Written evidence submitted by the Committee on the Administration of Justice (CAJ), related to Addressing the Legacy of Northern Ireland's past: The UK Government's New Proposals inquiry (LEG0044)

Supplementary written evidence following Oral Evidence before the Committee on 15 June 2022 in relation to the Committee's work on Addressing the Legacy of Northern Ireland's past, and the Committee's requests for two follow up notes. These relate specifically to whether sexual offences fall within the scope of the Northern Ireland Troubles (Legacy and Reconciliation) Bill (hereafter 'the Bill') and whether there are precedents for international involvement in appointments to investigation and truth recovery mechanisms. These matters are dealt with in turn below.

Interpretation of sexual offences falling within scope of the Bill (Q517)

1. The first issue relates to our interpretation as to whether sexual offences fall within the scope of the Bill. In our response to the Bill, attached as an appendix, the position taken by the Model Team was that sexual offences can fall within the scope immunity requests provisions of the Bill:

> 'Troubles-related' offences are defined as conduct which constitutes a crime in the law that was related to 'the events and conduct and conduct that related to Northern Ireland affairs' and occurred between 1 January 1966 and 10 April 1998. The scheme applies to 'serious offences', defined as offences that caused death or serious physical or mental harm. Unusually for such an immunity scheme, there is no specific prohibition on certain kinds of crime, such as crimes of sexual violence. It would therefore appear that applicants who had been involved in rape and other crimes of sexual violence related to the Troubles, or indeed the covering up of such crimes within paramilitary or state organisations, would be entitled to apply for immunity under this bill.[i]

2. The Minister Conor Burns MP in the Second Reading of the Bill argued to the contrary that sexual offences would not be subject to the immunity provisions as they only covered "serious and connected Troubles-related offences that took place [between 1966-1998] and are related to death or serious injury".[ii] The Minister also argued that it would be outside the scope proposed Independent Commission on Reconciliation and Information Retrieval (ICRIR) to investigate sexual offences, but that the ban on criminal investigations by the police would not apply to sexual offences *that were not* Troubles-related.[iii] The PPS to the Secretary of State Jonathan Gullis MP has also stated that immunity will not be available under the Bill for sexual offences '*which are not Troubles-related'* (*The House*, 6 June 2022).[iv] The ECHR Memorandum published with the Bill argues that ICRIR reviews will provide a means of discharging Article 3 procedural obligations (prohibition on torture) which can include sexual violence.[v]

Concept of qualifying offences relating to the Early Release Scheme and the Bill

3. It should first be noted that the Bill (in relation to immunity and ICRIR Reviews) uses a different formulation to distinguish offences that are or are not Troubles-related to that provided under the Early Release Scheme.

4. The concept of a 'qualifying offence' under the Early Release Scheme (Northern Ireland (Sentences) Act 1998, s 3(7)) relies on whether the offence was a 'scheduled offence' under the Northern Ireland (Emergency Provisions) Acts. This is in reference to a list of specified offences (including murder, firearms, explosives offences etc) listed in a 'schedule' to such acts, provided the offence in question had not been certified as not being conflict-related through a certificate issued by the Attorney General.

5. Under the current Bill (as introduced) schedule 11 makes amendments to the Early Release Scheme, to *inter alia*, close a gap whereby conflict-related offences which occurred pre-1973 fell outside its scope on a technicality. In order to do this the Bill continues to rely on specified offences that would have been in the schedule with the Director of Public Prosecutions now empowered to differentiate as to whether the offence in question for which early release is sought is or is not conflict-related. As set out in the Explanatory Notes:

> The existing early release scheme in the Sentences Act applies to persons convicted of "scheduled offences" between 8 August 1973 and 10 April 1998. "Scheduled offences" are those specified in the Northern Ireland (Emergency Powers) [sic] Act 1973 ("the 1973 Act") and subsequent Northern Ireland Emergency Powers Acts. Paragraph 2 extends the early release scheme to offences committed on or after 1 January 1966 and before 8 August 1973 and which arose out of any conduct forming part of the Troubles. However, these offences cannot be "scheduled offences" because that concept was created by the 1973 Act. Subsection 7A is therefore inserted into the Sentences Act to enable offences committed prior to 8 August 1973 to be certified by the Director of Public Prosecutions for Northern Ireland as an offence which, had it been committed on 8 August 1973, would have been a scheduled offence within the meaning of the 1973 Act.[vi]

Requests of Immunity under the bill

6. A different approach is taken elsewhere in the Bill including in relation to immunity requests. Requests for immunity under clause 18 of the Bill (as introduced HC) must relate to one or more "serious or connected Troubles-related offences."

7. Interpretation of these terms is found in clause 1(5).

8. In addition to offences causing the death of a person the threshold of 'serious' is met if the offence 'was committed by causing a person to suffer serious physical or mental harm.' The term 'serious physical or mental harm' is defined (subsection 6) in relation to a series of physical injuries but also 'severe psychiatric damage'. Rape and other sexual offences could meet this threshold.

9. There is also the concept of a 'connected' Troubles-related offence. This covers an offence which 'relates to' 'or is otherwise connected with' a serious Troubles-related offence (whether committed by the same person or another). This broadens the scope of sexual offences covered by the immunity provisions. This is both in the sense of offences relating to act and omissions covering up of sexual offences that meet the 'serious' threshold, along with circumstances whereby offences in addition to the sexual offence, such as serious injuries, were also inflicted on a victim.

10. The third part of the definition relates to whether an offence is 'Troubles-Related'. This is defined with reference to any criminal offence in relation to any of the UK jurisdictions which was '*to any extent* conduct forming part of the Troubles' (emphasis added). 'Forming part of the Troubles' requires the conduct to have been between 1966 and 1998 and relating to 'Northern Ireland Affairs' (defined in relation to constitutional status or political/sectarian hostility). Sexual offences conducted by actors (non-state and state) using or abusing their capacity as participants in the conflict may have little difficulty in meeting this definition.

11. There is a broader problem if Ministers rely on the assertion that sexual offences neither led to 'serious' harm nor were 'Troubles-related'. Sexual violence was very much part of the Northern Ireland conflict. It would be problematic to suggest such gender-based violence against women involving abuses of power by actors in the conflict 'does not count' as part of the Troubles.

12. If the intention of Ministers was to exclude sexual offences from the scope of the immunity provisions in the Bill, the present formulation is both problematic and does not reliably achieve this. It is unclear why if this was the intention, sexual offences were not expressly excluded from the scope of the relevant parts of the Bill.

13. There is a second difficulty with reliance on the current formulation. This relates to other acts that constituted torture (that engage ECHR Article 3 and the UK's broader international obligations) that inflicted the serious or physical harms enumerated in the Bill, also being eligible for grants of immunity.

Investigations and reviews into sexual offences under the Bill

14. Section 33(1) of the Bill would ban the instigation or continuation of any criminal investigation into '<u>any</u> Troubles-related offence' (emphasis added).

15. This provision would therefore prevent <u>any</u> future police investigation into rape or other sexual offences that were Troubles-related. The Minister appears to have conceded this at Second Reading in stating that such offences could still be investigated if they were *not* Troubles-related.

