

Written evidence from the Northern Ireland Human Rights Commission (NIB0003)

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(1) of the Northern Ireland (NI) Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in NI. The NIHRC is also mandated, under section 78A(1) to monitor the implementation of Article 2(1) of the Protocol on Ireland/NI of the European Union (EU) Withdrawal Agreement, to ensure there is no diminution of rights protected in the ‘Rights, Safeguards and Equality of Opportunity’ chapter of the Belfast (Good Friday) Agreement 1998 as a result of the United Kingdom’s withdrawal from the European Union. In accordance with these functions the following evidence is submitted to the Joint Committee on Human Rights (Joint Committee) for its legislative scrutiny of the NI Troubles (Legacy and Reconciliation) Bill.
- 1.2 The NIHRC is clear that the Bill is incompatible with Articles 2 (right to life) and 3 (freedom from torture) of the European Convention on Human Rights (ECHR).¹ This Bill is fatally flawed, it is not possible to make it compatible with the ECHR.
- 1.3 The NIHRC is due to publish comprehensive advice, which will be shared with the Joint Committee in due course. The NIHRC is also considering Article 2(1) of the Protocol on Ireland/NI of the European Union (EU) Withdrawal Agreement in the context of this Bill and will provide this advice in due course. This evidence raises the headline issues in line with the Joint Committee’s questions.

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

2.0 Reviews of Deaths

Effective investigation

- 2.1 The review of cases undertaken by the Independent Commission for Reconciliation and Information Recovery (ICRIR) do not meet the procedural obligations under Articles 2 and 3 of the ECHR.
- 2.2 The Secretary of State is involved in making the rules/guidance,² proposing cases for review,³ determining resources⁴ and monitoring⁵ the ICRIR. ICRIR's work can be concluded when the "Secretary of State is satisfied that *the need* for ICRIR" to exercise its functions "has ceased", as opposed to completion of the ICRIR's mandate.⁶ The extent of the Secretary of State's involvement across every aspect of the ICRIR's work cannot be categorised as independent and impartial.
- 2.3 A light-touch review or historical record by the ICRIR do not equate to thorough and effective investigations.⁷ It is indicated that a review will be a more detailed exploration than a historical record.⁸ This creates disparity between cases, further diluting investigative obligations.
- 2.4 The proposal that the ICRIR will avoid duplication with previous investigations⁹ augments the assumption that previous investigations were ECHR-compliant. The shortcomings exposed in case law from the European Court of Human Rights (ECtHR)¹⁰ and findings of the Council of Europe (CoE) Committee of Ministers¹¹ emphasise that such assumptions should not be made.
- 2.5 The requirement to conduct reasonably prompt and expeditious investigations is not a reason for this legislation to be rushed through without meaningful consultation or the

² Clauses 19(3), 20(6), 20(7), 20(7), 20(8), 28, 29, 30, 52, Schedule 1, NI Troubles (Legacy and Reconciliation) Bill.

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

⁴ Clause 2(1), NI Troubles (Legacy and Reconciliation) Bill.

⁵ Clause 31, NI Troubles (Legacy and Reconciliation) Bill.

⁶ Clause 32(1), NI Troubles (Legacy and Reconciliation) Bill.

⁷ Clauses 9-17 and 23-24, NI Troubles (Legacy and Reconciliation) Bill.

⁸ Clauses 13-16 and 23(1), NI Troubles (Legacy and Reconciliation) Bill.

⁹ Clause 11(7)(b), NI Troubles (Legacy and Reconciliation) Bill.

¹⁰ *McKerr v UK* (2001) ECHR 329; *Kelly and Others v UK* (2001) ECHR 328; *Shanaghan v UK* (2001) ECHR 330.

¹¹ CM/ResDH(2020)367, 'CoE Committee of Ministers Execution of the Judgments of the European Court of Human Rights: McKerr and Other Seven Cases Against the UK', 3 December 2020.

backing of victims and survivors. The speed of this process is irrelevant if the other aspects of the procedural obligations of Articles 2 and 3 of the ECHR are not met, particularly that investigations are thorough, independent and impartial.

- 2.6 Considering that investigations should be of the State's own motion, it is right that a review can be requested by State agents.¹² However, whether the resulting review equates to an Article 2 ECHR compliant investigation remains an issue.
- 2.7 Keeping family members informed is welcomed.¹³ Guided by proportionality and considering sensitive issues, the degree of public scrutiny is permitted to vary from case-to-case if the public or victim's relatives are provided with access at "other stages of the available procedures".¹⁴ The purpose of this requirement is to ensure public confidence in the process.¹⁵ That is currently lacking given how the UK Government published and forged ahead with this legislation without meaningful consultation or listening to expert views on the Bill's incapability with the ECHR. Only requiring that the ICRIR 'may', not 'must', publish the final report of any review exacerbates this.¹⁶ The ICRIR 'must publish the historical record',¹⁷ but subject to certain conditions that, without safeguards, could dilute this commitment.¹⁸ Furthermore, the Bill creates a two-tiered approach affecting the steps that certain family members can or cannot take. The definition of a close family member, who has precedent over other family members, is narrower than the ECtHR's categorisation of next-of-kin.¹⁹

Definition of offences

- 2.8 The limitations of ICRIR's scope²⁰ is a notable departure from the Victims and Survivors (NI) Order 2006. A prescriptive list limited to extreme injuries and that does not accommodate rehabilitative injuries is not ECHR compliant. It ignores the

¹² Clause 9, NI Troubles (Legacy and Reconciliation) Bill.

