subject to certain conditions),[80] there is no specific requirement placed on the ICRIR regarding the content of the reports. As noted above, in order to be effective, the reports produced by the ICRIR must identify, where possible, whether the use of force was justified and lawful, and identify any persons responsible for unlawful conduct.

29. **The Bill should be amended to impose a duty upon the Chief Commissioner to ensure that reports, wherever possible, seek to identify whether any use of force was justified and lawful, and to identify any persons responsible for unlawful conduct (see Annex, Amendment 3).**

Disclosure to the ICRIR and onward disclosure

30. There are also concerns regarding the provisions regarding disclosure. The Bill provides that a "relevant authority" must disclose to the ICIRIR information, documents or other materials that the ICRIR "may reasonably require for the purposes of, or in connection with, the exercise of the review function or the immunity function."[81] The inclusion of the term "may reasonably require" may allow the authorities to challenge a request from the ICRIR on the basis that the information is not "reasonably required". Ultimately, there is no sanction for failure to provide such information in accordance with this duty.[82] So whilst the duty of full disclosure is welcome, it has no teeth.

31. Furthermore, the ICRIR is prohibited from disclosing information if certain prohibitions apply.[83] These prohibitions include where the information has been identified as sensitive[84] by the Commissioner for Investigations, a relevant authority, or the

77 Clause 13(5)
78 Clause 15
79 Clause 16(2)
80 For example, if the review was carried out in accordance with clause 12 (i.e. in connection with requests for immunity), then the Chief Commissioner MAY publish the final report. (Clause 16(3)). Further, if a referral of a case has been made to a prosecutor under clause 22(1), then the final report is not to be published unless and until a decision has been made not to prosecute or the prosecution is no longer continuing. (Clause 17(3))
81 Clause 5
82 Note that persons who fail to provide information without reasonable excuse under clause 14 are liable for a penalty up to £1000 - Schedule 4.
83 Clause 26(2).
84 Sensitive information is defined in clause 54 as "information which, if disclosed generally, would risk prejudicing, or would prejudice, the national security interests of the UK."

SOSNI;[85] the information has been identified as "protected international information"[86] by the SOSNI; or where the disclosure would contravene the duty on the ICRIR to avoid prejudicing the national security of the UK, the lives or safety of any person, or prejudicing criminal proceedings in the UK;[87] or where the disclosure would contravene data protection legislation, or relevant provisions of the Investigatory Powers Act 2016.[88] The Commissioner for Investigations may propose disclosure of sensitive information to the SOSNI, who may prohibit this disclosure. If this occurs, the ICRIR's report must include a statement that the SOSNI has prohibited the disclosure and the reasons for this decision.[89] The decision of the SOSNI to prohibit disclosure is subject to appeal to the courts.[90] Whilst the judicial oversight of the SOSNI's decisions to prohibit disclosure is welcome, the ability of the SOSNI to make decisions on the redaction of reports could be used to shield the State where there has been police collusion or State complicity in criminal activity. The use of these powers to prohibit disclosure and to redact reports may prevent the ICRIR from identifying persons responsible for unlawful conduct.

32. **The duty of full disclosure on the relevant authorities is welcome, however, there is no sanction provided for failure to comply. In addition, the Secretary of State may prohibit onward disclosure by the ICRIR. We are concerned that this may perpetuate the existing grievances with regard to the State's failure to disclose relevant information regarding Troubles-related cases. Consideration should be given to the inclusion of a sanction upon the relevant authorities in circumstances where they fail to comply with their duty of disclosure. Consideration should also be given to the appointment of independent counsel to make decisions regarding disclosure instead of the Secretary of State.**

Five-year time limit

33. The Bill provides that no requests for an ICRIR review can be made after five years of its operations.[91] Further, the SOSNI is provided with a power to wind up the ICRIR if satisfied that the need for the ICRIR to exercise its functions has ceased.[92] The SOSNI could therefore close down the ICRIR at any time before the five-year period has lapsed. This is problematic given the prohibition on criminal investigations, prosecutions, inquests and civil claims would remain. If new evidence arises after the closure of the ICRIR, this leaves no avenue available for the pursuit of an effective investigation. The procedural obligation to undertake effective investigations could be triggered after the closure of the ICRIR due to the discovery of new evidence, but there will be no mechanism in place to allow for an investigation to take place.

85 Clause 26(4–6)
86 Defined in clause 54 as "information which (a) was supplied to any person or by an agency of the government of a country or territory outside the UK, and (b) if disclosed generally might, in the opinion of the SOS, damage international relations."
87 Clause 26(7)
88 Clause 26 (8–9)
89 Schedule 5 Part 2 para (8)
90 Schedule 5 Part 2 para 10
91 Clause 9(8) and 10(3).
92 Clause 33(1)

34. **The imposition of a five-year time limit for requesting reviews is problematic in light of the prohibitions and restrictions on all other legal proceedings. The Government should consider allowing for flexibility in cases where new evidence comes to light which could trigger the need for an investigation.**

Reasonably prompt and expeditious?

35. The ECtHR accepts that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as "essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."[93]

36. The Government has acknowledged that "while the investigation can no longer be said to be 'prompt' in relation to the original event, that would be the case for any contemporary investigation of a Troubles-related incident."[94] It is not clear what the timetable will be for the new ICRIR. There is a five-year deadline on referring cases for review which, for the reasons set out above, is problematic. It will be imperative that the new mechanism is able to operate expeditiously in respect of all outstanding cases bearing in mind there are over 1,100 outstanding criminal investigations and 36 outstanding inquests to date.

Public scrutiny?

37. In order to comply with the Convention, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability. This requirement does not, however, require all aspects of all proceedings to be public. Disclosure of, for example, police reports and investigative materials may involve sensitive issues with possible prejudicial effects on private individuals or other investigations. The degree of public scrutiny required may vary from case to case.[95]

38. The Bill provides that the ICRIR is under an obligation to publish reports which will be public[96] (unless the review was carried out following a request for immunity).[97] However, there does not appear to be any other opportunity for public scrutiny. There will be no public hearings, so the public will be limited to reading reports once a review has concluded, although these reports may be redacted. Given the crucial importance of public confidence in the system, the exclusion of the public from the process has the potential to undermine trust.

39. **The ECHR requires that there be sufficient public scrutiny of investigations. The proposed model does not provide for the public to engage in the review process. The public is limited to reading the published reports. The Commissioner for Investigations should be required to give consideration to whether any public hearings could be held during the course of case reviews (see Annex, Amendment 4).**

93 Jordan v United Kingdom [2001] ECHR 327, para 108
94 Explanatory Notes to the Northern Ireland Troubles (Legacy and Reconciliation) Bill [Bill 0010 (2022–23) - EN], para 30
95 Jordan v United Kingdom [2001] ECHR 327, para 109
96 Clause 16(2)
97 Clause 16(3)

Involvement of next of kin?

40. The Convention requires that investigations must adequately involve the next-of-kin, to the extent necessary to safeguard their legitimate interests. Investigations must be initiated by the State rather than being solely dependent on initiation by the next-of-kin. The ECtHR has held that "authorities must act of their own motion, once the matter has come to their attention. They 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."[98]

41. Clause 9 of the Bill provides that the close family members[99] of the deceased may make a request for the ICRIR to review a death.[100] If there are no close family members of the deceased, any member of the family may exercise the right to make a request if "appropriate"[101] (which is to be determined by the Commissioner for Investigations).[102]

42. The Government's position is that the ICRIR's investigations "will fully involve the next of kin, and the ability of the Secretary of State and other holders of public office to request a review means that the initiation of an investigation does not wholly depend on the next-of-kin making a request."[103] However, the Government appears to anticipate that the reviews will be primarily initiated by next of kin, rather than the State:

> "The purpose of granting the Secretary of State the power to request a review in any circumstances is to ensure that in any case where the procedural obligation arises under Article 2 ECHR, a review can be triggered in order to discharge that obligation. It is also intended that, in general, this power will only be exercised when the procedural obligation arises and a review has not otherwise been requested. The Secretary of State will consider whether that obligation arises in appropriate cases."[104]

43. This is problematic for two reasons. Firstly, the duty to undertake effective investigations cannot be discharged by placing the onus on the victims or survivors to initiate the reviews. Once matters have come to the attention of the authorities, they must act of their own motion. It would therefore be necessary for the Government to take responsibility for ensuring all outstanding cases which trigger the investigative duty are referred for review, rather than relying on victims and survivors to take this responsibility upon themselves.

44. Secondly, the "savings clause" which gives the SOSNI the power to refer cases to ensure compliance with Articles 2 and 3 is premised on the assumptions that (i) victims will be aware of this power; (ii) there will be a process set up for victims to bring their cases to the attention of the SOSNI where they are not eligible to refer their cases directly

98 Jordan v UK 2001, para 105, also see İlhan v. Turkey [GC] no. 22277/93, ECHR 2000-VII, para 63
99 A "close family member" is defined in Part 1 of Schedule 3.
100 Clause 9(1)
101 Clause 9(2)
102 Clause 9(7)
103 Explanatory Notes to the Northern Ireland Troubles (Legacy and Reconciliation) Bill [Bill 0010 (2022–23) - EN], para 30
104 Explanatory Notes to the Northern Ireland Troubles (Legacy and Reconciliation) Bill [Bill 0010 (2022–23) - EN], para 25

to the ICRIR; and (iii) that the SOSNI will act on these referrals from victims and will request a review to be undertaken. There is no procedure set out on the face of the Bill to address these issues.