16. This provision does not affect the 'reviews' conducted by the ICRIR, yet this engages broader problems of the ICRIR including that:

    a) The ICRIR in our view is not capable of conducting effective, independent investigations in accordance with ECHR Article 3.

    b) The ICRIR is time-bound, after its conclusion there will be a *de facto* amnesty for Troubles-related sexual offences (and other acts torture), regardless of new evidence, as there can be no reviews or investigations at all.

    c) Where it is deemed to be the case that a particular Troubles-related sexual offence does not meet the definition in the bill of 'serious harm' this paradoxically means that the ICRIR (or anyone else) *cannot* conduct a review into it on the basis of a complaint from the victim (clause 10). The ICRIR, nor any other independent office holder, could not request or initiate the review either. The sole manner in which an ICRIR review could be conducted would be at request of the Secretary of State, this includes when those accused of the sexual offence were state actors, engaging the ECHR independence requirements.

Question of international involvement in transitional justice mechanisms (Q539)

17. The second matter on which further information is sought relates to whether there is any precedent for international involvement in relation to appointments to legacy bodies. This is in light of the current Bill vesting the power to appoint all of the ICRIR Commissioners solely in the Secretary of State.

18. It is first worth noting that given the bilateral nature of the peace process there is precedent for appointments not to be 'UK only' within the Northern Ireland peace process.

19. The Independent International Commission on Decommissioning (IICD) was composed of Commissioners from Canada, Finland and the US, appointed by the British and Irish Governments, with additional appointments for inspections of former Finnish President Martti Ahtisaari and (the current South African President) Cyril Ramaphosa. In specific relation to legacy, under the Weston Park Agreement of 2001, the British and Irish Governments appointed former Canadian Supreme Court Judge Peter Cory to lead collusion inquiries. The appointments of these persons were therefore not undertaken unilaterally by the UK, given the bilateral role of the Irish Government.

20. Following the Stormont House Agreement (SHA), the terms of Independent Commission on Information Retrieval (ICIR) were set out in a bilateral treaty with Ireland. Article 5 of

the treaty related to the appointments to the ICIR of a Chairperson (who themselves may be of 'international standing'), who would be appointed jointly by the Irish and British Governments, in consultation with the First and deputy First Ministers; and four other Commissioners, one appointed by the UK, another by Ireland, and two by the First and deputy First Ministers. Under the draft SHA legislation the Historical Investigations Unit Director was to be appointed by the NI Justice Minister on the recommendation of an appointments panel consisting of a number of distinct office holders, including one appointed by the Justice Minister with criminal investigation experience (not necessarily from the UK, leaving open the possibility, but not certainty, of international involvement).

21. The approach of the current Bill in vesting powers of appointment in the UK Secretary of State alone therefore itself departs from these precedents.

22. There are broader international precedents. For example, the Inter-American Human Rights Commission (IACHR)– an autonomous organ of the intergovernmental Organisation of American States has in recent years appointed, in agreements with the States in question, international experts to form part of investigatory mechanisms. This includes the appointment of the Expert Group investigating the disappearance of 43 students in Mexico in 2014 (Ayotzinapa case) who in recent months presented their findings.[vii] Another set of appointments relates to the violent events in Nicaragua between April 18th and May 30th, 2018,[viii] and a third to investigate human rights violations in Bolivia between September the 1st and December 31st of 2019.[ix] There are also examples from United Nations bodies, for example the UN Secretary General appointed the head Commissioner for the Historical Clarification Commission of Guatemala.[x]

23. Whilst there are other examples hopefully this can highlight that there are precedents for international involvement in appointments of such mechanisms.

June 2022

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[i] Model Bill Team Initial Response to NI Troubles (Legacy and Reconciliation) Bill, page 16. https://www.dealingwiththepastni.com/project-outputs/project-reports/model-bill-team-initial-response-to-ni-troubles-legacy-and-reconciliation-bill

[ii] Minister of State Northern Ireland Office Conor Burns: Hansard HC 24 May 2022 Column 253 "…on his point about sexual offences that we are very clear that any offences from 1 January 1966 to 10 April 1998 that are not troubles-related can still be investigated by the PSNI and police forces in Great Britain. Troubles-related offences that are not linked to a death or serious injury will not be investigated by this body and will not be subject to the immunity provisions. Only serious and connected troubles-related offences that took place between those dates and that are related to a death or serious injury will be eligible for immunity."

[iii] As above.

[iv] https://www.politicshome.com/thehouse/article/we-must-protect-veterans-and-support-victims-and-survivors

[v] Northern Ireland Troubles (Legacy and Reconciliation) Bill European Convention on Human Rights Memorandum, Paragraph 13.

[vi] Northern Ireland Troubles (Legacy and Reconciliation) Bill, Explanatory Notes, paragraph 300.

[vii] https://www.theguardian.com/world/2022/mar/29/mexico-43-disappeared-students-military-report-iguala-ayotzinapa

[viii] https://gieinicaragua.org/en/#section00

[ix] https://gieibolivia.org/

[xxxxx] https://www.un.org/press/en/1999/19990301.guate.brf.html

Appendix:

MODEL BILL TEAM INITIAL RESPONSE TO NORTHERN IRELAND TROUBLES (LEGACY AND RECONCILIATION) BILL[1]

Contents

Executive Summary

- The Model Bill Team has worked for almost a decade to find human rights compliant solutions to the legal and political challenges regarding dealing with the past in Northern Ireland. It is therefore with profound regret that we have concluded that the Northern Ireland Troubles (Legacy and Reconciliation) Bill (NITLRB) is **unworkable, in breach of the Good Friday Agreement and binding international law and that it will not deliver for victims and survivors**, many of whom have waited for decades for truth and justice.
- The NITLRB breaches the provisions of the Good Friday Agreement in relation to the incorporation of the European Convention on Human Rights (ECHR) and the powers of the devolved institutions. The Agreement commits to 'complete incorporation into Northern Ireland law of the European Convention on Human Rights, *with direct access to the courts*, and remedies for breach of the convention' (emphasis added). The NITLRB will directly limit the ability of people in Northern Ireland to challenge alleged breaches of the ECHR in either the Northern Ireland Coronial Courts (after May 2023) or the Northern Ireland civil courts (after 17 May 2022, the date of the Bill's first reading).
- The Delegated Powers Memorandum associated with NITLRB makes explicit the intention to override devolved institutions 'in order to achieve the delivery of this policy' and so to brush aside the widespread opposition to these proposals.
- **The NITLRB provides for direct government control over the establishment and operation of all its proposed mechanisms.** The Secretary of State for Northern Ireland (SOSNI) will appoint the personnel, make regulations governing its work, issue 'guidance' on the

immunity process, can initiate reviews, direct a response to historical findings and control the overall budget.