¹³ Clauses 15 and 16, NI Troubles (Legacy and Reconciliation) Bill.

¹⁴ *Hugh Jordan v UK* (2001) ECHR 327, at paras 121-124.

¹⁵ *McKerr v UK* (2001) ECHR 329, at para 114.

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

¹⁷ Clause 24(1), NI Troubles (Legacy and Reconciliation) Bill.

¹⁸ Clauses 4(1), 24(2), 24(3), and 25(3), NI Troubles (Legacy and Reconciliation) Bill.

¹⁹ *McKerr v UK* (2001) ECHR 329; *Hugh Jordan v UK* (2001) ECHR 327; *Gül v Turkey*, Application No 22676/93, 14 December 2000; *Ogur v Turkey* (1999) ECHR 30; *Gülec v Turkey*, Application No 21593/93, 27 July 1998; *McCann v UK* (1995) 21 EHRR 97.

²⁰ Clause 1(6), NI Troubles (Legacy and Reconciliation) Bill.

absoluteness of Article 3 of the ECHR.²¹ Each potential case should be assessed on its own circumstances,²² not determined by a rigid list of extreme outcomes.

- 2.9 The constrained definition of offences and the cessation of other proceedings²³ raises concerns that there will be no recourse to justice for Troubles-related sexual offences. This would discriminately affect women. Gender-based violence in all its forms should be criminalised, legal systems should protect victims and offer an effective remedy.²⁴ Thus, any laws that facilitate, justify or tolerate any form of gender-based violence should be repealed.²⁵

Temporal scope

- 2.10 Defining Troubles-related offences as those that occurred on or after 1 January 1966 fits the point widely recognised as when tensions escalated into violence and captures when the first Troubles-related deaths occurred.²⁶ The end date of 10 April 1998 reflects when the Belfast (Good Friday) Agreement was signed. However, peace is a process and Troubles-related offences continue to occur. To justify the proposed end date, a review confirming that post-10 April 1998 offences have been investigated or have the option of being investigated in line with Articles 2 and 3 of the ECHR is required to confirm that it is justifiable to omit later offences from the Bill. It should not be assumed that this is the case following introduction of the Human Rights Act 1998. An alternative date to consider is 2 October 2000, when the Human Rights Act came into force.

Jurisdictional scope

- 2.11 As the impact of the NI conflict extended beyond NI, not placing a jurisdictional limit on Troubles-related offences is welcomed.²⁷ Yet, the ICRIR's limited mandate may have a negative impact on the investigative ability of other jurisdictions, such as Ireland, with responsibility for investigating Troubles-related offences that occurred

²¹ Article 15(2), ECHR.

²² *Mursic v Croatia* (2016) ECHR 927, at para 97.

²³ Clauses 36 and 38-40, NI Troubles (Legacy and Reconciliation) Bill.

²⁴ CEDAW/C/GC/35, 'UN CEDAW Committee General Comment No 35: Gender Based Violence Against Women Updating General Comment No 19', 14 July 2017, at para 30.

²⁵ *Ibid*, at para 31.

²⁶ David McKittrick et al, 'Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the NI Troubles' (Mainstream Publishing, 2007), at 23.

²⁷ Clause 1(7), NI Troubles (Legacy and Reconciliation) Bill.

in another CoE jurisdiction, involved a cross-border element with another CoE jurisdiction, or affected a victim based in another CoE jurisdiction. An ECHR-ratifying State is required to “secure to everyone within their jurisdiction the rights and freedoms” contained within the ECHR.²⁸

Biometric data

3.5 The Bill’s treatment of biometric data²⁹ is largely in line with *Gaughran v UK* (2020).³⁰ Requiring that retention of biometric data material be subject to periodic review and that the material is destroyed within a reasonable period after the conclusion of the ICIR’s work are welcomed. The ICIR can use the evidence,³¹ but it is not stated that retained biometric data must be relevant to the ICIR’s work. It is hard to view this as a proportionate approach, as required by Article 8 of the ECHR (right to a private life).³²

3.0 Conditional Immunity Scheme

3.1 An immunity scheme for gross abuses of human rights, such as those related to Articles 2 and 3, violates the ECHR.³³ Admittedly the ECtHR’s mixed views have confused this debate. However, there is growing jurisprudence that reflects this conclusion.³⁴ It is difficult to justify any other determination given the limited nature of Article 2 of the ECHR and absoluteness of Article 3 of the ECHR.

