

Written evidence from the Law Society of Northern Ireland (NIB0005)

Introduction

The Law Society of Northern Ireland represents and supports c.3,000 practicing solicitors working in the public, private and third sectors. It works in the public interest to influence law reform, defending access to justice and upholding the rule of law. The Society's Human Rights and Equality Working Group welcome's this opportunity to respond to this consultation.

First, we wish to express our deep concern at the attacks on lawyers acting for victims and survivors of the Troubles, by the Secretary of State for Northern Ireland¹ (SoSNI) and other members of Parliament² in commentary supporting this Bill. This legislation 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 1998³. These concerns have been raised by both the UN⁴ and Council of Europe Human Rights Commissioner⁵ in response to the 2021 Command Paper⁶ issued prior to the Bill.

The Bill does not command the support of victims and survivors' groups, civil society and the Northern Ireland political parties and is, in our view, a significant impediment to truth and reconciliation in Northern Ireland.

¹ <https://www.conservativehome.com/platform/2022/06/brandon-lewis-my-northern-ireland-legacy-plan-no-longer-will-our-veterans-be-hounded-for-about-events-that-happened-decades-ago.html>

² <https://www.politicshome.com/thehouse/article/we-must-protect-veterans-and-support-victims-and-survivors>

³ 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' which will be breached through this Bill. See pg. 16: Rights, Safeguards and Equality of Opportunity, Human Rights. <https://www.gov.uk/government/publications/the-belfast-agreement>

⁴⁴ [UK: UN experts voice concern at proposed blanket impunity to address legacy of "the Troubles" in Northern Ireland | OHCHR](#)

⁵ [UK government's legacy proposals must not undermine human rights and cut off victims' avenues to justice in Northern Ireland - View \(coe.int\)](#)

⁶ [CP 498 Addressing the Legacy of Northern Ireland s Past.pdf \(publishing.service.gov.uk\)](#)

1. Reviews of deaths:

1. **The procedural obligation under Articles 2 and 3 ECHR requires that investigations into deaths and serious injuries must: be independent, effective, reasonably prompt and expeditious, include a sufficient element of public scrutiny, adequately involve the next-of-kin, and be initiated by the State rather than solely dependent on being raised by the next-of-kin. Will the reviews of cases undertaken by the new ICRIR meet these requirements?**

We endorse the comments of the Chief Commissioner of Northern Ireland Human Rights Commission⁷ and the analysis of the ‘Model Bill Team’ which finds the ICRIR non-compliant with Articles 2 and 3 of the ECHR.⁸ The legislation as drafted raises significant concerns around the ICRIR, including:

Independence

SoSNI reserves significant powers and control over the work of the ICRIR while retaining a vested interest in the outcome of many reviews. This therefore jeopardises the ICRIR's independence on a number of grounds e.g. the appointment of the Chief Commissioner will be made by the SoSNI; the SoSNI can withhold information from a Review report and has broad powers to control information that will influence the ICRIR. The power to trigger a review into Troubles-related ‘other harmful conduct’ also rests solely with the SoSNI. The ICRIR cannot act on its own initiative and lacks sufficient public scrutiny of its decision-making processes.

Effectiveness

The Bill references ‘reviews’ rather than the necessary ‘investigations’ under ECHR and the ICRIR is prevented from duplicating any aspect of a previous investigation, regardless of how flawed that may have been, though it can do so if it views the duplication as ‘necessary’ under Clause 13(5). Further, in contrast to the Stormont House Agreement’s (SHA) Historical Investigations Unit which met the investigative requirements⁹ of Article 2, there is no clarification on how or when the ICRIR’s police powers may be exercised in criminal investigations, and it is unclear if the ICRIR will be empowered to conduct such investigations. Where immunity has been granted it is unclear if a criminal investigation could in fact take place.