- The existing mechanisms for dealing with the past have been weakened, largely through government refusal to implement the judgements of the European Court of Human Rights and refusal and delays in the provision of information by state agencies. However, given the structure of the NITLRB, we ask whether part of the reason for introducing it is because **existing mechanisms are working too well in exposing past human rights abuses**.
- Recent inquests have provided proof of innocence of victims of state violence and much increased knowledge about the circumstances of deaths. Those promised inquests deserve their chance for human rights compliant, legal mechanisms to discover the truth. Civil actions, independent police investigations and the historic investigations of the Police Ombudsman can also provide victims with information and redress. The NITLRB would end all these processes at a time when they are increasingly delivering.
- In order to safeguard the right to life under Article 2 of the ECHR, there is a positive obligation that requires independent and effective *investigations* to be conducted into certain deaths including those with potential state culpability.
- There is a similar obligation under Article 3 relating to torture and serious injury. The proposed Independent Commission for Reconciliation and Information Recovery (ICRIR) will not meet those obligations and so **will be in breach of the UK's international obligations and domestic law under the Human Rights Act.**
- Judicial, policing and oversight processes in Northern Ireland have already established a body of cases whereby Article 2 ECHR-compliant investigations have been adjudged to not have taken place. Such cases were to form, alongside outstanding cases from the PSNI's Historical Enquiries Team and Police Ombudsman, the baseline caseload of the proposed Stormont House HIU. The proposed process requires families to initiate 'reviews' or, in limited circumstances, coroners and the Attorney General for Northern Ireland plus, of course, SOSNI. Therefore, there is no guarantee that those cases, which require a proper investigation, will even be on the caseload of the ICRIR.
- The independence of the ICRIR is undermined by the appointment process and the requirement for some officers to have NI policing experience. The Command Paper proposed that the new legacy body be given far more limited powers than either any existing mechanism or those proposed under the SHA, with provisions limited to a review of the papers and mainly voluntary testimony. The powers to compel testimony in the NITLRB or the provision of information are weak but also lack any safeguards against discriminatory or abusive use. Some officers may be given police powers, but it is unclear where they could be used. Police powers are generally used in criminal investigations not 'reviews.' **We do not consider that the ICRIR has the powers to conduct effective investigations.**

- In 2021, the UK government issued a command paper in which it proposed a general and unconditional amnesty (statute of limitations) for all Troubles-related offences. This proposal was widely condemned internationally and nationally, opposed by all of the main political parties in Northern Ireland, across the victims' sector, the churches and elsewhere. In this bill, the government has instead opted for a conditional immunity with a conspicuously low threshold for the granting of immunity. A conditional immunity that must be granted with minimal due process considerations and little obligation to test the account being offered runs the risk of de facto operating as unconditional amnesty for all who apply. The possibility for the ICRIR to grant immunity without opening reviews or adequately corroborating with information received, together with the opacity of how any information that is received will be handled and made available to victims and society, mean that there is very little reason to have confidence that this process will facilitate truth recovery and reconciliation. **The immunity provisions are unlikely to be in compliance with the ECHR.**
- Immunity *must* be granted on the basis of a subjective test, 'where the person has provided an account which is true to the best of their knowledge and belief', and the Commissioners' judgement on that will be subject to 'guidance' by SOSNI. There are no mechanisms for testing the veracity of testimony, much less any representation of victims in the process. There is no clarity on whether victims will even be informed of testimony relevant to the 'review' of their case.
- In certain circumstances, the ECHR permits flexibility in the mitigation of punishment for even serious offences, but such flexibility can only occur in the context of *investigations* that are fully compliant with article 2 of the ECHR and not the *reviews* envisaged in this Bill.
- **The extensive proposals on oral history, memorialisation and academic research on the conflict would appear to be designed to provide legal and political cover for what many regard as an indirect route to impunity.**
- Ensuring the independence of this initiative is crucial for credibility. The NITLRB proposes to place it under the direction and control of the Secretary of State for Northern Ireland. It will be for the Secretary of State (clause 49(1)) to designate persons whom he is 'satisfied … would make a significant contribution' to the oral history initiative and whom he decrees to be 'supported by different communities in Northern Ireland'. The Secretary of State will invite the 'designated persons' to prepare a memorialisation strategy and he or she will then 'consider and decide a response to each of the recommendations made'.
- The work of academics on patterns and themes of the conflict is to depend partly on the review process of the ICRIR. Given our grave misgivings about the workability of the ICRIR (including the likelihood of boycott from key stakeholders) this organic link between the supposedly independent academic research and the ICRIR is deeply problematic.
- The idea of an 'Official History' must be approached with great caution. Given that the current proposals are wrapped up in a plan to introduce

immunity that will primarily benefit state actors and that is clearly designed to tilt and control the narrative on the past, it is our view that **the proposals are incompatible with academic ethics, independence, rigour and integrity**.

- For victims and survivors who have been waiting decades for precious information about the deaths of their loved ones, it is cold comfort indeed to suggest that 'we can't offer anything more than a review of the death of your loved one, but you can have access to a museum of the Troubles, an oral history archive or an official history instead'. In our view it is unlikely that any self-respecting historian, archivist or museum director would be willing to participate in such an initiative.

Model Bill Team Initial Response to Northern Ireland Troubles (Legacy and Reconciliation) (NITLR) Bill[1]

Introduction

- This document was prepared by the 'Model Bill Team' based at Queen's University Belfast and the Committee on the Administration of Justice, Belfast.[2] This is our initial response to the Bill. Since 2013, this team has produced a range of technical briefings and reports designed to help inform public debates on dealing with the past. Members of the team have also given written and oral evidence to the US Congress (2015 and 2022), the Westminster Defence Select Committee (2017), the Dáil Joint Oireachtas Committee on the Implementation of the Good Friday Agreement (2018) and the Westminster Northern Ireland Affairs Committee (2019, 2021).
- The approach of the team has been to anchor all of our work in fidelity to the rule of law, the Good Friday Agreement (1998) and the Stormont House Agreement (2014) – the latter being the agreement between the British and Irish governments and four of the five main local political parties on how to address the past in Northern Ireland.
- Within that framework, our approach has been a 'problem solving one', working closely with the two governments and other stakeholders in trying to find solutions to a range of legal and political challenges regarding dealing with the past in Northern Ireland.
- Given that significant commitment in both time and energy in trying to help implement agreed mechanism to finally address the legacy of the past in Northern Ireland, it is with profound regret that we have concluded that the Northern Ireland Troubles (Legacy and Reconciliation) Bill is unworkable, in breach of the Good Friday Agreement and binding international law and that it will not deliver for victims and survivors, many of whom have waited for decades for truth and justice.
- Our reasons for reaching those conclusions are detailed below.

The NITLR bill is in breach of the Good Friday Agreement and runs contrary to the devolution of policing and justice to Northern Ireland

- Incorporation of the European Convention of Human Rights (ECHR) is a fundamental aspect of the GFA. The Agreement commits to 'complete incorporation into Northern Ireland law of the European Convention on Human Rights, *with direct access to the courts*, and remedies for breach of the convention'. The NITLRB will directly limit the ability of people in Northern Ireland to challenge alleged breaches of the ECHR in either the Northern Ireland Coronial Courts (after May 2023) or the Northern Ireland civil courts (after 17 May 2022, the date of the Bill's first reading).
- Paragraph 32 of the Good Friday Agreement (GFA) stipulates that the role of the Secretary of State for Northern Ireland is 'to remain responsible for NIO matters not devolved to the Assembly, subject to regular consultation with the Assembly and Ministers.' Paragraph 33 (b) stipulates that the role of the Westminster parliament is 'to legislate as necessary to ensure that the United Kingdom's international obligations are met in respect of Northern Ireland.'[3] The GFA also committed the UK government to 'devolve policing and justice issues' to Northern Ireland, as indeed occurred in 2010.
- In the explanatory notes for the NITLR, the government notes the convention that Westminster will not normally legislate with regard to devolved matters without the consent of the relevant devolved legislature.[4] It further notes that the legislative consent motion process 'will be engaged' regarding various provisions in the Bill. More revealing is the language in the related Delegated Powers Memorandum[5] that is explicit (in relation to the regulation making powers in the bill) that there is an open intention of usurping the devolution settlement. It states (para 7) with regard to the powers to be exercised by the Secretary of State for Northern Ireland: 'A number of these powers relate to matters which are transferred under the Northern Ireland devolution settlement. *The Bill does not contain provision* for the Secretary of State to seek the consent of the Northern Ireland Assembly in respect of these matters.' It further states that 'the Government has carefully considered whether to provide the Northern Ireland Assembly with a power of veto in relation to transferred matters, which would be more formally in line with the devolution settlement in Northern Ireland. In this instance it has decided to confer the power solely on the Secretary of State in order to achieve the delivery of this policy.' It is clear that there is widespread opposition to this proposed bill from across the political divide in Northern Ireland, the Irish government, and across the victims and survivors sector. However, the government's stated intent is to ignore that opposition from across the community to whom the Bill is supposedly addressed.