3.2 Alternative ECtHR views rely on the amnesty being in the public interest³⁵ or an existing effective reconciliation process and/or form of compensation to the victims.³⁶ This is not the case in NI. The Bill is portrayed by the UK Government as within the public interest and that it delivers an effective reconciliation process. This is impossible without buy-in from victims and survivors and elected representatives.

²⁸ Article 1, ECHR.

²⁹ Clause 30, NI Troubles (Legacy and Reconciliation) Bill.

³⁰ *Gaughran v UK* (2020) ECHR 144.

³¹ Clause 30(1)(d), NI Troubles (Legacy and Reconciliation) Bill.

³² *Mozer v Republic of Moldova and Russia* (2016) ECHR 213, at para 194.

³³ *Margus v Croatia* (2014) ECHR 523, at para 126; *Abdülsamet Yamana v Turkey* (2004) ECHR 572, at para 55; *Ali and Ayse Duran v Turkey* (2008) ECHR 289, at para 69; *Okkali v Turkey*, Application No 52067/99, Judgment of 17 October 2006, at para 76; *Yesil and Sevim v Turkey*, Application No 34738/04, Judgment of 5 June 2007, at para 38.

³⁴ *Ibid.*

³⁵ *Duarjadin v France*, Application No 16734/90, Judgment of 2 September 1991; *Tarbuk v Croatia* (2012) ECHR 2049, at para 50.

³⁶ *Ould Dah v France* (2009) ECHR 532; *Association 21 December 1989 and Others v Romania* (2012), Application Nos 33810/07 and 18817/08, Judgment of 24 May 2011.

The Victims Payments scheme is a compromise,³⁷ but is not an all-encompassing form of compensation.

- 3.3 Removing the possibility of immunity for an on-going case or previous conviction³⁸ may constitute a violation of Article 14 of the ECHR (prohibition of discrimination), which requires that there be no discrimination based on “other status”. What constitutes ‘other status’ is ever evolving. There is the potential that it would apply in this instance. The Bill arbitrarily distinguishes between alleged offenders that can and cannot have immunity. It is more likely to impact alleged paramilitary offenders, than State agents with no existing legal basis or ECHR-compliant justifiable reason.
- 3.4 Given the variety of issues and importance to consider each case on its merits, it is imperative to not arbitrarily focus on specific cases. However, in supervising the execution of ECtHR judgments, the CoE Committee of Ministers “recalled with profound regret that inquests and investigations in the cases of *McKerr*, *Shanaghan* and *Kelly and Others* have still not been completed”.³⁹ This Bill does not address the Committee of Ministers’ concerns.

4.0 Cessation of Proceedings

- 4.1 Immediately ceasing criminal investigations (other than those referred by the ICIR to the prosecutor), police complaints, civil proceedings and inquests/inquiries arising out of the Troubles does not comply with the ECHR. Article 13 of the ECHR (right to an effective remedy) has a close relationship with Articles 2 and 3 of the ECHR.⁴⁰ Removing these domestic remedies makes seeking remedy from the ECtHR the only alternative option. Considering the principle of subsidiarity this should not be the case. ECtHR judgments are not enforceable, instead relying on State-initiated compliance. Considering the UK Government’s approach to existing judgments, heavy reliance on parliamentary sovereignty is likely, resulting in a related ECtHR ruling being disregarded or only partially adhered to.

³⁷ Victims’ Payments Regulations 2020.

³⁸ Clause 19(1), NI Troubles (Legacy and Reconciliation) Bill.

³⁹ CM/ResDH(2020)367, ‘CoE Committee of Ministers Execution of the Judgments of the European Court of Human Rights: McKerr and Other Seven Cases Against the UK’, 3 December 2020.

⁴⁰ *Isayeva v Russia* (2005) ECHR 128, at para 229.

4.2 Right of access to courts and tribunals is inherent to Article 6(1) of the ECHR (right to a fair trial), enabling any claim relating to a person’s civil rights and obligations be brought before a court or tribunal.⁴¹ This right is not absolute and may be subject to limitations. However, limitations “must not restrict or reduce the access left to the individual in such a way or to such an extent that very essence of the right is impaired”.⁴² The immediacy of the proposed changes to a victim’s access to justice and closing-off any pursuit of justice outside of an ICRIR that is not compliant with Articles 2 or 3 of the ECHR is contrary to Article 6 of the ECHR.

5.0 Early Release of Prisoners

5.1 The proposal to extend the accelerated release scheme to those serving sentences for related offences committed on or after 1 January 1966 and before 8 August 1973 is welcomed.⁴³ It appears this applies to anyone convicted of a Troubles-related offence, including members of the security forces, but this needs clarified.

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⁴¹ *Golder v UK* (1975) 1 EHRR 524, at para 28.

⁴² *Philis v Greece* (1991) 13 EHRR 741, at para 59.

⁴³ Schedule 11, NI Troubles (Legacy and Reconciliation) Bill.