Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) in relation to the supervision of the cases concerning the actions of the security forces in Northern Ireland

Jordan v the United Kingdom, judgment final on 4 August 2001
Kelly and Ors v the United Kingdom, judgment final on 4 August 2001
McKerr v the United Kingdom, judgment final on 4 August 2001
Shanaghan v the United Kingdom, judgment final on 4 August 2001
McShane v the United Kingdom, judgment final on 28 August 2002
Finucane v the United Kingdom, judgment final on 1 October 2003

and

Hemsworth v UK, judgment final on 16 October 2013

McCaughey & Others v UK, judgment final on 16 October 2013

July 2022

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Introduction and background

1. The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights (FIDH). Its membership is drawn from across the community.

2. CAJ has regularly made Rule 9 communications to the Committee of Ministers on the 'McKerr group of cases' concerning the actions of the security forces in the 1980s and 1990s in Northern Ireland.

3. These submissions have charted the evolution of the 'package of measures' agreed to by the UK further to the above judgments, and their proposed replacement with measures agreed by the UK and Ireland, and political parties in the Northern Ireland Executive, under the December 2014 Stormont House Agreement (SHA). The submissions also cover the unilaterally departure by the UK from its commitment to implement the SHA on the 18 March 2020, the UK Command Paper of July 2021 and the consequent Northern Ireland Troubles (Legacy and Reconciliation) Bill introduced into the UK Parliament in May 2022.

4. This Rule 9 communication is for consideration at the 1443rd meeting (September 2022) of the Ministers' Deputies. This meeting is to follow up the Decision adopted by the Committee of Ministers at its 1436th meeting (June 2022) in this group of cases.

Interim Resolution: McKerr group of cases

5. The Committee last issued an Interim Resolution in December 2020 on this group of cases. In summary the Committee of Ministers:

- EXPRESSED PROFOUND CONCERN the UK had not provided any further information on its proposed approach to legacy investigations since the Written Ministerial Statement of 18 March 2020, despite an express request from the Committee.

- CALLED UPON the UK to follow up on their previous commitments to introduce legislation in the UK Parliament to implement the Stormont House Agreement (SHA).

- NOTED information on Finucane, further to the UK Supreme Court ruling of February 2019, had only been provided shortly before the Committee meeting.

- RECALLED WITH PROFOUND REGRET that the inquests and investigations in the cases of *McKerr, Shanaghan,* and *Kelly and Others* have still not been completed, seeking progress without further delay.

- NOTED WITH INTEREST the plan for the conclusion legacy inquests and urged in the context of COVID-19 a recovery plan to ensure continuity in a timely manner.

- NOTED information on the Police Ombudsman's budget and strongly encouraged the UK to take all necessary steps to ensure it has the capacity to conduct legacy work. [1]

[1] CM/ResDH(2020)367 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a097b6

6. A further meeting of the Ministers Deputies took place in March 2021. This meeting reiterated 'profound concern' at the systemic delays in progressing the cases and noted a UK claim at the time that it still intended to introduce legislation in light of the Stormont House Agreement. The Decision expressed 'profound concern about the delay and continued lack of detail' as regards the legislation and stressed the importance of any proposed legislation providing for ECHR-compliant *effective investigations* into all outstanding cases. Also recalling, in the meantime, the vital role played by the inquest system and Police Ombudsman investigations.[2]

UK Command Paper July 2021

7. The UK Government did not disclose the policy behind its proposed legislation until May 2021, when leaks to the London *Times* and *Telegraph* newspapers set out a new policy intention of amnesty and an alternative approach dispensing with ECHR compliant investigations with instead 'all sides' being encouraged to 'come forward and talk about historic events' to a legacy commission.[3]

8. In June 2021 the UK pulled back from introducing such legislation. Instead, the UK committed at a meeting of the British-Irish Intergovernmental Conference (BIIGC) in Dublin to a period of 'intensive engagement' with NI Parties and others, on the implementation of SHA and also taking the views of participants in this process on the new UK proposals. They agreed *"that the interests and perspectives of victims and survivors, and all those most directly affected by the Troubles, had to be central to the discussions*".[4] On the 14 July 2021 the UK then published its proposals in a Parliamentary Command Paper. This proposed ending all ECHR-compliant investigations and instead introducing a broad sweeping unconditional amnesty (more expansive than that introduced by General Pinochet in Chile). It also proposed ending civil proceedings, inquests and Police Ombudsman investigations, and instead establishing an Information Recovery Body (IRB) with far more limited powers to conduct desktop reviews into some legacy cases.[5]