Throughout the spine of the NITLR Bill there is a clear intent to exercise UK governmental control over dealing with the past in Northern Ireland

- A fundamental principle of the obligations upon states to investigate deaths or serious injuries (Art 2 and Article 3 of the ECHR respectively) is that such investigations must be independent from government. Our experience of having worked extensively in over a dozen post conflict societies (including South Africa – see further below), shows that, when state actors have themselves been involved in human rights violations, any mechanism which cannot demonstrate sufficient independence from the state will lack any public credibility. Such processes, even if they accurately and honestly report the human rights violations of non-state actors, will inevitably be dismissed as a whitewash because of that lack of independence from government.
- Independence from the UK government was therefore a key principle threaded throughout the Stormont House Agreement 2014. The *Historical Investigations Unit* was described as a 'new independent body' (para 30) reporting to the devolved Northern Ireland Policing Board. In the 2018 Draft Bill the appointments panel for the HIU Director was to be made up of the Attorney General for Northern Ireland, a representative from the Victims and Survivors Commission for Northern Ireland, Head of the NI Civil Service and a NI Ministry of Justice appointee with investigative experience.[6] The *Independent Commission for Information Retrieval* (para 41-44) was to be established by treaty between the British and Irish governments, have five members and an independent chairperson of international standing (appointed by both governments in consultation with the First and Deputy First Minister), with two nominees appointed by the First and Deputy First Ministers and one each appointed by the two governments. The 11 strong body. which was to be tasked with promoting reconciliation and overseeing academic work on themes and patterns (*the Implementation and Reconciliation Group*), was to include an independent chair, nominees from the Northern Ireland political parties according to their electoral strength and one nominee each from the UK and Irish governments. Finally, the *Oral History Archive* was to be established by the Northern Ireland Executive and to be 'independent and free from political interference'.[7]
- In stark contrast, as is detailed further below, there is clear evidence in the NITLR Bill of a determination on the part of the UK government to maximise control over its proposed mechanisms for dealing with the past and minimise their independence. By way of illustration, the Bill stipulates that the Appointment of Chief Commissioner of the proposed Independent Commission for Reconciliation and Information Recovery (ICRIR) will be the Secretary of State. The rules concerning requests for immunity are to be developed by the SOSNI and the Chief Commissioner. The SOSNI is granted broad powers relating to the information that could heavily shape the case load of the ICRIR despite clear conflicts of interest. In addition, the SOSNI has the power to prohibit information being contained in a Review report on the grounds of national security. Powers are vested in SOSNI alone under clause 10(2) to trigger ICRIR reviews into any 'harmful conduct' during the Troubles with no requirement that it should have been serious. With regard to Oral History and Memorialisation, the

SOSNI will designate persons whom he is 'satisfied…would make a significant contribution' to the oral history initiative and whom he decrees to be 'supported by different communities in Northern Ireland'. In short, this Bill suggests a mindset that is oblivious to the need to command public confidence in Northern Ireland on such a sensitive matter.

Legacy civil actions and inquests – are the current mechanisms working too well?

- It has long been a truism of discussion on dealing with the past in Northern Ireland that the 'piecemeal' approach of relying on different investigative aspects of the criminal justice system, including police investigations (previously the Historical Enquiries Team, now the PSNI Legacy Investigative Branch of the PSNI), Office of the Police Ombudsman, legacy inquests and civil actions, has been failing victims. It is certainly true that police investigations in particular have been bedevilled by issues related their capacity to independently investigate state actor cases.[8] Certainly all of them have been much slower to deliver results to victims than one would wish. However, absent the implementation of the overarching mechanisms agreed to in the Stormont House Agreement (2014), to varying degrees these measures have proved to be an important tool for truth recovery and a measure of accountability in Troubles-related matters. **Indeed, as the likely effect of the NITLR Bill has become more apparent, we have been increasingly asking whether part of the reason for the Bill being introduced is whether these Northern Ireland based measures have actually been too effective.**
- The Council of Europe's Committee of Ministers continues to supervise the 'package of measures' proposed by the UK in response to Article 2 ECHR (right to life) violations arising from the NI conflict and has noted the 'vital role played by the inquest system' as well as the Police Ombudsman for Northern Ireland.[9] As a result, the Stormont House Agreement made specific provision for the continuation of legacy inquests alongside the four bodies, in light of the important role they play in discharging Article 2 ECHR obligations. While these processes have been subject to delay (including in the provision of funding), and obfuscation (often as a result of the actions or inactions of public authorities such as the Northern Ireland Office, Ministry of Defence and Police Service of Northern Ireland) they have provided an essential information recovery forum for victims and survivors.

Inquest as a route to information recovery

- In 2021, the NI judiciary carried out a welcome case management of both legacy inquests, civil actions and judicial reviews in an effort to streamline these processes,[10] which follows the previous Lord Chief Justice's Five-Year Plan on legacy inquests.

- In February and March 2022 the Presiding Coroner, Mr Justice Humphreys, conducted reviews in all legacy related inquests that had not been allocated a Coroner, and identified 9 inquests into 16 deaths to be progressed by the Legacy Inquest Unit in 'Year 3' of the Five Year Plan for inquests.[11] We understand that there are 22 inquests into 34 deaths pending before the Coroners' Courts.[12] This does not include applications made to the Attorney General for Northern Ireland to order fresh inquests into legacy related deaths.[13]
- Part 3 of the NITLR Bill 'creates prohibitions and restrictions' on civil and inquest proceedings as well as police investigations. No new troubles related inquest, Coronial investigation or inquiry (Scotland) may be opened or started (after May 2023) and no new troubles related civil claim after the first reading of the Bill (17 May 2022). Inquests that are already opened 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. The Bill will also shut down a number of requests (often made under Article 2 ECHR) pending with the Attorney General for Northern Ireland to order a fresh inquest under s14 Coroners (Northern Ireland) Act 1959, where there has never been an inquest or there was a flawed one previously.
- **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. Moreover, they have also seen the utility of inquests as forum of 'truth recovery with legal teeth' for other families.
- For example, in the Ballymurphy Massacre inquest completed in July 2021, after 100 days of evidence Mrs Justice Keegan (now Lady Chief Justice) delivered her verdicts and findings in which she held that all 10 victims killed between 9-11 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. It is also noted 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. In a similar vein, the long-running inquest (due to report soon) into the IRA murder of ten Protestant civilians at Kingsmill has involved the 'largest volume of intelligence material that has been disclosed in the context of any inquest that has run in this jurisdiction'.[14]
- **Given the profound weaknesses identified in the 'review system' discussed below in the proposed NITLR and the promises previously made to them by the Northern Ireland legal system, it is simply unconscionable that the families currently in Years 3-5 of the LCJ Five Year Plan awaiting inquests into the deaths of their**

loved ones should not have those promises honoured.