45. **The Government must not rely on victims and families to initiate case reviews - there is an obligation on the State to act of its own motion. It is therefore imperative that the Secretary of State ensures that all outstanding cases which trigger the investigative duty under Articles 2 or 3 are referred for review (see Annex, Amendments 5 and 6).**

Conclusions on the duty to undertake effective investigations

46. In sum, we are concerned that the ICRIR, as a standalone mechanism, will not be able to satisfy the requirements arising from the procedural duty to undertake effective investigations into deaths and serious harm. There are serious concerns regarding its lack of independence from the State, its efficacy, and the limited involvement of the public and next of kin. In order to be effective, investigations must be capable of identifying and punishing persons responsible for unlawful conduct. The ICRIR has no means of ensuring that perpetrators are punished - on the contrary, those who are granted immunity will evade punishment. **Given the prohibitions and restrictions on all other legal avenues such as inquests and criminal investigations, the ICRIR as a standalone mechanism does not appear to provide a Convention-compliant approach.**

Scope of reviews

47. A further issue arises in relation to the scope of case reviews permitted by the Bill. The ICRIR will be limited to carrying out reviews of Troubles-related deaths and "other harmful conduct".[105] "Other harmful conduct" is defined as "any conduct forming part of the Troubles which caused a person to suffer physical or mental harm of any kind (excluding death)".[106] However, a person may only request a review of "other harmful conduct" if the conduct caused the person to suffer "serious physical or mental harm".[107] "Serious physical or mental harm" is narrowly defined as eight specific conditions, including paraplegia, severe brain injury or damage, and total blindness.[108] It is unclear how many of the victims would fall within the scope of this narrow definition. This restrictive definition of serious harm does not cover the full spectrum of serious harm which would fall within the scope of Article 3. It is possible, therefore, that conduct amounting to a violation of Article 3 would fall outside of the scope of the ICRIR's mandate.

48. To address this problem, the Government is relying on Clause 10(2) which gives the SOSNI the power to refer cases to the ICRIR for review. This clause operates as a "safety valve clause" as it means the SOSNI can refer cases which fall outside of the definition of "serious physical or mental harm", but which concern treatment contrary to Article 3. This is problematic as it relies entirely on the discretion of the SOSNI to exercise this power. It also assumes that the SOSNI will be aware of such cases, although there is no procedure or guidance set out in the Bill as to how victims of Article 3 violations can raise

105 Clause 2(4)(b)
106 Clause 1(4)
107 Clause 10(1)
108 Clause 1(6)

their cases with the SOSNI to seek a referral. In our view, it would be preferable to widen the definition of serious harm to ensure that all conduct contrary to Article 3 is included within the scope of the ICRIR's review mandate.

49. In addition, reviews of cases concerning "other harmful conduct" can only be requested by the direct victim or the Secretary of State[109]–if the victim is now deceased (or lacks capacity), there is no provision for the family members to request a review. This may also lead to allegations of serious harm falling outside the remit of the ICRIR, with no other avenue available to the family.

50. **There is a risk that the Government will not be able to discharge its procedural obligations under Article 3 ECHR given the narrow definition of "serious physical or mental harm" which may exclude from scope numerous cases concerning treatment which constitutes torture or inhuman and degrading treatment or punishment. This is particularly problematic in light of the prohibitions and restrictions on any other legal avenues. The definition of "serious physical or mental harm" must include the full scope of harm prohibited by Article 3 (see Annex, Amendment 7). Where victims of torture or inhuman and degrading treatment or punishment are now deceased, or lack capacity, it should be possible for next-of-kin to refer cases to the ICRIR (see Annex, Amendment 8)**

109 Clause 10

3 Conditional immunity scheme

51. This Chapter sets out an overview of the conditional immunity scheme and considers whether immunity from prosecution in relation to unlawful killings and serious harm can comply with Articles 2 and 3 ECHR. The Government's position is that the scheme can be "justified as an exception to the requirement to punish those identified as being responsible for a death or life-threatening injury, as a proportionate means of achieving and facilitating truth recovery and reconciliation in Northern Ireland."[110] However, we find that the legal basis for this position is questionable.

Overview of the conditional immunity scheme

52. Although the ICRIR has powers to undertake reviews of deaths and cases resulting in certain forms of serious harm, and may therefore be able to identify perpetrators, the operation of the conditional immunity scheme means that those perpetrators who meet certain conditions must be granted immunity from prosecution. The immunity requests panel is required to grant immunity from prosecution where it is satisfied that each of the following three conditions are met:[111]

a) A valid request for immunity from prosecution has been made.[112]

b) The immunity requests panel must be satisfied that the applicant has provided an account of his or her involvement in conduct forming part of the Troubles which is true to the best of his or her knowledge and belief.[113]

c) The immunity requests panel must be satisfied that the applicant's account discloses conduct which would tend to expose him or her to (criminal) investigation or prosecution for at least one "serious or connected" Troubles-related offence.[114] "Serious" offences are defined in clause 1 as offences which cause death or serious physical or mental harm. "Connected" is defined in the same provision as "relating to or otherwise connected with such offences, and in particular, offences are connected when they form part of the same event." Offences which are Troubles-related but not "serious" or "connected" are outside the scope of the scheme and instead are subject to a total prohibition on investigation and prosecution.[115]

53. Where the above conditions are met, the immunity requests panel must decide whether the individual should be granted either (a) specific immunity from prosecution (i.e. immunity from prosecution for all the identified possible offences); (b) general immunity from prosecution (i.e. immunity from prosecution for all serious or connected Troubles-related offences within a description determined by the panel); or (c) specific

110 Explanatory Notes to the Northern Ireland Troubles (Legacy and Reconciliation) Bill [Bill 0010 (2022–23) - EN], para 22
111 Clause 18(1)
112 Clause 18(2). Clause 20 deals with procedural matters and contains a power for the Secretary of State to make rules about the procedure for making applications for immunity and for dealing with requests.
113 Clause 18(3)
114 Clause 18(5)
115 Clause 37

and general immunity from prosecution (i.e. immunity from prosecution for all of the identified possible offences and all serious or connected Troubles-related offences which are within a description determined by the immunity requests panel).[116]

54. The effect of a grant of immunity from prosecution is that no criminal enforcement action may be taken against the individual in respect of the offence(s).[117] Immunity from prosecution may not be revoked.[118]

The threshold test

55. The bar for the granting of immunity is set very low. Firstly, the applicant's account may consist entirely of information which has previously been provided to other bodies, as long as the panel is satisfied that the information is true to the best of the applicant's knowledge and belief.[119] Secondly, there is no requirement placed upon the ICRIR to test the veracity of the perpetrator's account through examination or cross-examination and no involvement of victims or survivors–although the panel must check the account against any information they already hold, they are not required to obtain and assess information from anyone other than the applicant.[120] Thirdly, there is no discretion granted to the panel to allow them to take into account other factors–if the conditions are met, the panel must grant the immunity. Once granted, immunity cannot be revoked.[121] This means that if it later transpired that the applicant had been lying, and that s/he was in fact involved in a much more serious incident than the facts disclosed, there would be no mechanism for revoking the grant of immunity for dishonesty.

56. **We have serious concerns about the compatibility of the conditional immunity scheme with the Convention. However, if the immunity scheme is to remain in the Bill, there should be a higher threshold test for the granting of immunity. At a minimum, the panel must be required to test the veracity of the account given by seeking evidence from relevant third parties, including victims and their families where relevant (see Annex, Amendment 9). Additionally, immunity from prosecution should be revocable in circumstances where a false account has been given (see Annex, Amendment 10).**

Is the conditional immunity scheme compatible with Articles 2 and 3 ECHR?

57. The question arises as to whether immunity from prosecution in relation to unlawful killings and serious harm can comply with Articles 2 and 3. There is limited consideration of the compatibility of amnesties within ECtHR jurisprudence. The Government relies on two cases. In *Dujardin v France* (1991),[122] the European Commission on Human Rights[123] observed that an amnesty would not *per se* breach the ECHR unless "it can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes". Importantly, *Dujardin* predates the development of the procedural obligation (to undertake effective investigations) under Articles 2 and 3 and

116 Clause 18(7)-(11)
117 Clause 35
118 Clause 18(14)
119 Clause 18(4)
120 Clause 21(4)
121 Clause 18(14).
122 Dujardin v France, [1991] Application No, 16734/90, Commission Decision .
123 The Commission, now abolished, used to act as a first tier for cases before they proceeded to the Court.

does not therefore hold much, if any, weight. The Government also cites the case of *Tarbuk v Croatia* (2012).[124] Importantly, this was not primarily concerned with the compatibility of amnesties with the ECHR. However, the Court noted that a State is justified in enacting "any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public."[125] This suggests, therefore, that there is some leeway to grant amnesties for human rights violations, but that they must be "necessary" and take account of the interests of individuals. Whilst it may be possible to argue that amnesties are "necessary" in certain circumstances to put an end to ongoing conflict and establish peace, it seems difficult to argue that it would be "necessary" in the context of Northern Ireland, decades after the end of the conflict.

58. In evidence to the Northern Ireland Affairs Committee, Sir Declan Morgan, former Lord Chief Justice of Northern Ireland, suggested that a very small number of people will apply for immunity on the basis that the Bill allows for applications for immunity to be made up to the point at which a decision to prosecute is taken.[126] Therefore, he stated that only those individuals who have been subject to investigations and brought in for questioning are likely to consider that it is worth making an application for immunity, i.e. where there is a viable case against the accused.[127] In other words, it is not worth applying for immunity unless it becomes clear that a decision to prosecute is about to be made. Sir Declan noted that this would apply to "a vanishingly small number of people. Again, the question then arises of why you would put immunity in place for such a small number of people in the circumstances."[128] The former SOSNI also conceded that only a small handful of individuals may come forward to provide information for families through the ICRIR.[129] If this is correct, even if the case law allowed for the use of such amnesties, the small number of people expected to benefit from the scheme raises serious questions as to whether it can be justified on the basis that it is necessary for reconciliation. We are unconvinced.