9. Shortly thereafter UN special procedures experts raised 'grave concerns' regarding the UK proposals which they assessed as providing for 'blanket impunity' and placing the UK in 'flagrant violation of its international obligations'.[6] In September 2021, the Council of Europe Commissioner for Human Rights, Dunja Mijatović, raised concerns that the Command Paper proposals would 'lead to impunity' and conflicted with obligations under the ECHR.[7]

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[2] 1398th meeting, 9-11 March 2021 (DH) [tab CM Decisions] https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22004-2202%22]}

[3] For further detail see: https://eamonnmallie.com/2021/06/nio-legacy-bill-a-blueprint-for-burying-the-and-impunity-for-veterans-by-daniel-holder/

[4] https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2021/june/joint-communique-of-the-british-irish-intergovernmental-conference-.php https://www.gov.uk/government/news/joint-communique-of-the-british-irish-intergovernmental-conference

[5] https://www.gov.uk/government/publications/addressing-the-legacy-of-northern-irelands-past

[6] UK: UN experts voice concern at proposed blanket impunity to address legacy of "the Troubles" in Northern Ireland 10 August 2021 https://www.ohchr.org/en/press-releases/2021/08/uk-un-experts-voice-concern-proposed-blanket-impunity-address-legacy

[7] UK government's legacy proposals must not undermine human rights and cut off victims' avenues to justice in Northern Ireland https://www.coe.int/en/web/commissioner/-/northern-ireland-legacy-proposals-must-not-undermine-human-rights-and-cut-off-victims-avenues-to-justice

December 2021 response by the Committee of Ministers

10. A UK submission to the Committee of Ministers in October 2021, provided no further detail on its proposed legislation.[8]

11. In a further Decision in December 2021 the CM expressed 'profound regret about the authorities' failure to take any concrete steps to enable effective investigations into the outstanding cases' and expressed concern regarding the departure from the Stormont House Agreement, in light of the UK Command Paper proposals to bring an immediate end to criminal investigations and prosecutions, Police Ombudsman investigations, inquests and civil proceedings, and introduce a 'statute of limitations'. The Committee of Ministers, noting the UK position was not final, 'strongly encouraged' the UK to engage with all stakeholders on the draft legislation considering it 'vital that any proposals garner trust and confidence from the public…'[9]

12. In February 2022 the NI Secretary of State sent a holding letter and 'short interim update' to the Committee, that provided no detail on proposed draft legislation.[10]

Northern Ireland Troubles (Legacy and Reconciliation) Bill

13. On the 17th May 2022 the UK introduced the Northern Ireland Troubles (Legacy and Reconciliation) Bill ('the Bill') into the UK Parliament without any consultation on draft legislation with the public, NI political parties, Irish Government or the NHRI, or prior engagement with the Committee of Ministers.[11]

14. The Second Reading debate took place on the 24th May 2022 at which the UK Government announced the Bill would be subject to accelerated passage, bypassing the usual committee stage scrutiny of the Bill. The Bill consequently cleared all remaining stages in the House of Commons by the 4th July 2022, and passed to the Upper Chamber (House of Lords).[12]

Committee of Ministers Decision, June 2022

15. At the 1436th meeting, 8-10 June 2022 (DH) the Deputies, reiterated their previous concern regarding the departure from the SHA and noted the introduction of the Bill.

16. The Decision emphasised that ultimately adopted legislation should be in full compliance with the ECHR, noted the concerns regarding non-ECHR compliance of the Bill and the UK position the Bill was ECHR compliant. In addition to seeking information on engagement on the Bill the Committee of Ministers considered additional information was required to make a full assessment of the effectiveness and ECHR compliance of the proposed *Independent Commission for Reconciliation and Information Recovery* (ICRIR) and instructed the secretariat to prepare a detailed list of questions for the UK.[13]

[8] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a43c4d
[9] https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a4acb2
[10] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a564c0
[11] For further detail see section below on Parliamentary Progress of the Bill.
[12] https://bills.parliament.uk/bills/3160/stages
[13] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a6ce9b

17. A detailed list of questions was sent to the UK on the 16th June 2022 on the ICRIR including seeking further information on the ECHR compliance of ICRIR; the ECHR compatibility of the immunity provisions; why legacy inquests will be closed down and the Impact on individual measures.[14]

18. A response was sought from the UK by the 1st August 2022 to enable assessment at the September meeting of the Committee of Ministers.

Parliamentary Progress of the Bill

19. The CM Decision of June2022, in addition to information on the ICRIR, requests the UK to: *'…provide 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;'*[15]

20. There was no public consultation or meaningful process of engagement on the draft legislation before its introduction in the UK Parliament on the 17 May 2022.