Civil actions as route to reparations and information recovery

- Civil litigation on legacy issues initiated by victims and survivors has provided reparations, accountability and information recovery in relation to conflict-related incidents. Paragraph 38 of the Bill proposes to bar all Troubles-related civil action from the first reading of the Bill. The Bill precludes both reparations and information recovery, including on past unlawful investigations, for those victims and survivors who did not bring civil action before the first reading. The SOS NI's press statement on the legislation however contradicts paragraph 38, stating that: 'Civil claims that already existed on or before the day of the Bill's introduction will be allowed to continue, but new cases will be barred from this date.'[15]
- Civil actions initiated by victims and survivors have also previously proved an effective mechanism to obtain discovery and reparations denied to victims and survivors through other routes.
- For example, in the Sean Graham bookmakers killing on the Ormeau Road in 1992, the UDA/UFF killed five Catholic civilians. It later emerged that one of the weapons used was part of a shipment of weapons from South Africa organised by Brian Nelson, a British military intelligence agent. Another weapon used was a British army issue weapon which was allegedly stolen from a Malone Road British Army barracks and was later handed over by an RUC agent to his RUC Special Branch handler and ultimately returned to the UDA/UFF. It is therefore a high-profile collusion case reported on by the Police Ombudsman in 2022. During the course of that Ombudsman investigation it became clear as a result of discovery via a civil action taken by the family that significant materials held by the PSNI had not been properly disclosed to the OPONI. Without the availability of the civil courts as a route for families, the failure to disclose these materials might never have been unearthed.
- Similarly, in December 2021 the UK MOD and PSNI paid £1.5 million in damages in a settlement to two of the three families of those killed, and to two survivors, of the Miami Showband attack. This related to a sectarian gun and bomb attack on the popular music band the Miami Showband in 1975 killing three of its members and injuring two others. The survivors and relatives had taken a civil claim against state agencies alleging security force collusion with loyalist paramilitaries in the killings.[16]
- As noted above, denying people in Northern Ireland their right to access a local court to challenge the actions of the state is an abrogation of their fundamental human rights and a breach of the Good Friday Agreement.

The Independent Commission for Reconciliation and Information Recovery (ICRIR) – an end to meaningful investigations?

- As has been well rehearsed, the procedural obligations under Article 2 (right to life) require independent and effective *investigations* to be conducted into certain deaths including those with potential state culpability. Similar obligations are attached to ECHR Article 3 (torture, inhuman and degrading treatment). Such *investigations* are to be state-initiated and, as was reflected in draft legislation to implement the Stormont House Agreement (SHA), the obligation can be revived by the emergence of 'new evidence'.
- In the absence of the establishment of the SHA mechanisms, legacy *investigations* in Northern Ireland have continued under the 'Package of Measures' put in place by the UK following findings of Article 2 breaches by the European Court of Human Rights. The mechanisms include the reformed inquests system, the legacy role of the Police Ombudsman, and PSNI 'called in' independent police investigations including Operation Kenova, led by former Chief Constable Jon Boucher.
- As noted above, the Stormont House Agreement was to provide a more comprehensive framework with a Historical Investigations Unit (HIU) conducting independent Article 2 compliant investigations, and the Independent Commission on Information Retrieval (ICIR) on which a treaty was concluded with Ireland.
- Inquests rely on judicial inquiry powers and mechanisms such as Operation Kenova, the Police Ombudsman and proposed HIU on police powers to conduct criminal investigations; they are hence models of '**truth recovery with teeth'**.
- Whilst such mechanisms to date have faced obstruction (including through withholding of resources) they are increasingly delivering and poised to deliver. This is notable in recent legacy inquest decisions or in the 600+ pages of information recovery contained in two Police Ombudsman legacy reports already in 2022, Kenova has amassed 50,000 pages of evidence and is poised to publish its own reports. Such products have delivered significant historical clarification to victims and broader society in Northern Ireland. This has included affirming the previously questioned innocence of victims and highlighting culpability for violations, which can further enhance guarantees of non-recurrence.
- The NITLR bill would end all these processes at a time they are increasingly delivering. Clause 33(1) provides that 'no criminal investigation of any Troubles-related offence may be continued or begun' on the day of commencement. Instead, the ICRIR will conduct 'reviews' not investigations of certain cases. The Secretary of State (SOSNI) is granted extensive powers to shape and intervene in the work of the ICRIR. We do not consider what is proposed as meeting either the effectiveness or independence requirements of the ECHR.

The ICRIR caseload

- Judicial, policing and oversight processes in Northern Ireland have already

established a body of cases whereby Article 2 ECHR-compliant investigations have been adjudged to not having taken place. Such cases were to form, alongside outstanding cases from the PSNI's Historical Enquiries Team and Police Ombudsman, the baseline caseload of the proposed Stormont House HIU. These cases are dispensed with and not included in the proposed caseload of the ICRIR.

- There is no provision whereby the ICRIR Commissioners can on their own initiative bring cases within their remit. Instead, certain family members can request 'reviews' into deaths along with the SOSNI. Along with Coroners in certain circumstances the only independent officer able to request 'reviews' into deaths is the Attorney General for Northern Ireland, albeit this is qualified by a veto on national security grounds by the Advocate General.
- While the UK Government has previously queried the 'doability' of investigations into outstanding Troubles-related deaths, this claim was refuted by experienced investigators such as the Kenova team. It is notable that despite this context the Government bill would significantly extend the case remit of the proposed legacy mechanism. Victims who were seriously injured in Troubles-related incidents are able to trigger ICRIR reviews. Far broader is a power vested in the SOSNI alone under clause 10(2) to trigger ICRIR reviews into any 'harmful conduct' during the Troubles with no requirement that it should have been serious.
- The NITLR also contains a cut-off date of five years for ICRIR reviews. Such cut off represents a de facto amnesty after that period. Unlike the HIU agreed to in the SHA, there is no provision in the bill relating to the prioritisation of cases. **The ICRIR therefore has no power to otherwise open cases nor a duty to investigate those where outstanding ECHR obligations remain.** By contrast the SOSNI is granted broad powers that could heavily shape the case load of the ICRIR despite clear conflicts of interest.

Composition and resourcing of the ICRIR

- The Bill removes the SHA role of the NI Minister of Justice, Department of Justice and Policing Board. Instead, the SOSNI will decide how many ICRIR Commissioners there will be and make all the appointments himself (Schedule 1, para 6-7). The SOSNI will also directly control the resources provided to the ICRIR (clause 2(7)).
- The Bill directly mandates (clause 3(3)) that a significant proposition of ICRIR Officers must have previous Northern Ireland policing experience. No justification is set out for this despite extensive discussions on this issue over many years. No provision is made to manage potential conflicts of interest. **For reasons of Article 2 independence, current mechanisms such as the legacy directorate of the Police Ombudsman and Operation Kenova largely preclude the employment of persons who previously served in organisations**

who may themselves be subject to legacy investigations. The decision to ignore that experience of conducting legacy investigations in an Article 2-compliant manner is baffling.