⁷ <https://committees.parliament.uk/oralevidence/10359/html/>

⁸ <https://www.dealingwiththepastni.com/assets/MBT-Initial-Response-to-Bill-Embargoed-24.5.22-1200-noon-1653392164.pdf>

⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706299/Draft_Northern_Ireland_Stormont_House_Agreement_Bill_-_Explanatory_Notes.pdf

Next-of-kin involvement

Involvement of next-of-kin is wholly inadequate, with the entitlement only to seek a review into a death while the ICIR has no duty to inform next-of-kin where immunity has been granted to perpetrators. We note the comments of the CEO of WAVE Sandra Peake that:

‘In some ways perpetrators have power over victims – they have a choice, they can engage, they don’t have to engage - but those families who are bereaved don’t have that.’¹⁰

- 2. The ICIR will be limited to carrying out reviews of Troubles-related deaths and “other harmful conduct” (clause 2(4)(b)). “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)” (clause 1(4)). “Serious physical or mental harm” is defined in clause 1(6) as a list of 8 conditions. Is the definition of “serious physical or mental harm” adequate? Does it risk excluding reviews of cases which would concern treatment amounting to a violation of Article 3 ECHR and UNCAT? If so, what are the implications for the UK’s compliance with the procedural obligations under Article 3 ECHR and UNCAT?**

The definition of ‘serious physical or mental harm’ fails to include all treatment captured by the non-derogable protections under Article 3 ECHR. Notably the legislation fails to address sexual violence offences linked to the Troubles and the treatment of the ‘disappeared’. This will likely lead to legal challenges domestically and to the ECtHR to address these failures.

The UN Committee Against Torture has also previously advised the UK that enacting amnesties or statutes of limitation for torture or ill-treatment is inconsistent with its obligations under the Convention against Torture and the UK should:

‘Ensure that effective and independent investigations are conducted into outstanding allegations of torture, ill-treatment and conflict-related killings to establish the truth and identify, prosecute and punish perpetrators’ and

‘Undertake other initiatives, including expanding the mandate of the historical investigations unit, to address allegations of torture, sexual violence and disappearances committed during the conflict’.¹¹

¹⁰ <https://www.belfasttelegraph.co.uk/news/northern-ireland/fears-troubles-legacy-bill-gives-perpetrators-power-over-victims-claims-campaigner-41661669.html>

In June 2022 the UN identified a List of Issues to be addressed prior to the 7th periodic report on the UK including the above recommendations.¹²

It also seeks information on the ‘mechanism for impunity’ referenced in the written ministerial statement of 18 March 2020 which this Bill provides for in detail.

3. Does the temporal scope of the UK’s procedural obligations under Articles 2 and 3, as a matter of domestic law, apply to all outstanding Troubles-related cases in Northern Ireland?

In December 2021 the Supreme Court in *McQuillan, McGuigan and McKenna*¹³ held that the ‘critical date’ for ECHR obligations domestically is 2 October 2000, when the Human Rights Act 1998 came into force. It is our understanding that this judgment closes down, in domestic law, investigative obligations under Articles 2 or 3 ECHR arising from the Northern Ireland Troubles-related cases that took place 10 years before the Human Rights Act 1998 came into force. ECHR obligations of course remain as a matter of international law regardless of domestic temporal restriction.

4. Does the proposed regime for the retention of biometric material (clause 30) constitute a justified interference with Article 8 ECHR (the right to private and family life)?

In *Gaughran v. The United Kingdom*¹⁴ the ECtHR unanimously ruled that the indefinite retention of biometric data and photographs of persons convicted of an offence punishable by imprisonment was a breach of Article 8 ECHR. The issue of retention for legacy cases was canvassed by the UK government in *Gaughran*. The ECtHR noted that ‘Insofar as the government’s submission could concern the substance of the proportionality test under Article 8, the Court considers that the necessity to preserve parts of the DNA database for the purposes of historic investigations is not significantly different to the general arguments advanced that retaining biometric data is helpful for investigating other types of ‘cold cases’, examples of which were included as case studies illustrating the Government’s general argument’¹⁵. This would suggest the approach contained in this legislation does not constitute a justified interference.