Functions of the NHRI: the Northern Ireland Human Rights Commission

21. The treatment of the NHRI – the Northern Ireland Human Rights Commission (NIHRC)– was particularly concerning. The NIHRC is a core safeguard institution established as a result of the 1998 Belfast/Good Friday Agreement (GFA). Advising the Secretary of State on legislative measures that ought to be taken to protect human rights is among its core statutory functions.[16]

22. The NIHRC will routinely advise on legislative proposals in advance of their publication and in particular as to whether they are ECHR compliant. In this instance the UK withheld the Bill from the NIHRC, who were only able to comment after the Bills' publication.[17]

23. Following publication, the NIHRC made the following assessment to the UK Parliament's Joint Committee on Human Rights on the Bill:

> 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). This Bill is fatally flawed, it is not possible to make it compatible with the ECHR.[18]

Treatment of transparency and impact assessment duties under Equality law

24. In addition to the functions of the NIHRC, a further core safeguard of the GFA was the introduction of a statutory equality duty overseen by a National Equality body the Equality Commission for Northern Ireland. The equality duty requires equality testing of new or revised policies and related transparent consultation with key stakeholders across the community.[19]

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[14] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a6ec1b
[15] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a6ce9b paragraph 10.
[16] Section 69(3) Northern Ireland Act 1998 (the main GFA implementation legislation). https://www.legislation.gov.uk/ukpga/1998/47/section/69
[17] https://nihrc.org/news/detail/ni-human-rights-commission-responds-to-proposed-legislation-on-dealing-with-the-past
[18] Written evidence from the Northern Ireland Human Rights Commission (NIB0003), to Joint Committee on Human Rights, Paragraph 1.2 https://committees.parliament.uk/writtenevidence/109473/html/
[19] Section 75 and Schedule 9 of the Northern Ireland Act 1998, see: https://www.equalityni.org/S75duties

25. Further to complaints from CAJ and the Pat Finucane Centre the Equality Commission in October 2021 conducted a formal investigation and found that the Northern Ireland Office (NIO) had breached its statutory Equality Scheme (that sets out how the equality duties are to be applied) over the process applied to the NI legacy bill following the March 2020 statement.[20] The Investigation Report also revealed that the NIO had withheld documentation from Equality Commission investigators despite their exercise of formal powers of investigation.[21] One explanation for this is that the UK at this stage wished to continue to conceal and preclude equality impact assessment of its proposed unconditional amnesty and closing down of investigations on different sections of the community (with reference to protected characteristics under NI equality law).

26. The Equality Commission investigation reiterated the duty to impact assess and complete related public consultation on the legacy policy bill *prior* to a policy decision being taken. However, the NIO only released an Equality Impact Assessment for consultation *after* a decision had been taken to introduce the Bill to the UK Parliament. This has prompted the Equality Commission to make the rare move of taking steps to initiate an 'own initiative' investigation against the NIO due to concerns that a fresh breach of the Equality Scheme duties have now taken place.[22] It has also prompted further complaints from CAJ and PFC, both regarding procedure and the 'box ticking' nature of the draft equality impact assessment that has been ultimately produced.

27. The UK in developing its legacy proposals from March 2022 has therefore bypassed core equality safeguards designed to ensure transparency, structured public engagement and objective assessments of impacts on different sections of the NI community in relation to policy development.

Engagement with the Northern Ireland Department of Justice and NI Legislature

28. Powers over most of the criminal justice system in Northern Ireland are matters not retained by London but, since 2010, have been transferred to the Northern Ireland Executive and Legislature. The Northern Ireland Justice Minister and Department of Justice are the competent department.

29. Much of the content of the present Bill falls within the competence of justice powers transferred to Northern Ireland.

30. The UK Parliament does retain a parallel legislative competence for Northern Ireland, but by constitutional convention is not to legislate on transferred matters without the consent of the Northern Ireland institutions. The exception to this in the GFA is when such legislation is *required to meet the UK's international obligations*. This is

[20] Troubles legacy: 'Failures' found in NI Office policy BBC News Online 29 September 2021 https://www.bbc.co.uk/news/uk-northern-ireland-58724218

[21] Complainants (the Committee on the Administration of Justice and the Pat Finucane Centre) & The Northern Ireland Office https://www.equalityni.org/Investigations "The NIO representatives did not, either prior to, for the investigation meeting, nor afterwards, provide a copy of the draft screening documentation referred to. They were asked again during the preparation of this report, but again declined to release a draft document [4.16]."