Powers, reviews, and the lack of investigations: A de facto amnesty without the political opprobrium?

- The functions set out in the bill for the ICRIR expressly restrict its remit to conducting 'reviews' rather than 'investigations' (Clause 4).
- An ICRIR Commissioner will decide on the steps to 'review the case referred to it' (Clause 13). However, the ICRIR is debarred from duplicating any aspect of a previous investigation, unless the ICRIR can make a case that it is 'necessary' to do so (Clause 13(5)). Such limitation provisions in existing statutes have had the effect of unduly restricting some current legacy investigations, even when previous investigations were not Article 2 compliant.
- A key safeguard to date against limited or 'sham' investigations has been the ability of families to judicially review contested investigations for Article 2 compliance. It would be a matter of deep concern if the government moves to constrain the ability of families to challenge ICRIR reviews. Reviews in the Northern Ireland legacy context have tended to refer to inquiries limited to a review of papers or limited testimony evidence that does not involve the use of police investigative powers.
- By contrast under Stormont House the HIU was to conduct Article 2 compliant investigations. The HIU Director was obliged to issue a statement on how the investigatory function would be exercised in a manner that ensured Article 2 ECHR and other human rights obligations were complied with. This is dispensed with for the ICRIR. The HIU was to investigate criminal offences and also (replicating powers of the Police Ombudsman) grave or exceptional police misconduct relating to a death. Whilst this misconduct provision has been a key power shaping Ombudsman investigations, there is no reference to it being within the remit of the ICRIR.
- **The 2021 Command Paper proposed that the new legacy body be given far more limited powers than either any existing mechanism or those proposed under the SHA, with provisions limited to a review of the papers and voluntary testimony.** The current bill does introduce powers to compel testimony to the ICRIR. It has been argued that the potential offer of immunity from prosecution will lead to persons coming forward.
- However, in the absence of the ICRIR conducting effective investigations it is difficult to envisage how any prosecutions can proceed. The ability of the Director of Public Prosecution to pursue prosecutions becomes largely theoretical. **Such a scenario would amount to a de facto general amnesty but without having to face the political and opprobrium which greeted the Command Paper in 2021.**

- It is also not clear what safeguards individuals will have against 'fishing' expeditions where persons are summonsed to testify before the ICRIR without individual reasonable suspicion, or similar safeguards that are provided for in criminal justice processes. One express mechanism to preclude attendance is vested in a procedure for representations from security and policing bodies or Ministers that an individual may not attend on grounds it would be contrary to the UK's national security interests (clause 14(7)) and that an alternative should be fielded. This is not limited to employees of agencies but could also include state agents.
- The Bill does provide that ICRIR officers can be designated as having police powers. **It is unclear however when or how such powers are to be exercised. Police powers are exercised in relation to criminal investigations**. It is not clear if it is ever intended for the ICRIR to conduct such investigations. In cases where a person has been granted immunity from prosecution it is not clear if a criminal investigation could in any case be conducted. In short, we do not consider that the ICRIR has the powers to conduct effective investigations.

The 'Products' – The ICRIR Reports

- The ICRIR will produce Reports on its reviews. The content of these reports is subject to significant redaction by the SOSNI on 'national security +' grounds. This means material can be excluded on general national security grounds, or on grounds it originates with covert policing bodies (clause 53, Interpretation Sensitive Information). This provision can be used to conceal improper and unlawful conduct by informants and other agents of the state.

- Whilst the HIU bill had specific provisions that each family report 'must be as comprehensive as possible' there is no such provision in the current bill as to what ICRIR reports to families should contain. As discussed further below, with regard to the process for granting immunity, there is no provision whereby family members will be informed in Reports whether a suspect of other individual connected to their case has been granted immunity.

The Conditional Immunity Scheme

- In 2021, the UK government issued a command paper in which it proposed a general and unconditional amnesty (statute of limitations) for all Troubles-related offences. This proposal was widely condemned internationally and nationally, opposed by all of the main political parties in Northern Ireland, across the victims' sector, the churches and elsewhere. In this bill, the government has instead opted for a conditional immunity, with a conspicuously low threshold for the granting of that immunity. A conditional immunity that must be granted with minimal due process considerations and little obligation to test the account being offered runs the risk of de facto operating as unconditional amnesty for all

who apply.

Immunity must be granted on the basis of a subjective test

- The NITLR Bill imposes a duty wherein the relevant panel established by the ICRIR **must** grant immunity from prosecution when (A) a person has requested such immunity, (B) where the person has '**provided an account which is true to the best of their knowledge and belief**' and (C) where the panel is satisfied the conduct described would appear expose the person to prosecution for one or more serious troubles-related offences.
- Criterion B is of course central to the extent to which the immunity scheme will be able to contribute to information recovery. There are few elements that raise concerns on the extent to which this would be effective.
- First, Clause 18(4) sets out that the applicant's account could consist entirely of information which they have previously provided to the ICRIR or other legacy
- processes. Second, immunity can be granted even if no family is to benefit from information recovery. Clause 20(5) explains that when the ICRIR decided not to open a review 'that does not prevent the immunity requests panel from forming a view on the truth of an account given by P.' Third, while the ICRIR must check the account against any information already in its possession, Clause 20(4) states that when forming a view on the veracity of the account 'the immunity requests panel is not required to seek information from a person other than P (the applicant)'.
- The memorandum on human rights compliance draws parallels between this process and the amnesty process of the South African Truth and Reconciliation Commission. The South African process did allow desk-based decisions on applications for less serious offences. However, for serious offences, the Amnesty Committee held televised public hearings in which victims could be present, victims were legally represented, their legal representatives could cross-examine the amnesty applicant, and victims could provide impact statements. This process provided much greater recognition of victims' rights and contained greater possibilities for information recovery than the very weak mechanism proposed in the bill.

Which crimes are eligible? Would crimes of sexual violence be ineligible?

- 'Troubles-related' offences are defined as conduct which constitutes a crime in the law that was *related to* 'the events and conduct and conduct that related to Northern Ireland affairs' and occurred between 1 January 1966 and 10 April 1998. The scheme applies to 'serious offences', defined as offences that caused death or serious physical or mental harm. Unusually for such an immunity scheme, there is no specific prohibition on certain kinds of crime, such as crimes of sexual violence. It would therefore appear that applicants who had been involved in rape and other crimes of sexual violence related to the Troubles, or indeed the covering

up of such crimes within paramilitary or state organisations, would be entitled to apply for immunity under this bill.

Are both state and non-state actors eligible to apply for conditional immunity?

- Given the origins of this bill, it is clearly designed to facilitate applications for conditional immunity for state actors unless a prosecution for a relevant Troubles-related offence has already begun and is continuing (Clause 19(1)). With regard to loyalist and republican paramilitaries, Clause 19(1) of the bill also states that a request for immunity would be invalid if the applicant 'has a conviction for a relevant Troubles-related offence'. It is estimated that 25-30,000 republicans and loyalists were imprisoned in Northern Ireland during the period of the conflict.[17]
- In a context where there were comparatively few state actors convicted for conflict related offences,[18] such a prohibition would severely reduce the ICRIR's ability to gather information from paramilitary actors. The memorandum published by the government asserting the Bill's compliance with the ECHR stipulates that a person who is 'subject to ongoing prosecution' or 'holds a conviction' is specifically prohibited from applying for immunity in relation to the conduct for which they are being prosecuted or for which they were convicted. However, it does not clarify whether those with 'relevant' convictions are entitled to apply for immunity more generally.