¹¹ UNCAT Concluding Observations, 2019. See paragraph 41: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/154/71/PDF/G1915471.pdf?OpenElement>

¹²https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGBR%2fQPR%2f7&Lang=en

¹³ <https://www.bailii.org/uk/cases/UKSC/2021/55.html>

¹⁴ *GAUGHRAN v. THE UNITED KINGDOM* (coe.int)

Moreover, we note the inherent contradiction of legislating to preserve biometric material that otherwise ought to be destroyed in the same bill which mandates all criminal investigations must cease unless they are pre-commencement prosecutions.¹⁶

¹⁵ GAUGHRAN v. THE UNITED KINGDOM (coe.int) paragraph 92

¹⁶ As noted by Richmond: 'The longstanding requirement to address human rights issues attendant upon the acquisition and retention of biometric data, has led to the preponderance of Council of Europe member states limiting the retention periods for which such samples may be retained. Richmond, Karen, Human Rights Compatibility of Biometric Data Retention on Shared UK Databases (March 18, 2021). iCourts Working Paper Series No. 241, Available at SSRN: <https://ssrn.com/abstract=3807099> or <http://dx.doi.org/10.2139/ssrn.3807099>

2. Conditional Immunity Scheme:

- 1. The UK is under a duty to investigate and punish serious crimes and grave breaches of fundamental human rights, such as unlawful killings and torture. Is the conditional immunity scheme compliant with this duty? If not, does it constitute a justified exception to this duty? For example, does the pursuit of truth and reconciliation provide a legal basis for the proposed conditional immunity scheme?**

The ECHR Memorandum accompanying the Bill makes reference to ECtHR jurisprudence on the use of amnesties in the pursuit of truth and reconciliation and where there have been Article 2 compliant investigations. However, the reviews provided for in this Bill do not meet the Article 2 procedural requirements as outlined above.

The threshold for granting of immunity¹⁷ is a low one, including even in determining the truthfulness of an application. For example, where person 'P' has requested immunity, the immunity requests panel is expressly not required to seek information from persons other than P¹⁸ and the panel can form a view on P's truthfulness even in the absence of an ICRIR review¹⁹.

Immunity can be granted even where a family has not requested a review. This process contrasts starkly with the South African truth and reconciliation process to which the Government has attempted to draw comparison.

- 2. Is there a risk that this scheme may result in unjustifiable discrimination against persons with certain affiliations or who were engaged in certain types of conduct, which is prohibited by Article 14 ECHR?**

The comments of the SOS NI raise serious concerns about the intention of this Bill to protect specific actors from accountability from unlawful actions:

¹⁷ Under Clause 18 of the Bill the granting of immunity is not subject to a discretionary power but is a mandatory duty on the ICRIR if a number of basic conditions are met. These are that a person 'P' has requested the ICRIR to grant P immunity from prosecution, the immunity requests panel is satisfied that the ICRIR is in possession of 'P's account that has been given by P, describes conduct by 'P which is or includes conduct forming part of the Troubles and is 'true to the best of P's knowledge and belief.

¹⁸ At Clause 20(4)

¹⁹ At Clause 20(5)

‘No longer will those who served – and we have explicitly included veterans of the security services and the Royal Ulster Constabulary – be subjected to a witch hunt over their service in Northern Ireland, enduring perpetual cycles of investigations and re-investigations.’²⁰

Under Clause 10(2) the SOSNI may request a review of ‘other harmful conduct’ whether or not it caused any serious, physical or mental harm to any person raising concerns about politically-driven decision-making.

3. What are the implications of this legislation for the McKerr group which remain under the supervision of the Committee of Ministers?