[22] Correspondence to CAJ and PFC from ECNI (29 June 2022) and NIO (8 June 2022).

not the case with the present Bill, indeed the present bill runs *contrary* to the UK's treaty-based obligations, including the ECHR.[23]

31. Under constitutional convention the current Bill therefore required consultation with the Justice and other Northern Ireland Ministers and a Legislative Consent Motion from the Northern Ireland Assembly.[24]

32. On this occasion the UK has bypassed these processes. The Northern Ireland Justice Minister, Naomi Long MLA has told a Parliamentary Committee: "We only became aware of the latest proposals on the morning the Bill was published." Ms Long also maintained that the 'intensive engagement' with Northern Ireland parties committed to by the UK Government following the Command Paper did not occur.[25]

33. The Delegated Powers Memorandum published with the Bill is explicit in that the UK Government will bypass constitutional convention and transgress on transferred powers to deliver the Bill and is doing so in light of opposition to the Bill.[26] The NI Justice Minister has stated that the bill is an "egregious interference with the Northern Ireland justice system" and called for its withdrawal.[27]

34. This 'reaching in' by the UK to transferred powers is one of two ways in which the present Bill breaches the GFA. The second, of particular relevance to the Committee, relates to the GFA commitment to the Incorporation of the ECHR into NI law as a core safeguard of the peace settlement. The GFA commits the UK 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 Bill will directly limit the ability of people in Northern Ireland to challenge

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[23] Paragraph 32 of Strand 1 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 sets out that the role of the UK Parliament, which retains legislative competence for Northern Ireland is to legislate on 'non-devolved' issues, setting out an exception where the UK Parliament will still legislate for NI on devolved matters "as necessary to ensure that the United Kingdom's international obligations are met in respect of Northern Ireland." A recent example of when the UK Parliament has legislated on transferred matters to comply with international treaty based obligations relates to primary and secondary legislation on women's reproductive rights further to a CEDAW ruling.

[24] The Sewel Convention – see: https://www.instituteforgovernment.org.uk/explainers/sewel-convention

[25] Northern Ireland Affairs Committee: Oral evidence: Addressing the Legacy of Northern Ireland's Past: The UK Government's New Proposals, HC 284, Tuesday 21 June 2022, Q581. https://committees.parliament.uk/oralevidence/10441/html/

[26] Delegated Powers and Regulatory Reform Committee: Northern Ireland Troubles (Legacy And Reconciliation) Bill, Memorandum by the Northern Ireland Office, paragraphs 6-9: https://bills.parliament.uk/bills/3160/publications The Memorandum (in relation to the regulation making powers in the bill) states that there is an open intention of usurping the devolution settlement. It states 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*.'

[27] Northern Ireland Affairs Committee: Oral evidence: Addressing the Legacy of Northern Ireland's Past: The UK Government's New Proposals, HC 284, Tuesday 21 June 2022, Q583. https://committees.parliament.uk/oralevidence/10441/html/

alleged breaches of the ECHR in either the Northern Ireland Coronial Courts or the Northern Ireland civil courts. It will also prevent remedies for ECHR breaches.

Engagement with key stakeholders

35. Despite the bilateral nature (until 2020) of the peace process, and the conclusion of a treaty on the SHA with Ireland, the Irish government were not consulted on the draft legislation. Following the publication of the bill the Irish Government on 'initial reading' expressed 'serious concerns' regarding the bill, including regarding the powers of the ICRIR, the 'reviews' it would produce "*and of course, fundamentally, compliance with Article 2 of the European Convention on Human Rights and other international human rights obligations*."[28]

36. All political parties from Northern Ireland, as well as all other opposition parties in the UK Parliament have opposed and voted against the Bill. Only members of the ruling Conservative party, which has a sizable majority, voted for the Bill, with some notable abstentions including from the former NI Secretary of State Julian Smith MP, who brokered the January 2020 deal to restore the Northern Ireland institutions, in which the UK had again committed to the implementation of the SHA.[29]

37. The Northern Ireland Assembly had previously unanimously passed a motion opposing the UK legacy policy set out in the Command Paper.[30] The NI Assembly has not debated the Bill as the reestablishment of the Assembly following the May 2022 elections has been blocked as part of opposition from the UK Government and largest unionist party (DUP) to implementing provisions the UK negotiated and signed up to in the Northern Ireland Protocol to the EU-UK Withdrawal Agreement. The establishment of the NI Executive has also been blocked, but previous ministers remain in post.