59. More recently, in 2014, the ECtHR considered the case of *Margus v Croatia*, which concerned grave breaches of fundamental human rights including intentionally killing civilians and inflicting grave bodily injury on a child. In this case, the ECtHR held that "granting an amnesty in respect of the killing or ill treatment of civilians would run contrary to the State's obligations under Articles 2 and 3 of the Convention since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible."[130] The Court also recognised a "growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously

124 Tarbuk v Croatia, Application no. 31360/10, 11 December 2012. This case concerns Mr Tarbuk, a Croatian national, who was arrested and placed in pre-trial detention on suspicion of espionage during the war in Croatia. He was subsequently granted an amnesty and the criminal proceedings against him were discontinued. Upon his release he instituted civil proceedings for damages against the State for the period of his detention. During the civil proceedings the relevant domestic law was amended to excluded the possibility of receiving compensation for detention where the criminal proceedings had been discontinued based on the amnesty. Relying on Article 6 (right to a fair trial), the applicant complained that the legislative intervention had rendered his proceedings unfair. The ECtHR found no violation of Article 6.

125 Tarbuk v Croatia, Application no. 31360/10, 11 December 2012

126 Clause 19

127 Oral evidence taken before the Northern Ireland Affairs Committee taken on 22 June 2022, HC 284, Q601 and Q602

128 Ibid., Q602

129 'A Troubled Legacy', The House Magazine, No.1725, Vol.45, 20 June 2022, pp. 34–36

130 Margus v Croatia, Application No. No 4455/10 (27 May 2014) para 181

recognised obligation of States to prosecute and punish grave breaches of fundamental human rights."[131] This reflects earlier jurisprudence from 2004, concerning a case involving allegations of torture of a child in Turkey, in which the ECtHR stated that "where a state agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an 'effective remedy' that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible."[132]

60. **The proposal to introduce immunity from prosecution will amount to an amnesty for serious human rights violations. The ECHR requires that the investigations must "be capable of leading to punishment of those responsible". Whilst the jurisprudence on the compatibility of amnesties with the Convention is limited, there is very clear guidance which indicates that amnesties for human rights violations conflict with the duty to prosecute and punish grave violations. Unless the ECtHR departs from this position, the conditional immunity scheme is likely to breach the UK's procedural obligations under Articles 2 and 3 ECHR in circumstances where immunity is granted for unlawful killings, torture, and inhuman or degrading treatment or punishment. The conditional immunity scheme should be removed from the Bill (see Annex, Amendment 11).**

Exclusions of certain offences

61. As introduced, the Bill provided no exceptions from the immunity scheme for certain offences. The Bill was amended by the Government in the Commons to exclude sexual offences from the scope. Clause 19 now states that there is no immunity for "Troubles-related sexual offences". Clause 19(7) states that "sexual offence" includes (a) rape; (b) any offence committed by (i) sexual assault, (ii) sexual activity, or (iii) causing or inciting another person to engage in sexual activity; (c) any offence relating to indecent images of children. Whilst this exemption is welcome, this definition is not exhaustive. Clause 19(9) allows the Secretary of State to define in regulations what is meant by "sexual offence" including provision specifying offences which are to comprise, or to be included in, that definition.

62. **It is not clear why the Government did not exclude all relevant sexual offences from the immunity scheme on the face of the Bill. It would assist clarity and transparency to include an exhaustive definition rather than delegate to the Secretary of State the power to define which sexual offences are excluded from the scope of the immunity scheme. Further, although an individual cannot be granted immunity for sexual offences, the Bill still prohibits any criminal investigation of Troubles-related death or serious injury which could potentially cover sexual offences if they are connected to the Troubles. If the prohibitions on criminal investigations are to remain in the Bill, an exception must be made for sexual offences to avoid impunity (see Annex, Amendment 12). If the immunity scheme is retained, further exceptions must be made for conduct which amounts to violations of Articles 2 and 3 in order to avoid impunity for human rights violations (see Annex, Amendment 13). The Bill must also be amended to allow criminal investigations and prosecutions of cases concerning unlawful killings or torture to proceed (see Annex, Amendment 12).**

131 Margus v Croatia, Application No. No 4455/10 (27 May 2014) para 139

132 Abdülsamet Yaman v Turkey, ECHR, Application no. 32446/96, 2 November 2004, para 55, Mocanu and Others v. Romania [GC], ECHR 17 Sept 2014, 2014, para 326

4 Restrictions and prohibitions on legal proceedings

Overview

63. The current mechanisms for dealing with legacy cases include: investigations by the Office of the Police Ombudsman of Northern Ireland (OPONI) into allegations of police misconduct;[133] coronial inquests;[134] police investigations (previously conducted by the Historical Enquiries Team, now the PSNI Legacy Investigation Branch); the ability of the PSNI to request another external force to investigate controversial cases (e.g. Operation Kenova);[135] public inquiries; the Public Prosecution Service (PPS); and civil litigation. The Bill would prohibit or (in the case of prosecutions) severely restrict, the operation of the above measures in the following ways:

a) Criminal investigations into Troubles-related incidents will be prohibited, except where they are being carried out in support of a prosecution which began before entry into force (pre-commencement prosecutions).[136] The criminal investigations underlying active criminal prosecution cases will be able to continue - all other ongoing investigations will cease. We understand there are seven such active cases.

b) Prosecutions for Troubles-related offences not involving (or connected to) death or serious harm will be prohibited.[137] Prosecutions for a Troubles-related offence involving or connected with a death or serious harm will only be permitted following a referral to the prosecutor from the ICRIR following a review.[138] Persons who have been granted immunity may not be prosecuted for the conduct for which immunity was granted.[139]

c) Civil claims (tort, delict, or fatal accident actions) arising from conduct forming part of the Troubles and events between 1 January 1966 and 10 April 1998, where a claim has yet to be filed by the date of the Bill's introduction, will be prohibited.[140] Those claims which are issued before the Bill's introduction (i.e. 17 May 2022) will continue.

d) Inquests which have not yet reached the stage of a substantive hearing by 1 May 2023 or the date on which the ICRIR becomes operational (whichever comes first) will be halted–these cases can be referred by families or coroners to the ICRIR for investigation.[141]

133 Powers to conduct investigations using full police and disclosure powers into past police criminality, and to investigate grave and exceptional police misconduct.
134 A judicial inquiry led by a Coroner with powers to compel witnesses, disclosure etc.
135 Operation Kenova has full police powers and has passed prosecution files to the PPS. It also produces reports of its investigative findings.
136 Clause 34
137 Clause 37
138 Clause
139 Clause 35
140 Clause 39
141 Clause 40

64. Pursuant to this Bill, the ICRIR will become the sole mechanism for delivering Article 2/3 compliant investigations, with the exception of any prosecutions of persons who have not been granted immunity for an offence causing death or serious harm. If the ICRIR fails to comply with the procedural requirements, there will be no alternative avenue for ensuring that effective investigations are undertaken.

Prohibition of civil claims based on tort, delict and fatal accident actions

65. Clause 39 of the Bill prohibits Troubles-related civil actions founded on tort, delict, the Fatal Accidents (Northern Ireland) Order 1977, Fatal Accidents Act 1976 and equivalent causes of actions under foreign law, from being brought after commencement. Claims filed between the Bill's first reading and the date of commencement, except those where final judgment has been delivered before that date, will also be prohibited from continuing. Claims filed before the Bill's first reading will not be affected by the prohibition. Clause 39 operates similarly to a limitation period as it prohibits claims relating to certain types of event occurring before 10 April 1998 from being pursued. This engages the right to a fair trial (Article 6(1)) and the right to an effective remedy (Article 13) ECHR .

66. Article 6(1) confers on individuals a right to submit disputes as to their civil rights and obligations for determination by a court or tribunal. The ECtHR has held that the right of access to a court is an inherent aspect of the safeguards enshrined in Article 6 and is related to the principles of the rule of law and the avoidance of arbitrary power which underlie the ECHR.[142] However, the right of access to a court is not absolute. It may be subject to restrictions, but those restrictions must not reduce the access to a court in such a way that the very essence of the right is impaired. Further, any restrictions upon access to a court must pursue a legitimate aim and be proportionate to that aim.

67. Limitation periods for civil claims are common, as lengthy delays can be unfair on respondents as they may no longer be able to remember details or have access to relevant evidence or witnesses. It may not be in the interests of justice to allow civil claims after a significant period of time. The ECtHR has upheld the compatibility of limitation periods, even if they are absolute, on the basis that they are within the State's margin of appreciation.[143] In the case of *Stubbings v UK*, the Court approved the need in civil litigation for limitation periods because they ensured legal certainty and finality, the avoidance of stale claims and preventing injustice where events in the distant past involved unreliable and incomplete evidence because of the passage of time.[144] However, there are cases where limitation periods have breached Article 6 ECHR due to their short duration[145] or disproportionality.[146]

68. It is possible that a limitation period for civil claims arising from the Troubles would fall within the margin of appreciation granted to the State. However, the cessation of all civil claims arising from the Troubles is problematic for two reasons. First, it is absolute in nature and offers no discretion to the courts to allow for cases to be brought where

142 Golder v UK (1975) 1 EHRR 524
143 Stubbings v UK (1996) 23 EHRR 213
144 Ibid.
145 Perez da Rada Cavanilles v Spain (1998) 29 EHRR 109 (three-day time limit) and De Geuoffre de la Pradille v France (1992) Series No. A 253 (three-month time limit)).
146 Roman v Finland [2013] 1 FCR 309

exceptional circumstances arise or where it would be in the interests of justice to do so. We consider that it would be fairer to allow for some discretion for the courts to consider claims where the information required to make the claim was not disclosed or available to the affected person until a later date. Secondly, it is contrary to the rule of law to give effect to this provision from the date of introduction of the Bill, as individuals who may have been preparing to bring a claim will have had no notice of the absolute bar on civil claims from 17 May 2022. This would constitute a retrospective limitation period which would contravene the principle of procedural fairness.