Given concerns about the Bill, the Committee of Ministers met in June 2022, earlier than timetabled in September 2022, to discuss the implications of this legislation for the McKerr group of cases. It issued a Decision, expressing concern again about the change of approach from the Stormont House Agreement, reminding the UK again that:

‘it is crucial that the legislation ultimately adopted is in full compliance with the European Convention and will enable effective investigations into all outstanding cases’.²¹

It has also published an open letter to the UK setting a list of detailed questions to enable it to make a ‘full assessment of the effectiveness and Convention-compliance’ of the ICRIR and has asked for information on the progress of the draft legislation, including on the process of engagement undertaken and planned to gain confidence and bring stakeholders on board.²²

The UK’s obligations under the ECHR are legally binding and the Committee of Ministers may issue further resolutions on the failure to implement the McKerr Group of cases and comply with Article 2 ECHR procedural obligations. The Committee of Ministers has previously issued infringement proceedings against Member States for non-implementation of ECtHR judgments.

²⁰ <https://www.conservativehome.com/platform/2022/06/brandon-lewis-my-northern-ireland-legacy-plan-no-longer-will-our-veterans-be-hounded-for-about-events-that-happened-decades-ago.html>

²¹ <https://www.irishtimes.com/politics/2022/06/10/council-of-europe-challenges-britain-over-troubles-amnesty-bill/>

²² https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a6ec1b

3. Cessation of proceedings:

- 1. Do the prohibitions and restrictions which apply to police investigations, criminal proceedings, civil proceedings, and inquests (inquiries in Scotland) arising out of the Troubles comply with human rights law and, in particular, the requirements of Article 2, Article 3, and Article 6 ECHR?**

No, for example it is our view that families who have not yet issued civil proceedings will be entitled to make a claim under Article 6 of the Human Rights Act seeking a declaration of incompatibility given the denial of access to the courts for a cause of action that they could have brought relating to ill treatment or death during the Troubles. Also, those families that have not had an inquest into deaths from 1989/1990 can challenge the failure to hold an Article 2 compliant investigation and seek a declaration of incompatibility. Moreover, the inquest procedure has played a positive role in accessing the truth of incidents and has significant confidence of victims and survivors

Police Ombudsman²³, inquests²⁴, civil proceedings and police investigations²⁵ have played a central role in providing information recovery and truth to many families. The flaws are not with the current system but rather the delays in disclosure and underfunding of these processes.²⁶

4. Early release of prisoners:

- 1. The ‘early release of prisoners scheme’ will be amended to reduce the minimum time a person convicted of a relevant offence must spend serving their sentence before being eligible for release on license to zero. Is this amendment compliant with the UK’s procedural obligations under Articles 2 and 3 ECHR?**

The investigative duties under Articles 2 and 3 ECHR are an obligation of means not results. They require that an investigation must be capable of leading to a determination of whether the force used was or was not justified in the circumstances and of identifying and if appropriate punishing those responsible. Authorities must take reasonable steps to secure evidence.

²³ <https://www.policeombudsman.org/Investigation-Reports/Historical-Reports>

²⁴ <https://www.justice-ni.gov.uk/news/doj-announces-legacy-inquest-reform>

²⁵ <https://www.opkenova.co.uk/>

²⁶ See for e.g. the findings in the Ballymurphy Inquest, 2021: <https://www.judiciaryni.uk/judicial-decisions/summary-findings-matter-series-deaths-occurred-august-1971-ballymurphy-west>

While there is no right under Articles 2 or 3 to obtain a prosecution, conviction or particular sentence, such decisions must be preceded by Article 2 or 3 compliant investigations which are absent from this Bill. Therefore, for the reduction of the minimum sentence to zero to be ECHR-compliant, the underpinning investigation must itself be compliant with Articles 2 and 3 ECHR.

2. Is there a risk that this scheme may result in discrimination which is prohibited by Article 14 ECHR?

See above.

5. Does this Bill raise any other human rights concerns?

The cessation of civil proceedings from the date of the Bill's first reading, in violation of Article 6, is likely to also engage the protection of property rights under Article 1 of Protocol 1, given the prevention of the award damages to families disbarred from initiating civil cases. It is arguable that Article 13 and Article 14 will also be engaged given the lack of effective remedy and the discriminatory effect of this Bill on victims of state acts.

23/06/2022