38. Since the March 2020 Ministerial Statement the UK has made repeated claims it has engaged stakeholders on its policy proposals. This is deeply misleading. Both the Command Paper and Bill have been developed behind closed doors. The UK previously claimed that there would be 'intensive engagement'. By contrast cross-party UK Parliamentary Inquiry in October 2020 held that:

> We are dismayed by the lack of consultation and engagement with representative groups by the NIO on its new proposals both before and after the publication of the WMS in March 2020.[31]

39. On publication of the Command Paper the UK also committed to a 'process of intensive engagement' in Summer 2021. By October there were 14 meetings of the

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[28] https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2022/may/statement-by-the-minister-for-foreign-affairs-and-minister-for-defence-simon-coveney-td-.php

[29] https://www.gov.uk/government/news/deal-to-see-restored-government-in-northern-ireland-tomorrow

[30] On the 20 July 2021 the Northern Ireland Assembly was recalled from summer recess to debate a motion to reject the UK proposals and call for the withdrawal of the Command Paper. The motion stated that the proposals "do not serve the interests, wishes or needs of victims and survivors nor the requirements of truth, justice, accountability, acknowledgement and reconciliation" and was passed unanimously. http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2021/07/20&docID=347308.

[31] NIAC October 2020 report, paragraphs 24 ,4 & 6. https://publications.parliament.uk/pa/cm5801/cmselect/cmniaf/329/32902.htm

two Governments and parties to the NI Executive.[32] These sessions, one of which we participated in, involved external stakeholders presenting their views and a Q&A. There were no 'talks' or 'negotiations' with the UK on its proposals, who withheld the evolving content of their Bill from other parties. As alluded to above the Justice Minister (as well as other parties) have maintained that no such intensive engagement took place. Our experience has been that such formal engagement by the UK with civil society is 'box ticking' rather than meaningful insofar as the UK's intentions for specific provisions in the Bill remained concealed.

40. The victims group WAVE Trauma Centre– 'the largest cross community victims and survivors support group in Northern Ireland' previously raised concerns that from the Written Ministerial Statement [WMS] on the UK had "unilaterally and without reference to any victims and survivors stakeholder groups" set aside the SHA to instead focus on protecting military veterans though a process of closing the vast majority of unresolved cases through a process of 'speedy desktop review' that would constitute a *de facto* amnesty across the full spectrum of cases, including those involving paramilitaries. WAVE recalled they had last spoken to the Secretary of State for Northern Ireland in the immediate aftermath of the WMS where he had committed to 'intensive engagement' on the issues in the WMS. WAVE however note "We have heard absolutely nothing from him since then." [33] The victims group also raised concerns that the Secretary of State was 'dangerously deluded' if he believes the WMS proposals will aid reconciliation.[34]

41. The pattern of no meaningful consultation with groups representing victims and survivors and other civil society actors has continued from the publication of the Command Paper to the introduction of the Bill. This has been reiterated by representatives of WAVE and the Victims and Survivors Commissioner in evidence to a UK Parliamentary Committee. The Victims Commissioner stated, in relation to the Victims and Survivors Forum who represent the sector, that they had met with the Secretary of State and NIO prior to the Bill but "*would put on record that they do not feel that it was a consultation in any way. It was a transfer of information and not a consultation. That is what I have heard from a number of victims, both our forum members and other victims I have met over the last number of* weeks." The Chief Executive of WAVE in similar terms set out that they had been "very concerned" at the level of engagement, which was "not a consultation" and that at times information had been "scarce and limited" with officials 'unable' to give very much information.[35] Moreover, WAVE have raised concerns that "*referrals from Troubles'*

[32] Stated to Northern Ireland Affairs Committee of UK Parliament on the 27 October 2021 https://committees.parliament.uk/event/5669/formal-meeting-oral-evidence-session/

[33] http://wavetraumacentre.org.uk/news/wave-legacy-letter-to-mps/

[34] https://www.belfasttelegraph.co.uk/news/northern-ireland/ni-secretary-lewis-dangerously-deluded-over-plans-to-close-troubles-murder-cases-says-victims-group-39647230.html

[35] Northern Ireland Affairs Committee: Oral evidence: Addressing the Legacy of Northern Ireland's past: The UK Government's New Proposals, HC 284, 7 June 2022, Ian Jeffers, Commissioner, Commission for Victims and Survivors Northern Ireland; Sandra Peake, Chief Executive Officer, WAVE Trauma Centre; Q417 https://committees.parliament.uk/oralevidence/10360/html/

victims in need of mental health support have doubled in the past year, due to the UK government's legacy bill."[36]

42. By contrast spokespersons for military veterans and retired police officers have expressed satisfaction to the same Parliamentary Committee at the level of engagement they have had. The Commissioner for Northern Ireland (Military) Veterans stated that engagement with the NIO had been "satisfactory and very open". A spokesperson for the Northern Ireland Retired Police Officers Association stated they were "very happy" with the level of engagement, stating that "S*ince the new proposals were mooted, we have had a meeting with the Secretary of State; we have had a meeting with the Permanent Secretary at the Northern Ireland Office; and we have had regular update meetings either face to face or via this technology with an official in the Northern Ireland Office. We are happy with that*."[37]

Accelerated Passage of Bill

43. As further elaborated on in a later section of this submission, the main agenda behind the Bill, according to the very ministers behind it, is not to improve the situation for victims and survivors but to *end investigations* against the UK military.