Will victims and survivors be made aware of successful application for immunity in their particular case?

- There is an inherent tension in this bill between the clear desire to grant an immunity for veterans and the provision of information recovery to families. That tension results in a lack of clarity regarding the precise relationship between the immunity-granting functions and information recovery. The memorandum on the bill's human rights compliance states that the conditional immunity scheme would be 'conceptually separate from its investigative function of carrying out reviews, although it will run in parallel and in practice the two will overlap'. This could mean, for example, the granting of requests for immunity concerning a matter that has not previously been reviewed by the ICRIR, or that is under active review, or that has been referred for prosecution but where a prosecution has not yet been opened.
- Clause 2(5) of the Bill requires that annual statistics are provided on the number of successful applications for immunity. However, **it is not clear that a family member will be informed in the reports presented to them whether or not a suspect in their case has been granted immunity or what is the 'value added' of the testimony provided by that suspect.** The fact that families will not know whether or not former paramilitaries, former soldiers, former state agents (or their

handlers) may have been granted immunity in the compiling of a report on their case will affect the confidence of families in the reliability of the information provided therein.

- The NITLR Bill provides no further information on the deliberation process relating to granting the immunity requests nor how information from the immunity scheme would contribute to victims' reports, if the commission decides not to open a review. The lack of requirements for the commission to corroborate information it receives, beyond simply checking other information it holds relating to the subject matter of the request, raises the prospect that in the absence of a review request from victims or other public officials, immunities for serious offences could be granted based solely on an individual written request.

These immunity provisions are unlikely to be found to be in compliance with the ECHR

- The government memorandum on compliance with the European Convention on Human Rights states that the ICRIR review process proposed in the legislation will comply 'with most' of the requirements of Article 2 procedural obligations. We have detailed elsewhere the circumstances where the ECHR may permit a degree of flexibility regarding the mitigation of punishment for serious offences including murder.[19] However, as detailed above, such flexibility can only occur on the context of **investigations** which are fully compliant with article 2 of the ECHR and not the **reviews** envisaged in this Bill. Moreover, the possibility for the ICRIR to grant immunity without adequately corroborating the information received, together with the opacity regarding how any information that is received will be handled, made available and benefit victims and society in terms of information recovery, means that there is very little prospect that it would be found to be compatible with the ECHR.

Oral History, Memorialisation and Academic Research

- As noted above, the NITLR Bill also contains provisions with regard to Oral History, Memoralisation and Academic research on the conflict which also depart significantly from the Stormont House Agreement.

Prominence in New Proposals Linked to Justification for Immunity

- It is striking that memorialisation work (including an oral history initiative) and academic research on the patterns and themes of past conflict are front and centre of the NITLR. They also feature prominently in the accompanying memorandum on the European Convention on Human Rights. As noted, quoting Strasbourg case-law on amnesties, the

government acknowledges that the ECtHR has articulated a general opposition to reconciliation-linked amnesties, based on the principle that immunity hinders investigation and leads to impunity. The government considers, however, that the Court may consider an exception to this in cases where a 'reconciliation process' has been put in place.[20]

- **The significantly beefed-up proposals on oral history, memorialisation and academic research on the conflict would appear to be designed to provide legal and political cover for what many regard as an indirect route to impunity.**

- The clear implication in the government's proposals is that it is *essential* to call a halt to investigations into Trouble-related conduct, introduce immunity for Troubles-related offences (and thus as stated in the objectives, 'give veterans the protections they deserve') and close down civil claims and inquests in relation to Troubles-related conduct, in order to unlock the potential for reconciliation-focused work including oral history and memorialisation. This is simply not true.
- These proposals, in our view, are likely to have the opposite effect. Based on reaction to date, the vast majority of victims and survivors will want nothing to do with a programme of work that simultaneously closes down those routes to truth and justice currently accessible to them and that is broadly regarded as a thinly veiled cover for impunity and a serious breach of the Good Friday Agreement.[21] **Far from furthering reconciliation, these proposals could do untold damage to the credibility of oral history and academic research and will compound harm and breed cynicism and contempt amongst victims and survivors.**

Independence of the 'Designated Persons' Appointed to Take Forward this Programme of Work

- In our detailed response to the 2018 Draft Bill on the implementation of the Stormont House Agreement (SHA) legacy mechanisms, we highlighted the importance of the SHA commitment that the proposed oral history archive would be 'independent and free from political interference'. For this reason, we opposed the proposal to give the Director of the Public Records Office of Northern Ireland 'direction and control' of the archive given that PRONI 'operates under the direction and control' of a government minister.[22]
- The new proposals would appear to incorporate some of the improvements that we called for (the government appears to have moved towards a version of the 'hub and spokes' model we proposed, engaging a number of different organisations and groups and there is a weak suggestion that the designated persons will 'use their best endeavours' to establish and advisory forum and consider working through one of the UK Research Councils).

- **However, the 'fix' for the crucially important issue of ensuring the independence of this initiative is to place it under the direction and control of the Secretary of State for Northern Ireland.** It will be for the Secretary of State (clause 49(1)) to designate persons whom he is 'satisfied…would make a significant contribution' to the oral history initiative and whom he decrees to be 'supported by different communities in Northern Ireland'. The Secretary of State will invite the 'designated persons' to prepare a memorialisation strategy and he or she will then *'consider and decide a response to each of the recommendations made'.*

Organic Link to Work of ICRIR

- The 'designated persons' appointed by the Secretary of State for Northern Ireland will be required to commission a team of academic researchers to conduct work on the patterns and themes of the conflict, including a statistical analysis of all ICRIR reports relating to its review of deaths and the accompanying ICRIR historical record of deaths. Clause 45 (8) makes clear that this statistical analysis must establish 'to the extent possible from the IRCIR reports and the historical record' the number of deaths 'recorded in those reports and that record' and an overview of the circumstances of those deaths. Given our grave misgivings about the workability of the ICRIR (including the likelihood of boycott from key stakeholders) this organic link between the supposedly independent academic research and the ICRIR is deeply problematic.

Official History of the Troubles

- Although it is not explicitly referenced in the Bill, the Secretary of State has indicated elsewhere that he will also commission an 'official history' of the Troubles.[23] Although details of this proposal have not yet been published, Whitehall sources have indicated that the British government plans to appoint a group of historians under Privy Council terms to produce a 'balanced historical record' that 'challenges the role of the IRA in the conflict'.[24] As discussed recently with a panel of international historians convened by the University of Oxford, any kind of 'official history' must be approached with great caution and complete independence from government is of paramount importance.[25] Given that the current proposals are wrapped up in a plan to introduce immunity that will
- primarily benefit state actors, and that is clearly designed to tilt and control the narrative on the past, it is our view that the proposals are incompatible with academic ethics, rigour and integrity.

A Missed Opportunity

- One of the most depressing aspects of these proposals is the potential to thwart and discredit the vitally important work that could be done in the broad area of oral history and memorialisation.
- The benefits of this work include: giving voice to those whose stories have been wilfully or carelessly ignored; capturing the messy and complex realities of the conflict that shaped our relations with family, friends, neighbours, Churches, schools and employers; allowing victims and survivors to tell their story in full and thus helping to humanise 'the other'; documenting the gender dynamics of the conflict; accounting for contrasting urban and rural experiences; and probing intergenerational trauma.