69. **The absolute cessation of civil claims upon introduction of the Bill is not consistent with the rule of law or with the right of access to a court as protected by Article 6 ECHR. Limitation periods for civil cases are legitimate, but they should not be imposed retrospectively (see Annex, Amendment 14). It would be in accordance with the rule of law and the right of access to a court for the Bill to introduce a limitation period of, say, five years following the establishment of the ICRIR. This would allow individuals to bring claims arising from any new information disclosed during the course of the reviews undertaken by the ICRIR over the next five years (see Annex, Amendment 15). We also suggest that the courts should be able to exercise some discretion to allow for claims to be brought outside the limitation period where it would be equitable to do so. We propose an amendment to give effect to this recommendation (see Annex, Amendment 15).**

Restrictions on criminal investigations and prosecutions

70. All outstanding investigations which are currently being dealt with by the Legacy Investigations Branch of the Police Service of Northern Ireland (PSNI) will be prohibited from continuing.[147] The outstanding case load exceeds 900, involving nearly 1200 deaths.[148] Further, a Troubles-related offence connected with a death or serious injury may only be prosecuted if the individual concerned has not been granted immunity by the ICRIR immunity requests panel, and the case has been referred by that body to a prosecutor, following a review of the death or conduct causing the injury. The Bill will also place a bar on prosecutions for Troubles-related offences not involving death or serious injury, or which are not connected to offences involving death or serious injury. Cases where a decision to prosecute has already been made will not be affected.[149]

71. As with civil litigation, the criminal limb of Article 6 guarantees the right of access to a court, but this right is not absolute. Limitations must not impair the essence of the right, and must be in pursuit of a legitimate aim and proportionate to that aim.[150] Unlike civil claims, generally in domestic law, there are no time limitations applicable to criminal

147 Clause 34 (1)

148 Explanatory Notes to the Northern Ireland Troubles (Legacy and Reconciliation) Bill [Bill 0010 (2022–23) - EN], para 2

149 We understand from the NIO that there are seven ongoing prosecutions. At the time the information was shared: Soldier F, reached committal stage in Magistrates' Court before the PPS announced intention to withdraw proceedings. This was successfully challenged through a judicial review. The PPS is currently taking steps to seek clarity on a number of legal issues raised, via an Appeal to the Supreme Court. In the case of Soldier B, the PPS announced on 2 July 2021 their intention not to proceed with a prosecution in this case. This is also subject to a Judicial Review. The case of David Jonathan Holden is at trial. The case of James Fox is at pre-committal stage. The case of Winston Rea is at trial, but adjourned. The case of James Smyth is at post-committal stage. In the case of John Downey, no date has been set yet for trial. It is not clear whether Soldiers F and B will be eligible for immunity given the complexity of proceedings.

150 Guérin v. France [GC] 2000, 29 EHRR 210 98/55, para 37; Omar v. France [GC], [1998] ECHR 63, para 34

prosecutions, but a prosecutor will have regard to the cogency of evidence in deciding whether it is in the public interest to bring a prosecution which is inevitably affected by the passage of time. We note that the Overseas Operations Act 2021 provides for a statutory presumption against prosecution of current or former Armed Forces personnel for alleged offences committed in the course of duty outside the UK more than five years ago.[151] This provision is, however, a presumption rather than a prohibition and therefore leaves open the possibility of prosecution in certain circumstances, unlike the current Bill. In principle, limitation periods for criminal offences are permissible under the ECHR. However, such limitations need to provide for a reasonable period of time and must not be absolute in case new evidence arises.

72. The Government is under a duty to identify and punish offenders for serious violations of human rights such as unlawful killings and torture. However, the Bill places a blanket ban on all criminal investigations of "Troubles-related offences";[152] prohibits any criminal enforcement action to be taken against individuals who have been granted immunity in relation to a "serious or connected Troubles-related offence";[153] and prohibits any criminal enforcement action being taken in relation to any other Troubles-related offences.[154]

73. These restrictions on investigations and prosecutions may result in seemingly arbitrary outcomes. For example, consider that there are two similar cases concerning torture but resulting in differing harms. The first case results in severe brain injury–this type of harm falls under the definition of a "serious offence".[155] Where immunity is not granted, the case may be prosecuted. The second case of torture results in severe damage to one or more organs–this type of harm does not fall under the definition of a "serious" offence - there is, therefore, no possibility of a prosecution. It is not clear why these cases ought to be treated differently.

74. **The bar on prosecutions for persons granted immunity and for cases falling outside of scope of "death and serious harm" will lead to impunity for human rights violations. Criminal prosecutions for criminal conduct contrary to Articles 2 and 3 must be able to proceed to avoid impunity for human rights violations (see Annex, Amendment 16).**

Prohibition of inquests

75. We understand that there are 22 inquests into 34 Troubles-related deaths pending before the Coroners' Courts.[156] This does not include applications made to the Attorney General for Northern Ireland to order fresh inquests into Troubles-related deaths.[157] The Lord Chief Justice drew up a five-year plan for dealing with outstanding inquests. We are now in Year 2 of the Plan, during which time, we understand that ten cases have been dealt with, with two currently part-heard. The listing of cases for Year 3 has been completed.

151 Overseas Operations (Service Personnel and Veterans) Act 2021
152 Clause 34(1)
153 Clause 35
154 Clause 37
155 Clause 1(5)(b) and Clause 1(6)
156 "Legacy Inquest Case Management Reviews", Judicial Communications Office Press Release, 22 February 2022
157 Coroners Act (Northern Ireland) 1959, Section 14

76. The Bill provides that no new Troubles-related inquest, coronial investigation or inquiry (Scotland) may be opened or started (after May 2023).[158] Inquests that are already open will be permitted to continue until 1 May 2023 or earlier dependent on the operational date of the ICRIR and inquests not at "advanced hearing" by that date will be closed. We understand that it is likely that there will be a significant number of inquests that do not progress to a substantive hearing by May 2023 (i.e. the majority of the 36 outstanding inquests will not be able to proceed). This means that the vast majority of families expecting an inquest will have to refer their cases to the ICRIR.

77. The cessation of inquests has raised serious concerns. It has been noted by academics and lawyers in the Northern Irish 'Model Bill Team' that, "this means that families who have been promised by the judiciary and legal system of Northern Ireland that an inquest will take place into the deaths of their loved one will now have their legitimate expectation that such an inquest would take place thwarted because of their place in a queue over which they had no control or agency. Some of these families have been waiting on an inquest for decades."[159] In evidence before the Northern Ireland Affairs Committee, the former Lord Chief Justice, Sir Declan Morgan, believed that the Bill would leave around 18 inquest cases unheard: "The question from a human rights perspective is going to be 'how do you justify preventing those 18 cases being heard? What is the interest that justifies or compels that outcome?'"[160]

78. The Committee for the Administration of Justice (CAJ) has noted the importance of the inquest system in bringing to light breaches of Article 2. For example, in the Ballymurphy Massacre inquest completed in July 2021, the then Mrs Justice Keegan delivered her verdicts and findings in which she held that all 10 victims killed between 9 and 11 August 1971 were entirely innocent and that the force used by the British Army was not justified and in breach of Article 2 of the ECHR. CAJ suggest that due to the family-centred nature of the inquest proceedings, and the fact that the next of kin received substantial disclosure, lawyers for the families had the opportunity to test the veracity of evidence through examination of the witnesses. This process provided the next of kin with information, answers and results previously denied.[161]

79. **Inquests are often used as a means of discharging the State's obligation under Article 2 ECHR. The cessation of inquests means that the ICRIR must be capable of delivering Article 2 compliant investigations in lieu of the inquest system. As set out above, the ability of the ICRIR to satisfy this is not guaranteed. We are concerned that the cessation of inquests will deny the families of victims their legitimate expectation to an Article 2 compliant investigation into the deaths of their next-of-kin. We therefore propose that inquests be permitted to continue in accordance with the current five-year plan (see Annex, Amendment 17).**

158 Clause 40

159 Model Bill Team Initial Response to the Northern Ireland Troubles (Legacy and Reconciliation) Bill, p10

160 Oral evidence taken before the Northern Ireland Affairs Committee taken on 22 June 2022, HC 284, Q600

161 Committee on the Administration of Justice (CAJ), Submission to the Committee of Ministers in relation to the supervision of the cases concerning the actions of the security forces in Northern Ireland, July 2022, para 73, and Ballymurphy Inquest, accessed 12th October 2022

Police Complaints

80. Clause 41 amends the Police (Northern Ireland) Act 1998 with the effect that the investigation of police complaints relating to Troubles-related conduct is prohibited. There appear to be around 450 outstanding complaints currently lodged with the Police Ombudsman's office.[162] Depending on the circumstances, a police misconduct investigation or disciplinary proceedings may serve, in part, to discharge the State's procedural obligation under Article 2. However, Article 2 does not require the pursuit of misconduct proceedings against a police officer where there had been an inquest and a criminal investigation, and no challenge was made to the adequacy of the criminal investigation or the decision not to prosecute.