44. This issue was particularly prominent in the Parliamentary debate following the introduction of the Bill. The then NI Secretary of State Brandon Lewis stressed that the consequence of the Bill would be to end investigations against military veterans, maintaining that due to the legislation:

> No longer will our veterans, the vast majority of whom served in Northern Ireland with distinction and honour, have to live in perpetual fear of getting a knock at the door for actions taken in the protection of the rule of law many decades ago. With this Bill, our veterans will have the certainty they deserve and we will fulfil our manifesto pledge to end the cycle of investigations that has plagued too many of them for too long.[38]

45. The UK Government fast tracked the bill through 'accelerated passage.' This ensured the usual process of Parliamentary scrutiny within the House of Commons, including a detailed bill committee taking evidence from expert witnesses and stakeholders, was bypassed.[39] The Bill instead completed all remaining stages in just two days, and had passed the House of Commons by the 4th July 2022. This accelerated process will also have the effect of bringing forward the ending of investigations (including inquests and police ombudsman inquiries). In the normal legislative process, the passage of the Bill could have taken up to a year. Given that there is no emergency or urgent need to correct any injustice that might provide justification for the use of

[36] https://m.belfasttelegraph.co.uk/news/politics/boris-johnson-told-to-tackle-troubles-legacy-plan-before-his-exit-as-ni-trauma-expert-speaks-out-41828593.html

[37] Northern Ireland Affairs Committee: Oral evidence: Addressing the Legacy of Northern Ireland's past: The UK Government's New Proposals, HC 284, 15 June 2022 Danny Kinahan, NI Veterans Commissioner, NI Veterans Commissioner's Office; Chris Albiston, Member of the Executive Committee, Northern Ireland Retired Police Officers Association. Questions Q452-3 https://committees.parliament.uk/oralevidence/10401/html/

[38] https://hansard.parliament.uk/commons/2022-05-24/debates/9A7C93DC-8187-47B9-8786-CA602DA2BB39/NorthernIrelandTroubles(LegacyAndReconciliation)Bill#256

[39] Whilst no Bill committee was established other Parliamentary Committees have sought to probe the proposals including the Northern Ireland Affairs Committee and Joint Committee on Human Rights.

accelerated passage, it appears that its purpose is simply to avoid intensive parliamentary scrutiny.

46. The Bill has now passed to the Upper Chamber the House of Lords, who, at the time of writing, are scheduled to debate the bill on the 13th September 2022.[40] Under the 'Salisbury Convention' the Lords are not to oppose legislation that an elected government committed to in its election manifesto. The application of this constitutional convention in the present circumstances is highly debatable. As is further elaborated on below the Conservative Manifesto did not expressly commit to the main provisions of the current Bill.

47. CAJ, as part of the 'Model Bill Team' with Queen's University Belfast School of Law academics, usually attempt to propose human rights compliant solutions in relation to proposed legislation. In this case, however, we have assessed the Bill as irredeemable and unfixable. We have expressed this position in our formal response to the Bill and to UK and Irish Parliamentary Committees.[41] The breaches of human rights standards are so egregious and the principles of the Bill so conflictive to the rule of law, that no detailed amendments could produce human rights compliance.

48. A number of Northern Ireland parties did unsuccessfully table amendments to block the progress of the Bill. One opposition driven amendment was conceded by the UK Government in the House of Commons. This related to excluding conflict-related sexual offences from the scope of the immunity provisions of the Bill.[42] However, it should be stressed that while under the current version of the Bill a suspect cannot get immunity for conflict-related sexual offences, *the prohibition on any criminal investigation of the same sexual offences* that the Bill would introduce remains intact. Coupled with the time-limited and non-ECHR complaint nature of ICRIR 'reviews', this in lay terms will still lead to a 'de facto' amnesty for such sexual offences.[43]

Differences between Command Paper and the Bill

49. The UK claims in its brief submission to the Committee of Ministers that the Bill "*takes into account feedback gained through engagement with key stakeholders*" on the Command Paper.[44] The key stakeholders with which 'intensive discussion' is alleged to have taken place are listed as the "*Irish Government, the NI parties, the victims sector, veterans, operational partners, and others.*"[45]

50. It appears highly unlikely that changes to the Command Paper proposals that are reflected in the Bill are the result of stakeholder feedback. In part this due to the absence of any meaningful consultation and the 'intensive discussions' with