- Done properly, oral history and related memorialisation and academic research initiatives could give agency and voice to victims and survivors and make a powerful contribution to advancing understanding of the deep and tangled roots of our conflict. Far from unlocking the potential of work in this area, by instrumentalizing the proposals on oral history and memorialisation in support of impunity, this Bill could do untold damage to the credibility of oral history and academic research in general.
- For victims and survivors who have been waiting decades for precious information about the deaths of their loved ones it is cold comfort indeed to suggest that 'we can't offer anything more than a review of the death of your loved one, but you can have access to a museum of the Troubles, an oral history archive or an official history instead'. In our view it is unlikely that any self-respecting historian, archivist or museum director would be willing to participate in such an initiative.

Conclusion

- As noted above, it is our view that the NITRL Bill is in breach of the Good Friday Agreement, runs contrary to the devolution of justice in Northern and is in breach of binding international human rights standards, particular the right under Article 2 and Article 3 of the ECHR to an effective investigation and the right to access local courts where human rights have been breached.
- The Bill displays a clear desire on the part of the government to exercise control over all aspects of dealing with the past in Northern Ireland – a drive which fundamentally undermines this Bill as a vehicle for addressing the conflict.
- The conditional immunity scheme is a thinly veiled effort to secure de facto impunity for state actors rather than a good faith effort to assist victims and survivors in achieving information recovery.
- The ability of the Director of Public Prosecution to pursue prosecutions

becomes largely theoretical. Such a scenario would amount to a de facto general amnesty but without having to face the political and opprobrium which greeted the Command Paper in 2021.

- The decision to close down access to the coronial courts, particularly for families who are in the 'queue' of the Lord Chief Justice's five-year plan, is a cruel breach of trust and of their legitimate expectation that they will have a proper inquest into the deaths of their loved ones.
- The significantly expanded efforts to privilege work on oral history, memorialisation and academic research on the conflict is, in our view, designed to provide legal and political cover for what the government is describing as conditional immunity for reconciliation. If enacted, such proposals could do untold damage to the credibility of such work as a smokescreen for impunity.

1 See https://bills.parliament.uk/bills/3160/publications

2 See further Dealing with the Past in Northern Ireland (dealingwiththepastni.com). The team consists of Professor Kieran McEvoy, Professor Louise Mallinder and Dr Anna Bryson (Queen's University Belfast, School of Law & Senator George J. Mitchell Institute for Global Peace, Security and Justice) and Daniel Holder, Brian Gormally and Gemma McKeown (all Committee on the Administration of Justice). We would also like to thank Órlaith McEvoy and Anurag Deb for their research assistance which informed part of this report.

3 https://www.gov.uk/government/publications/the-belfast-agreement This is what occurred with regard to the reform of abortion law in Northern Ireland after the Northern Ireland Human Rights Commission successfully argued that the failure by the Northern Ireland Assembly to agree arrangements for the provision of abortion services had rendered the UK government in breach of its international legal obligations. However, in this instance, as argued below, the effect of the UK government's intervention will itself be in breach of binding international and UK legal obligations.

4 https://bills.parliament.uk/bills/3160/publications

5 https://bills.parliament.uk/bills/3160/publications

6 Draft Northern Ireland (Stormont House Agreement) Bill 2018, Schedule 2, Part 1.

7 https://www.gov.uk/government/publications/the-stormont-house-agreement

8 HMIC (2013) *Inspection of the Police Service of Northern Ireland Historical Enquiries Team*. Available at https://www.justiceinspectorates.gov.uk/hmicfrs/publications/hmic-inspection-of-the-historical-enquiries-team *Belfast Telegraph* (3 July 2013) 'Army Killings to be Re-examined After Troubles Murder Probe Criticised'

9 Paragraph 8, Committee of Ministers' Decision in the McKerr Group of Cases v UK, 1428th meeting, 8-9 March 2022, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5c3e2

10 https://www.judiciaryni.uk/legacy-litigation

11 https://www.judiciaryni.uk/sites/judiciary/files/media-files/Press%20Release%20-%20Legacy%20Inquests%20-%20Year%203%20Listings%20-%20220322.pdf

12 https://www.judiciaryni.uk/sites/judiciary/files/media-files/Press%20Release%20-%20Presiding%20Coroner%20Case%20Management%20Reviews%20-%20240222.pdf

13 Under s 14 Coroners Act (Northern Ireland) 1959, https://www.legislation.gov.uk/apni/1959/15/section/14 As of August 2021, the Attorney General had to date referred 32 inquests into 54 deaths (information provided by the Legacy Inquest Unit).

[14] Sean Doran QC, Counsel for the Coroner quoted in *Belfast Telegraph*, 20th November 2020 'Naming IRA men allegedly Involved in Kingsmill Massacre Would Help Uncover Any Collusion, Court Told.'

[15] https://www.gov.uk/government/news/secretary-of-state-for-northern-ireland-to-outline-way-forward-to-address-the-legacy-of-the-troubles

[16] https://www.bbc.co.uk/news/uk-northern-ireland-59641564

[17] Sir George Quigley (2007) *Recruiting People with Conflict Related Convictions, Employers Guidance.* Office of the First Minister and Deputy First Minister.

[18] As the Operation Banner review notes, only a dozen or so serious cases involving Army personnel killing or injuring others came to court during the 30 years of the Troubles. In relation to operational shootings the report cites 4 convictions for murder, one of which was overturned on retrial. These figures to not appear to include members of the Ulster Defence Regiment. British Army (2006) An Analysis of Military Operations in Northern Ireland. Available http://www.vilaweb.cat/media/attach/vwedts/docs/op_banner_analysis_released.pdf p. 46, para 431.

[19] Model Bill Team Response to the UK Government Command Paper on Legacy in NI | Dealing with the Past NI

[20] Northern Ireland Troubles (Legacy and Reconciliation) Bill European Convention on Human Rights Memorandum, Clauses 43 – 47.

[21] See further https://eamonnmallie.com/2021/07/nio-legacy-proposals-soft-options-will-not-suffice-by-dr-anna-bryson/indepPRIN

[22] See further http://rightsni.org/2015/10/the-stormont-house-oral-history-archive-proni-and-the-meaning-of-independence-guest-post-by-dr-anna-bryson/ and https://eamonnmallie.com/2021/07/nio-legacy-proposals-soft-options-will-not-suffice-by-dr-anna-bryson/indepPRIN

[23] See https://www.belfasttelegraph.co.uk/news/northern-ireland/british-government-to-commission-official-history-of-troubles-under-legacy-plans-41050099.html; https://news.sky.com/story/uk-govt-to-bring-forward-legislation-on-the-legacy-of-the-troubles-in-northern-ireland-12614804

[24] See https://www.telegraph.co.uk/politics/2021/11/13/ministers-plan-official-account-troubles-amid-fears-ira-supporters/

[25] https://talks.ox.ac.uk/talks/id/5c672e56-1090-44c8-9562-b435be3d6311/ . One of the authors of this report, Dr Anna Bryson, presented at this Oxford Irish History Seminar on 23 February 2022.