81. CAJ notes that Police Ombudsman reports have exposed patterns and practices of human rights violations in covert policing, which could have been redacted by the powers now proposed in the Bill. According to CAJ, such Ombudsman reports have considerably contributed to subsequent police reform and hence guarantees of non-recurrence.[163]

82. **The prohibition of police complaints shuts down yet another avenue for the State to discharge its procedural obligations under the Convention. Whether this results in a breach of Convention rights will depend on whether the ICRIR can solely discharge the obligations to undertake effective investigations in the absence of any other mechanisms. In the absence of any inquests or criminal investigations, the ability to pursue police complaints would become even more important for the discharging of the UK's procedural obligations.**

Conclusions on cessation of legal proceedings

83. We note the observations of Barra McGrory, former Director of Public Prosecutions in Northern Ireland: "I have grave reservations about any statute that proposes to abolish not just part of the rule of law, but the totality of the rule of law. It puts forward a proposal in respect of immunity that … .I think is unworkable. It also, in the same breath, proposes to abolish the outstanding inquests and civil processes that are in existence. It is all in the same breath. It is audacious, coming from a House in a state that considers itself to have brought the concept of the rule of law around the world."[164]

84. **We agree with the former Director of Public Prosecutions in Northern Ireland that the Government's proposed prohibitions and restrictions on legal proceedings undermine the rule of law and we urge the Government to reconsider. The restrictions and prohibitions placed on criminal investigations, criminal prosecutions, civil claims, inquests and police complaints shifts the responsibility of undertaking effective investigations entirely to the ICRIR. In addition to the issues raised with respect to Articles 2 and 3, the cessation of legal proceedings also raises questions of compatibility with Articles 6 and 13 ECHR. The right of access to courts and tribunals is inherent to Article 6(1) ECHR which provides that any claim relating to a person's civil rights and obligations be brought before a court or tribunal. This right of access to the courts is**

162 Committee on the Administration of Justice (CAJ), Submission to the Committee of Ministers in relation to the supervision of the cases concerning the actions of the security forces in Northern Ireland, July 2022, para 65

163 Committee on the Administration of Justice (CAJ), Submission to the Committee of Ministers in relation to the supervision of the cases concerning the actions of the security forces in Northern Ireland, July 2022, para 135

164 Oral evidence taken before the Northern Ireland Affairs Committee on 22 June 2022, HC 284, Q643

qualified and may therefore 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."

85. **The package of prohibitions and restrictions on access to the courts may risk breaching the right of access given the wide-ranging and absolute nature of many of the restrictions. In addition, Article 13 ECHR provides for the right to an effective remedy. Where access to the courts is shut down and the only avenue for recourse is a case review (with no remedy available), the Bill as drafted also risks non-compliance with Article 13.**

5 Early release scheme

86. The Bill amends the early release scheme in the Northern Ireland (Sentences) Act 1998, which was enacted to implement the prisoner release provisions in the Belfast/Good Friday Agreement.[165] The scheme currently applies to persons serving life sentences or determinate sentences of 5 years or more for certain scheduled offences between 8 August 1973 and 10 April 1998. "Scheduled offences" are those specified in the Northern Ireland (Emergency Powers) Act 1973 and subsequent Northern Ireland Emergency Powers Acts. As well as several offences specifically concerned with terrorism, they include general offences such as murder, manslaughter, kidnapping, and blackmail. It enables prisoners to apply to the Sentences Review Commissioners for early release on licence, with those Commissioners considering whether the prisoner meets certain criteria demonstrating that they do not present a risk of engaging in terrorism.

87. While the scheme currently applies to persons serving a sentence in Northern Ireland for a scheduled offence committed between 1973 and 1998 (as required by the Belfast/Good Friday Agreement), the Bill extends its application back to similar types of offence which arose out of any conduct forming part of the Troubles and which were committed on or after 1 January 1966, in line with the scope of this Bill. The Bill also enables a person to apply for release on licence immediately, whereas they are currently required to serve a minimum proportion of their sentence. It also extends the scheme to those with a determinate sentence of less than 5 years, further widening the application of the scheme.

88. The Government's position is that Schedule 11 forms part of a wider package of reconciliation measures and can be presented as an extension of a scheme that was an integral part of the Belfast/Good Friday Agreement, the Department considers that the amendments made by the Schedule are compatible with the Article 2 procedural obligation.[166]

89. The ECtHR has found that leniency in sentencing, suspension of sentences, or early releases relating to deaths can amount to a breach of the right to life (Article 2 ECHR). Whilst the Court grants substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by State agents, it must exercise a certain power of review and intervene in cases of manifest disproportion between the offence committed and the sanction imposed.[167] For example, the Court has found a violation of Article 2 under its procedural limb, inter alia, because of the unreasonable leniency shown towards the convicts by their early release.[168]

90. **The expansion of the early release scheme risks breaching Articles 2 and 3. By removing the need to serve a minimum term in custody and reducing the amount to zero, this amounts to a partial amnesty whereby those convicted of serious offences may effectively have their sentences extinguished by the Bill. The disproportionality between the severity of the offences and the reduction in sentence may amount to a violation of the Convention as it will effectively allow for impunity. We suggest the scheme should not be extended to such an extent that it equates to impunity.**

165 Clause 42 introduces Schedule 11

166 Explanatory Notes to the Northern Ireland Troubles (Legacy and Reconciliation) Bill [Bill 0010 (2022–23) - EN]

167 Armani Da Silva v. the United Kingdom [GC], ECHR 117 (2016) para 285; Duran v Turkey [2008] ECHR 289; Enukidze and Girgvliani v. Georgia [2011] ECHR 735 paras 269 and 275

168 Enukidze and Girgvliani v. Georgia [2011] ECHR 735 paras 269 and 275

6 The McKerr Group of cases

91. The 'McKerr group' is a group of five final judgments of the ECtHR which date back to 2001 and relate to investigations into Troubles-related deaths in Northern Ireland.[169] These deaths occurred either during security force operations or in circumstances giving rise to suspicion of collusion with those forces. The ECtHR found that the UK was in breach of the procedural requirement arising from Article 2 that there be an effective investigation when individuals have been killed as a result of the use of force. These cases identified various failings on the part of the UK Government.[170]

92. The execution (or implementation) of the ECtHR's judgments is supervised by the Council of Europe's Committee of Ministers.[171] The McKerr group of cases remain under the supervision of the Council of Europe's Committee of Ministers as the UK has failed to implement the measures required to comply with the final judgments. The Committee of Ministers meets periodically to review the progress made towards implementation of the judgments. At their meeting in March 2022, the Ministers "reiterated their profound regret that, despite the Committee's concerns and the length of time these judgments have been pending, with the families waiting for answers, the authorities have not yet finalised their plans for legislation to enable effective investigations into the outstanding cases or provided an indication of an estimated timetable for the same, and noted with concern what would appear to be a change of approach from the Stormont House Agreement". They further underlined "that the measures must be timely, adequate and sufficient and reiterated their profound concern that initiating new plans at this stage would appear to risk further delay".[172]

93. Following introduction of the Northern Ireland Troubles (Legacy and Reconciliation) Bill, the Committee of Ministers further discussed the McKerr group at its meeting on 8–10 June 2022. At this meeting, the Ministers noted a number of concerns. Notably, the Committee of Ministers stated that the immunity scheme "appears problematic in

169 McKerr v. the United Kingdom (application no. 28883/95, judgment of 4 May 2001) Finucane v. the United Kingdom (application no. 29178/95, judgment of 1 July 2003) Kelly and Others v. the United Kingdom (application no. 30054/96, judgment of 4 May 2001) Shanaghan v. the United Kingdom (application no. 37715/97, judgment of 4 May 2001) McCaughey and Others v. the United Kingdom (application no. 43098/09, judgment of 16 July 2013)

170 Lack of independence of the investigating police officers from security forces or police officers implicated in the incidents; Lack of public scrutiny of and information to the victims' families concerning the reasons for decisions not to prosecute; Defects in the police investigations; The inquest procedure did not allow for any verdict or findings which could play an effective role in securing prosecution in respect of any criminal offence which might have been disclosed; The soldiers or police officers who shot the deceased could not be required to attend the inquest as witnesses; Absence of legal aid for the representation of the victim's family; Non-disclosure of witness statements prior to the witnesses' appearance at the inquest prejudiced the ability of the applicants to participate in the inquest and contributed to long adjournments in the proceedings; The scope of the inquest procedure excluded the concerns of collusion by security force personnel in the killing; The public interest immunity certificate in McKerr had the effect of preventing the inquest examining matters which were relevant to the outstanding issues in the case; The inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

171 The Committee of Ministers is the Council of Europe's statutory decision-making body. Its role and functions are broadly defined in Chapter IV of the Statute. It is made up of the Ministers for Foreign Affairs of member States. The Committee meets at ministerial level once a year and at Deputies' level (Permanent Representatives to the Council of Europe) weekly. The Department for the Execution of Judgments of the European Court of Human Rights advises and assists the Committee of Ministers in its function of supervision of the implementation of the Court's judgments. It also provides support to the member States to achieve full, effective and prompt execution of judgments.