[40] https://bills.parliament.uk/bills/3160/stages (accessed 14th July 2022).
[41] Initial response to the bill: https://www.dealingwiththepastni.com/project-outputs/project-reports oral evidence to UK: https://committees.parliament.uk/oralevidence/10402/html/ and Irish select parliamentary committees https://www.oireachtas.ie/en/press-centre/press-releases/20220707-joint-committee-on-the-implementation-of-the-good-friday-agreement-to-discuss-british-government-legacy-proposals/
[42] See new clause 19 of the Bill as brought from the House of Commons to the House of Lords: https://publications.parliament.uk/pa/bills/lbill/58-03/037/5803037_en_3.html#pt2-pb4-l1g19
[43] For further detail see our supplementary written evidence to the Northern Ireland Affairs Committee of the UK Parliament. https://committees.parliament.uk/writtenevidence/109448/html/
[44] DH-DD(2022)579, Communication from the UK, 30 May 2022, page 4.
[45] As above.

stakeholders not having taken place. The content of the Bill also continues to be entirely at odds with the views of the vast majority of the cited 'key stakeholders', including the Irish Government, NI parties and the victims sector. There are also mixed views among the veterans regarding an amnesty.[46]

51. The three main changes in the Bill from the Command Paper are firstly the move away from a blanket unconditional 'Pinochet+' amnesty to a system of conditional immunity; secondly to augment the limited powers of the new legacy body by adding in the possibility of the use of police powers by the ICRIR; and thirdly an amendment to the prohibition of legacy inquests and civil claims that will allow claims and inquests that have substantially commenced prior to the Bill to continue.

52. A more credible explanation as to why these changes have been made is that they are grounded in a UK attempt to make their proposals to appear less obviously unlawful. This in particular in light of the criticism of UN experts and the Council of Europe Human Rights Commissioner that the Command Paper proposals were a 'flagrant breach' of UK's international obligations and incompatible with the ECHR.

53. The changes however appear presentational rather than indicative of a change of substance to the provisions:

- ***Immunity v Amnesty***

  The new 'conditional immunity' scheme has a conspicuously low threshold for the granting of immunity that, in practice, may produce a similar level of impunity to an unconditional amnesty for all who apply. Immunity *must* be granted on the basis of a subjective test where the person seeking immunity does not have to provide new information and only has to themselves believe their account is true. In general, the conditions are not sufficiently stringent and there is too much discretion allowed to the ICRIR in whether the credibility of the information will be tested and whether the information received will be linked to reviews. (Further critique of the immunity provisions is provided in a dedicated section below.)

  The changes to the immunity provisions are also indicative of disagreements within the UK Government as to how best to compel non-state actors to cooperate with the ICRIR whilst providing broad immunity to military veterans.[47]

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[46] See for example Veterans Commissioners comments to NI Affairs Committee Q460 https://committees.parliament.uk/oralevidence/10401/html/ and https://www.thetimes.co.uk/article/ex-ruc-officers-oppose-troubles-amnesty-despite-prosecution-risk-wkrj72lwz

[47] In December 2021, the UK *Daily Telegraph* newspaper reported that the bill had been delayed due to disagreements within the UK Cabinet between the Northern Ireland Office and the Ministry of Defence. (https://www.telegraph.co.uk/politics/2021/12/10/northern-ireland-prosecutions-bill-blocked-fears-preferential/) Whilst the Command Paper only provides for voluntary testimony to the legacy body, the dispute appeared to be focused on new proposals to compel testimony and cooperation. It is reported the Northern Ireland Office had proposed fines for persons who do not engage with the legacy body, and the Ministry of Defence had opposed this as 'unfair' on the military who may be compelled to testify. It was reported that that the Defence Minister conditioned his support to the bill to an alternative approach of qualifying benefiting from the immunity to engagement with the legacy body. At this stage (December 2021) Conservative backbenchers, supportive of a military amnesty, also pressed for the legislation to be introduced, blaming the NI Secretary of State for the delay. In response a government spokesperson apologised for the

- **Police Powers**

  The possibility of some ICRIR officers being able to use police powers also appears to have been 'bolted-on' to the Bill for the UK be able to argue that the ICRIR could theoretically conduct ECHR-compliant investigations.

  The powers and broader structure of the Bill have not been incorporated in a way indicative of any intention that the ICRIR will conduct criminal-type investigations with the use of such powers. The ICRIR continues to focus on 'reviews' not 'investigations' and it is unlikely that such powers could in any case be used against persons granted immunity. The Secretary of State himself has already given assurances to veterans that have implied that the ICRIR will not use police powers such as arrest and questioning against them. (This is further explored in the section on adequate / effective investigations below).