172 Council of Europe, 1428th (Human Rights) meeting of the Ministers' Deputies (8–9 March 2022)

terms of the State's procedural obligations under Articles 2 and 3 of the Convention, as well as other provisions of international law, to prosecute and punish grave breaches of human rights such as torture and intentional killings of civilians." The Committee of Ministers also states that "of grave concern is the proposal to terminate all inquests that have not reached substantive hearings. The shutting down of inquests at this late stage appears to be problematic and likely to lead to further delay and distress for individuals, including some applicants in the cases in this group (McKerr and Kelly and Others) who have been waiting for years for their inquests to begin and progress (since 2007 and 2015 respectively)."[173]

94. We note the general observations of the Committee of Ministers in June 2022 that "the long-standing problems identified by the Court in its judgments and the Committee during the supervision process have hampered nearly all the investigations conducted so far by the various bodies established." In particular the Committee of Ministers notes that these long-standing problems include, "the lack of independence of the bodies established to carry out investigations; insufficient allocation of resources, staff and funding for various bodies established to enable them to function effectively; and the delays in the work of the existing investigatory bodies linked to the failure of the various State authorities to cooperate and disclose relevant evidence and information." The Committee of Ministers therefore stressed that "it is important for the authorities to address in detail how these elements will be fully addressed by the ICRIR to ensure that similar issues do not arise again."[174]

95. From 27 June - 1 July 2022, the Council of Europe's Commissioner for Human Rights visited the UK to discuss, inter alia, the issue of legacy cases in Northern Ireland. Following this visit, the Commissioner made written submissions to the Committee of Ministers, in which she concluded as follows:[175] "Without prejudice to any views to be taken by the Committee of Ministers or any future findings by the Court, the Commissioner is of the opinion that, by introducing the Bill, the UK government has embarked on a course of action that runs a very significant risk of eventually being found by domestic courts and/or the European Court of Human Rights not to be compliant with the Convention. This would therefore not only further delay the full implementation of the group of judgments under examination. It would also fail to deliver on the government's wish to "draw a line" under the legacy of the Troubles and, most importantly, would continue to deprive victims and families from the full enjoyment of their rights under the Convention."[176]

96. On 20–22 September 2022, the Committee of Ministers met to consider the McKerr group once again. In its published decision, the Ministers "urged the authorities to amend the Bill, if it is progressed, to allay concerns about compatibility with the European Convention, including by addressing the following key issues: ensuring that the Secretary of State for Northern Ireland's role in the establishment and oversight of the ICRIR is more clearly circumscribed in law in a manner that ensures that the ICRIR is independent and seen to be independent; ensuring that the disclosure provisions unambiguously require

173 Council of Europe, 1436th (Human Rights) meeting of the Ministers' Deputies (8–10 June 2022) – Notes, MCKERR v. the United Kingdom

174 Council of Europe, 1436th (Human Rights) meeting of the Ministers' Deputies (8–10 June 2022) – Notes, MCKERR v. the United Kingdom

175 Council of Europe, Submission by the Council of Europe Commissioner for Human Rights under Rule 9.4 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in the group of cases of McKerr v. the United Kingdom

176 Ibid, para 28

full disclosure to be given to the ICRIR; ensuring that the Bill adequately provides for the participation of victims and families, transparency and public scrutiny; urged them further to reconsider the conditional immunity scheme in light of concerns expressed around its compatibility with the European Convention."[177] The Ministers also "reiterated their serious concern about the proposal to terminate pending inquests that have not reached substantive hearings, bearing in mind the progress finally being made in those inquests further to the measures recently undertaken; urged the authorities to reconsider this proposal and allow the limited number of pending legacy inquests to conclude, to avoid further delay for families".[178]

97. **We are deeply concerned that the approach to legacy cases put forward in the Bill as drafted will not overcome the long-standing problems as identified by the Council of Europe's Committee of Ministers. The Bill's approach to dealing with legacy cases risks the UK failing to comply with the outstanding judgments of the ECtHR, which is a breach of the UK's obligation under Article 46 of the Convention to comply with adverse judgments.**

177 Decisions, 1443rd meeting, 20–22 September 2022 (DH) H46–32, McKerr group v. the United Kingdom (Application No. 28883/95), para 8

178 Decisions, 1443rd meeting, 20–22 September 2022 (DH) H46–32, McKerr group v. the United Kingdom (Application No. 28883/95), para 9

7 Biometric data

98. Finally, we note that clause 31 confers upon the SOSNI the power to make regulations permitting the retention of certain collections of biometric material (i.e. a DNA profile or fingerprints) for the ICRIR to use in the exercise of its functions (with the exception of the function of producing a historical record).[179] Northern Ireland is expected to pass legislation in the near future to introduce strict controls on the retention and use of biometric data of people who have not been convicted.[180] Clause 31 would allow the Secretary of State to save certain biometric data which would otherwise fall to be destroyed under the expected legal regime.

99. The retention of biometric data engages Article 8 ECHR (the right to private and family life). Blanket and indiscriminate retention of biometric data from individuals who have not been convicted has been held by the ECtHR to violate Article 8 ECHR.[181] The indefinite retention of biometric data from persons who have been convicted has also been found to violate Article 8.[182]

100. We note that clause 31 provides that the SOSNI must require, by regulations, that the preserved material is periodically reviewed. This is welcome, but there is no indication of how regularly these reviews should take place. This provision could also be strengthened by providing an explicit time period for reviews and if the review concludes that the preservation of data is no longer necessary, the data must be destroyed.

101. Clause 31 also requires that the regulations must provide that the material is destroyed "no later than the end of a reasonable period after the conclusion of the ICRIR's work."[183] Whilst this is a welcome safeguard, there is a risk that the vagueness of a "reasonable period" may result in disproportionate retention of the data. Further, although there is a prescribed purpose for the retention of biometric data (i.e. use by the ICRIR in carrying out its functions), there is no requirement that the data must be relevant or necessary for the work of the ICRIR. Additionally, there is nothing within the clause that explicitly and exclusively limits the purpose of the preservation of biometric data to use by the ICRIR.

102. **Safeguards relating to the retention and use of biometric data must be tightened to ensure that the regime is a necessary and proportionate interference with the right to private life and does not amount to arbitrary or indefinite retention of data.**

179 Clause 31

180 This is to implement the outstanding adverse judgments given by the ECtHR in the cases of S v Marper ECHR 4 Dec 2008, and Gaughran v UK ECHR 13 Feb 2020

181 S and Marper v UK ECHR 4 Dec 2008

182 Gaughran v UK ECHR 13 Feb 2020

183 Clause 31(2)(b)

Conclusions and recommendations

Overview

1. We agree with various stakeholders that this Bill as drafted is unlikely to comply with the Convention. Whilst we put forward a series of amendments within this report which are intended to strengthen rights compliance, we acknowledge that some of these amendments would fundamentally alter the entire approach of the Bill. While we support the aim of reconciliation, we urge the Government to reconsider its whole approach and put forward legislation which ensures (i) investigations are independent, effective, timely, involve next of kin, and are subject to public scrutiny; (ii) perpetrators of serious human rights violations are held to account; and (iii) that all possible avenues for the pursuit of justice and the provision of an effective remedy are available to victims and their families. (Paragraph 13)

The ICRIR and the duty to undertake effective investigations

2. There are concerns as to whether the ICRIR is sufficiently independent from the Secretary of State for Northern Ireland. Independence is essential not only to instil public confidence in the proposed new mechanism, but also to ensure compliance with the obligation to undertake independent investigations under Articles 2 and 3 ECHR. The Government should consider convening an appointments panel to make recommendations relating to the appointment of Commissioners. Guidance on the immunity scheme should be included within the Bill so it can be subject to proper scrutiny. (Paragraph 20)

3. We are concerned that the efficacy of the ICRIR's case reviews might not reach the standard of effective investigations as required by the Convention. In order to improve the efficacy of the case reviews, there should be an explicit duty on the Commissioner for Investigations to conduct investigations in accordance with the requirements under the Convention. In particular, the Commissioner must be under a duty to take whatever reasonable steps they can to secure the evidence concerning the incident, including eyewitness 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. The Commissioner must also take reasonable steps to determine whether any force used was or was not justified in the circumstances and seek to identify those responsible for any unlawful conduct. The Bill should be amended to this effect (see Annex, Amendment 1). (Paragraph 25)

4. The scope of discretion available to the ICRIR should be broadened to allow it to duplicate any aspect of previous investigations where required to ensure compliance with the procedural requirements of Articles 2 or 3 of the ECHR (see Annex, Amendment 2). (Paragraph 27)

5. The Bill should be amended to impose a duty upon the Chief Commissioner to ensure that reports, wherever possible, seek to identify whether any use of force was justified and lawful, and to identify any persons responsible for unlawful conduct (see Annex, Amendment 3). (Paragraph 29)

6. The duty of full disclosure on the relevant authorities is welcome, however, there is no sanction provided for failure to comply. In addition, the Secretary of State may prohibit onward disclosure by the ICRIR. We are concerned that this may perpetuate the existing grievances with regard to the State's failure to disclose relevant information regarding Troubles-related cases. Consideration should be given to the inclusion of a sanction upon the relevant authorities in circumstances where they fail to comply with their duty of disclosure. Consideration should also be given to the appointment of independent counsel to make decisions regarding disclosure instead of the Secretary of State. (Paragraph 32)

7. The imposition of a five-year time limit for requesting reviews is problematic in light of the prohibitions and restrictions on all other legal proceedings. The Government should consider allowing for flexibility in cases where new evidence comes to light which could trigger the need for an investigation. (Paragraph 34)

8. The ECHR requires that there be sufficient public scrutiny of investigations. The proposed model does not provide for the public to engage in the review process. The public is limited to reading the published reports. The Commissioner for Investigations should be required to give consideration to whether any public hearings could be held during the course of case reviews (see Annex, Amendment 4). (Paragraph 39)

9. The Government must not rely on victims and families to initiate case reviews - there is an obligation on the State to act of its own motion. It is therefore imperative that the Secretary of State ensures that all outstanding cases which trigger the investigative duty under Articles 2 or 3 are referred for review (see Annex, Amendments 5 and 6). (Paragraph 45)

10. Given the prohibitions and restrictions on all other legal avenues such as inquests and criminal investigations, the ICRIR as a standalone mechanism does not appear to provide a Convention-compliant approach. (Paragraph 46)

11. There is a risk that the Government will not be able to discharge its procedural obligations under Article 3 ECHR given the narrow definition of "serious physical or mental harm" which may exclude from scope numerous cases concerning treatment which constitutes torture or inhuman and degrading treatment or punishment. This is particularly problematic in light of the prohibitions and restrictions on any other legal avenues. The definition of "serious physical or mental harm" must include the full scope of harm prohibited by Article 3 (see Annex, Amendment 7). Where victims of torture or inhuman and degrading treatment or punishment are now deceased, or lack capacity, it should be possible for next-of-kin to refer cases to the ICRIR (see Annex, Amendment 8) (Paragraph 50)

Conditional immunity scheme

12. We have serious concerns about the compatibility of the conditional immunity scheme with the Convention. However, if the immunity scheme is to remain in the Bill, there should be a higher threshold test for the granting of immunity. At a minimum, the panel must be required to test the veracity of the account given by seeking evidence from relevant third parties, including victims and their

families where relevant (see Annex, Amendment 9). Additionally, immunity from prosecution should be revocable in circumstances where a false account has been given (see Annex, Amendment 10). (Paragraph 56)

13. The proposal to introduce immunity from prosecution will amount to an amnesty for serious human rights violations. The ECHR requires that the investigations must "be capable of leading to punishment of those responsible". Whilst the jurisprudence on the compatibility of amnesties with the Convention is limited, there is very clear guidance which indicates that amnesties for human rights violations conflict with the duty to prosecute and punish grave violations. Unless the ECtHR departs from this position, the conditional immunity scheme is likely to breach the UK's procedural obligations under Articles 2 and 3 ECHR in circumstances where immunity is granted for unlawful killings, torture, and inhuman or degrading treatment or punishment. The conditional immunity scheme should be removed from the Bill (see Annex, Amendment 11). (Paragraph 60)

14. It is not clear why the Government did not exclude all relevant sexual offences from the immunity scheme on the face of the Bill. It would assist clarity and transparency to include an exhaustive definition rather than delegate to the Secretary of State the power to define which sexual offences are excluded from the scope of the immunity scheme. Further, although an individual cannot be granted immunity for sexual offences, the Bill still prohibits any criminal investigation of Troubles-related death or serious injury which could potentially cover sexual offences if they are connected to the Troubles. If the prohibitions on criminal investigations are to remain in the Bill, an exception must be made for sexual offences to avoid impunity (see Annex, Amendment 12). If the immunity scheme is retained, further exceptions must be made for conduct which amounts to violations of Articles 2 and 3 in order to avoid impunity for human rights violations (see Annex, Amendment 13). The Bill must also be amended to allow criminal investigations and prosecutions of cases concerning unlawful killings or torture to proceed (see Annex, Amendment 12). (Paragraph 62)

Restrictions and prohibitions on legal proceedings

15. The absolute cessation of civil claims upon introduction of the Bill is not consistent with the rule of law or with the right of access to a court as protected by Article 6 ECHR. Limitation periods for civil cases are legitimate, but they should not be imposed retrospectively (see Annex, Amendment 14). It would be in accordance with the rule of law and the right of access to a court for the Bill to introduce a limitation period of, say, five years following the establishment of the ICRIR. This would allow individuals to bring claims arising from any new information disclosed during the course of the reviews undertaken by the ICRIR over the next five years (see Annex, Amendment 15). We also suggest that the courts should be able to exercise some discretion to allow for claims to be brought outside the limitation period where it would be equitable to do so. We propose an amendment to give effect to this recommendation (see Annex, Amendment 15). (Paragraph 69)

16. The bar on prosecutions for persons granted immunity and for cases falling outside of scope of "death and serious harm" will lead to impunity for human rights

violations. Criminal prosecutions for criminal conduct contrary to Articles 2 and 3 must be able to proceed to avoid impunity for human rights violations (see Annex, Amendment 16). (Paragraph 74)

17. Inquests are often used as a means of discharging the State's obligation under Article 2 ECHR. The cessation of inquests means that the ICRIR must be capable of delivering Article 2 compliant investigations in lieu of the inquest system. As set out above, the ability of the ICRIR to satisfy this is not guaranteed. We are concerned that the cessation of inquests will deny the families of victims their legitimate expectation to an Article 2 compliant investigation into the deaths of their next-of-kin. We therefore propose that inquests be permitted to continue in accordance with the current five-year plan (see Annex, Amendment 17). (Paragraph 79)

18. The prohibition of police complaints shuts down yet another avenue for the State to discharge its procedural obligations under the Convention. Whether this results in a breach of Convention rights will depend on whether the ICRIR can solely discharge the obligations to undertake effective investigations in the absence of any other mechanisms. In the absence of any inquests or criminal investigations, the ability to pursue police complaints would become even more important for the discharging of the UK's procedural obligations. (Paragraph 82)

19. We agree with the former Director of Public Prosecutions in Northern Ireland that the Government's proposed prohibitions and restrictions on legal proceedings undermine the rule of law and we urge the Government to reconsider. The restrictions and prohibitions placed on criminal investigations, criminal prosecutions, civil claims, inquests and police complaints shifts the responsibility of undertaking effective investigations entirely to the ICRIR. In addition to the issues raised with respect to Articles 2 and 3, the cessation of legal proceedings also raises questions of compatibility with Articles 6 and 13 ECHR. The right of access to courts and tribunals is inherent to Article 6(1) ECHR which provides that any claim relating to a person's civil rights and obligations be brought before a court or tribunal. This right of access to the courts is qualified and may therefore 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." (Paragraph 84)

20. The package of prohibitions and restrictions on access to the courts may risk breaching the right of access given the wide-ranging and absolute nature of many of the restrictions. In addition, Article 13 ECHR provides for the right to an effective remedy. Where access to the courts is shut down and the only avenue for recourse is a case review (with no remedy available), the Bill as drafted also risks non-compliance with Article 13. (Paragraph 85)

Early release scheme

21. The expansion of the early release scheme risks breaching Articles 2 and 3. By removing the need to serve a minimum term in custody and reducing the amount to zero, this amounts to a partial amnesty whereby those convicted of serious offences may effectively have their sentences extinguished by the Bill. The disproportionality between the severity of the offences and the reduction in sentence may amount to

a violation of the Convention as it will effectively allow for impunity. We suggest the scheme should not be extended to such an extent that it equates to impunity. (Paragraph 90)

The McKerr Group of cases

22. We are deeply concerned that the approach to legacy cases put forward in the Bill as drafted will not overcome the long-standing problems as identified by the Council of Europe's Committee of Ministers. The Bill's approach to dealing with legacy cases risks the UK failing to comply with the outstanding judgments of the ECtHR, which is a breach of the UK's obligation under Article 46 of the Convention to comply with adverse judgments. (Paragraph 97)

Biometric data

23. Safeguards relating to the retention and use of biometric data must be tightened to ensure that the regime is a necessary and proportionate interference with the right to private life and does not amount to arbitrary or indefinite retention of data. (Paragraph 102)

Annex: Amendments

1. Amendment to Clause 13 (conduct of reviews)

Clause 13, page 11, line 25, at end insert –

(c)take reasonable steps to secure relevant **evidence concerning the** case under review**, including eyewitness 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;**

(d) take reasonable steps to determine whether any force used that contributed to the death or injury under review was or was not justified in the circumstances;

(e) seek to identify persons responsible for any unlawful conduct.

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that there should be an explicit duty on the Commissioner for Investigations to conduct investigations in accordance with the requirements under the European Convention on Human Rights.

2. Amendment to Clause 13(5) (conduct of reviews)

Clause 13, page 11, line 25, at end insert "including where it is necessary to ensure compliance with the procedural requirements of Articles 2 or 3 of the European Convention on Human Rights."

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that the Commissioner for Investigations should be able to duplicate any aspect of previous investigations where required to ensure compliance with the procedural requirements of Articles 2 or 3 of the ECHR.

3. Amendment to clause 15 (production of reports on the findings of reviews)

Clause 15, page 13, line 14, at end insert –

(3) In the case of all reviews of deaths or of other harmful conduct, the Chief Commissioner must ensure any reports produced in accordance with section 15(2) seek to identify:

(a) whether any use of force that contributed to the death or injury under review was justified and lawful; and

(b) the person responsible for the death or other harmful conduct.

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that there should be a duty upon the Chief Commissioner to ensure that reportsseek to identify whether any use of force was justified and lawful, and to identify any persons responsible for such conduct.

4. Amendment to Clause 13(6) (conduct of reviews)

Clause 13, page 11, line 25, at end insert "(c) must give consideration to whether any oral evidence should be given which would assist in establishing the facts relevant to the review or identifying persons responsible for wrongdoing, and, if so, whether any oral evidence hearings can be held in public."

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that the Commissioner for Investigations should give consideration as to whether any public hearings could be held during the course of case reviews.

5. Amendment to Clause 9(3)

Clause 9, page 8, line 5, leave out "may" and replace with "must", and after "conduct)" insert - "unless the death has already been referred to the ICRIR by another person with entitlement to request that a review is carried out by the ICRIR."

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that the Secretary of State must ensure that effective investigations are undertaken into all cases concerning deaths in order to comply with Article 2 ECHR.

6. Amendment to Clause 10(2)

Clause 10, page 9, line 22, insert -

(2) The Secretary of State must request a review of any harm which engages Article 3 of the European Convention on Human Rights unless the harm has already been referred to the ICRIR by another person with entitlement to request that a review is carried out by the ICRIR."

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that the Secretary of State must ensure that effective investigations are undertaken into all cases concerning treatment contrary to Article 3 ECHR.

7. Amendment to Clause 1(6)

Clause 1(6), page 2, line 30, leave out "means" and replace with "includes" and at end of line 38 insert - "torture, inhuman treatment or punishment, or degrading treatment or punishment, whether inflicted or facilitated by state agents or non-state agents".

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that the definition of "serious physical or mental harm" must include the full scope of harm prohibited by Article 3 ECHR.

8. Amendment to Clause 10

Clause 10, page 9, line 24, insert –

(3) In a case where the victim of the other harmful conduct is now deceased or does not have capacity to refer a case to the ICRIR, a close family member may request a review of other harmful conduct forming part of the Troubles."

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that where victims of torture or inhuman and degrading treatment or punishment are now deceased, it should be possible for next-of-kin to refer cases to the ICRIR.

9. Amendment to Clause 18 (immunity from prosecution)

Clause 18, page 16, line 23, at end insert –

(4) When determining whether P's account is true to the best of P's knowledge and belief, the immunity requests panel must take reasonable steps to obtain evidence from victims and any other relevant parties in order to test the veracity of P's account."

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that there should be a higher threshold test for the granting of immunity - the panel must be required to test the veracity of the account given by seeking evidence from relevant third parties, including victims and their families where relevant.

10. Amendment to Clause 18 (immunity from prosecution)

Clause 18, page 17, line 22, leave out "may not be revoked" and replace with "must be revoked if, following a grant of immunity, the immunity requests panel discovers that the account given by P was not true to the best of P's knowledge and belief".

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that immunity from prosecution should be revocable in circumstances where a false account has been given.

11. Amendment to Clause 18 (immunity from prosecution)

Clause 18, page 16, line 15, leave out Clause 18.

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that the conditional immunity scheme should be removed from the Bill.

12. Amendment to Clause 34 (No criminal investigations except through ICRIR reviews)

Clause 34, page 28, line 10, at end insert – "unless it is a Troubles-related offence concerning sexual offences, unlawful killing or torture".

Member's explanatory statement: this amendment will give effect to the recommendations of the JCHR that if the prohibitions on criminal investigations are to remain in the Bill, exceptions must be made for sexual offences, unlawful killings or torture to avoid impunity.

13. Amendment to Clause 19 (No immunity from prosecution for sexual offences)

Clause 19, page 17, line 39, after "sexual offences" insert – "or offences concerning unlawful killing or torture".

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that exceptions must be made to the conditional immunity scheme for conduct which amounts to violations of Articles 2 and 3 in order to avoid impunity for serious human rights violations. Consequential amendments would be required.

14. Amendment 14 Clause 39

Clause 39, page 30, line 5, leave out Clause 39(1)

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that a limitation period on civil claims should not be applied retrospectively to take effect from the date of the introduction of the Bill.

15. Amendment 15 to Clause 39

Clause 39, page 30, line 8, leave out "on or after the day on which this section comes into force" and replace with "after five years from the date on which the ICRIR is established, or such longer period as the court or tribunal considers equitable having regard to all the circumstances ".

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that the Bill should introduce a limitation period of five years following the establishment of the ICRIR to allow individuals to bring claims arising from any new information which is disclosed during the course of the reviews undertaken by the ICRIR over the next five years. It also allows the courts to exercise some discretion to allow for claims to be brought outside of the limitation period where it would be equitable to do so.

16. Amendment to Clause 34

Clause 34, page 28, line 9, leave out Clause 34

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that criminal prosecutions for criminal conduct contrary to Articles 2 and 3 must be able to proceed to avoid impunity for human rights violations.

17. Amendment to Clause 40

Clause 40, page 31, line 29, leave out Clause 40

Member's explanatory statement: this amendment will give effect to the recommendation of the JCHR that inquests be permitted to continue.

Formal minutes

Wednesday 19 October 2022

Hybrid Meeting

Members present:

Joanna Cherry KC MP, in the Chair

Baroness Chisholm of Owlpen

Lord Dubs

Lord Henley

Baroness Ludford

David Simmonds MP

Lord Singh of Wimbledon

Draft Report (*Legislative Scrutiny: Northern Ireland troubles (Legacy and Reconciliation) Bill*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 102 read and agreed to.

Summary agreed to.

Annex agreed to.

Resolved, That the Report be the Sixth Report of the Committee to both Houses.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Adjournment

[Adjourned till 26 October 2022 at 3pm.

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

NIB numbers are generated by the evidence processing system and so may not be complete.

1 Amnesty International UK (NIB0006)

2 Bar Council of Northern Ireland (NIB0007)

3 Committee on the Administration of Justice (CAJ) (NIB0008)

4 Law Society of Northern Ireland (NIB0005)

5 Northern Ireland Human Rights Commission (NIB0003)

6 Quaker Concern for the Abolition of Torture (Q-CAT) (NIB0001)

7 Rights & Security International (NIB0002)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

Session 2022–23

Number	Title	Reference
1st	Legislative Scrutiny: Public Order Bill	HC 351 HL 16
2nd	Proposal for a draft State Immunity Act 1978 (Remedial) Order	HC 280 HL 42
3rd	The Violation of Family Life: Adoption of Children of Unmarried Women 1949–1976	HC 270 HL 43
4th	Protecting human rights in care settings	HC 216 HL 51
5th	Legislative Scrutiny: National Security Bill	HC 297
1st Special Report	Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021–22	HC 608
2nd Special Report	Proposal for a draft State Immunity Act 1978 (Remedial) Order 2022: State Immunity & The Right of Access to a Court	HC 280

Session 2021–22

Number	Title	Reference
1st	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill	HC 90 HL 5
2nd	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)	HC 331 HL 23
3rd	The Government's Independent Review of the Human Rights Act	HC 89 HL 31
4th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Part 4): The criminalisation of unauthorised encampments	HC 478 HL 37
5th	Legislative Scrutiny: Elections Bill	HC 233 HL 58
6th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People	HC 451 HL 73
7th	Legislative Scrutiny: Nationality and Borders Bill (Part 1) – Nationality	HC 764 HL 90

Number	Title	Reference
8th	Proposal for a draft Bereavement Benefits (Remedial) Order 2021: discrimination against cohabiting partners	HC 594 HL 91
9th	Legislative Scrutiny: Nationality and Borders Bill (Part 3) – Immigration offences and enforcement	HC 885 HL 112
10th	Legislative Scrutiny: Judicial Review and Courts Bill	HC 884 HL 120
11th	Legislative Scrutiny: Nationality and Borders Bill (Part 5)— Modern slavery	HC 964 HL 135
12th	Legislative Scrutiny: Nationality and Borders Bill (Parts 1, 2 and 4) – Asylum, Home Office DecisionMaking, Age Assessments, and Deprivation of Citizenship Orders	HC 1007 HL 143
13th	Human Rights Act Reform	HC 1033 HL 191
1st Special Report	The Government response to covid-19: fixed penalty notices: Government Response to the Committee's Fourteenth Report of Session 2019–21	HC 545
2nd Special Report	Care homes: Visiting restrictions during the covid-19 pandemic: Government Response to the Committee's Fifteenth Report of Session 2019–21	HC 553
3rd Special Report	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill: Government Response to the Committee's First Report	HC 585
4th Special Report	The Government response to covid-19: freedom of assembly and the right to protest: Government Response to the Committee's Thirteenth Report of Session 2019–21	HC 586
5th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order): Government Response to the Committee's Second Report	HC 724
6th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 4 (Unauthorised Encampments): Government Response to the Committee's Fourth Report	HC 765
7th Special Report	Legislative Scrutiny: Elections Bill: Government Response to the Committee's Fifth Report	HC 911
8th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People: Government Response to the Committee's Sixth Report	HC 983
9th Special Report	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing: Government Response to the Committee's Third Report of Session 2019–21	HC 1198
10th Special Report	Legislative Scrutiny: Nationality and Borders Bill: Government Responses to the Committee's Seventh, Ninth, Eleventh and Twelfth Reports	HC 1208

Session 2019–21

Number	Title	Reference
1st	Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report	HC 146 HL 37
2nd	Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report	HC 148 HL 41
3rd	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing	HC 343 HL 59
4th	Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report	HC 256 HL 62
5th	Human Rights and the Government's response to COVID-19: the detention of young people who are autistic and/or have learning disabilities	HC 395 (CP 309) HL 72
6th	Human Rights and the Government's response to COVID-19: children whose mothers are in prison	HC 518 HL 90
7th	The Government's response to COVID-19: human rights implications	HC 265 (CP 335) HL 125
8th	Legislative Scrutiny: The United Kingdom Internal Market Bill	HC 901 HL 154
9th	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill	HC 665 (HC 1120) HL 155
10th	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill	HC 847 (HC 1127) HL 164
11th	Black people, racism and human rights	HC 559 (HC 1210) HL 165
12th	Appointment of the Chair of the Equality and Human Rights Commission	HC 1022 HL 180
13th	The Government response to covid-19: freedom of assembly and the right to protest	HC 1328 HL 252
14th	The Government response to covid-19: fixed penalty notices	HC 1364 HL 272
15th	Care homes: Visiting restrictions during the covid-19 pandemic	HC 1375 HL 278
1st Special Report	The Right to Privacy (Article 8) and the Digital Revolution: Government Response to the Committee's Third Report of Session 2019	HC 313
2nd Special Report	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill: Government Response to the Committee's Tenth Report of Session 2019–21	HC 1127
3rd Special Report	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill: Government Response to the Committee's Ninth Report of Session 2019–21	HC 1120

Number	Title	Reference
4th Special Report	Black people, racism and human rights: Government Response to the Committee's Eleventh Report of Session 2019–21	HC 1210
5th Special Report	Democracy, freedom of expression and freedom of association: Threats to MPs: Government Response to the Committee's Third Report of Session 2019	HC 1317
6th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 4 (Unauthorised Encampments): Government Response to the Committee's Fourth Report	HC 765
7th Special Report	Legislative Scrutiny: Elections Bill: Government Response to the Committee's Fifth Report	HC 911