- ***Impact on existing General Measures***

  The Bill will still reach into the Northern Ireland justice system and close down the possibility of opening any new legacy inquests and will also still prevent the initiation of inquests currently awaiting hearing that have not reached a 'substantive' stage, it will also retrospectively, to the date of the introduction of the Bill, prevent all new civil claims and close down all Police Ombudsman and criminal investigations. (This is further covered in the next section).

54. Our contention that the changes are grounded in an attempt to present the Bill as ECHR compliant is consistent with the UK's sudden enthusiasm in the Command Paper to argue its proposals are aimed at securing 'reconciliation' and to link this to selective citation of ECHR case law concerning the potential for amnesties to be ECHR compatible if necessary for reconciliation. In our Model Bill Team response to the Bill we set out concerns that:

> 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.[48]

55. The Commissioner for Human Rights, Dunja Mijatović has also queried the notion that the Bill can contribute to reconciliation given its almost universal rejection:

> The virtually unanimous, cross-community rejection of the proposals also casts doubt over their potential to contribute to reconciliation in Northern Ireland. The proposals fail to put victims at the heart of legacy: 'unilaterally shutting down options that many victims and families value greatly as part of their way of dealing with the past ignores their needs and wishes, and is causing many of them deep distress'.[49]

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delay and made reference to the issue protecting soldiers whilst not giving 'carte blanche to terrorists' https://www.theyworkforyou.com/debates/?id=2021-12-09b.575.0#g578.1

[48] https://www.dealingwiththepastni.com/project-outputs/project-reports/model-bill-team-initial-response-to-ni-troubles-legacy-and-reconciliation-bill

[49] https://www.coe.int/en/web/commissioner/-/united-kingdom-backsliding-on-human-rights-must-be-prevented

56. The UK presents conditional immunity as offering a means to information recovery, with the idea that information will contribute to reconciliation. However, the wide discretion to the ICRIR over whether to conduct reviews relating to immunity applications or to tie immunity applications to existing reviews, together with the lack of detail on how information provided will be used, indicates that victims may receive no truth from the conditional immunity process. The only information that the ICRIR will have to publish is the number of applications and the number of successful applications. In its current design, it is highly unlikely that the immunity scheme would deliver information to families.

57. The Minister for Justice in Northern Ireland Naomi Long MLA has also raised concerns that the apparent UK interest in reconciliation is to provide legal cover for the Bill, telling a UK Parliamentary Committee:

> In truth, while reconciliation is in the Bill title and the name of the new body, given the lack of buy-in by victims and local parties, it is hard to see this as anything other than a branding exercise in order to resist future successful legal challenge.[50]

58. In relation to whether the Bill is really designed to achieve information recovery it is notable that the NI Secretary of State himself conceded that only a small handful of suspects (admitting it might be 'one or two') may in fact come forward to provide information for families through the ICRIR.[51]

59. The Bill is proceeding at a time when the exiting General Measures have overcome obstacles and are delivering what we have called 'information recovery with teeth', as well as reparations, at a considerable rate. Yet it is this juncture where the Bill is being rushed through by the UK to shut down such mechanisms.

Current delivery of General Measures

Are the current mechanisms working too well for the UK?

60. As the Committee of Minsters will be aware the mechanisms relating to General Measures in the current group of cases have long faced limitation and obstruction including the withholding of resources and disclosure from State agencies.

61. However, in the context of long term supervision by the Committee of Ministers and intervention by families, their legal representatives, NGOs and others the mechanisms have now overcome many such obstacles, are increasingly now delivering 'truth recovery with teeth'.

62. This includes the General Measures mechanisms delivering historical clarification on the innocence of victims of the State in particular incidents and the identification of patterns of human rights violations, including paramilitary collusion, which can further enhance guarantees of non-recurrence.

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[50] Northern Ireland Affairs Committee: Oral evidence: Addressing the Legacy of Northern Ireland's Past: The UK Government's New Proposals, HC 284, Tuesday 21 June 2022, Q577 https://committees.parliament.uk/oralevidence/10441/html/

[51] https://www.politicshome.com/thehouse/article/brandon-lewis-troubles-legacy-hardest-thing-i-have-ever-dealt-with

63. This is notable in recent legacy inquest decisions and in the 600+ pages of information recovery contained in two large scale Police Ombudsman legacy reports already in 2022. The 'Operation Kenova' independent police team (under the 'Call In' mechanism of General Measures) has also amassed over 50,000 pages of evidence and is poised to publish its own reports. Civil cases are also leading to reparations and information recovery. The Committee of Ministers has noted the 'vital role played by the inquest system' as well as the Police Ombudsman.[52]

64. It is at this present juncture and in this context that the UK intends to shut these mechanisms down and curtail their work. We are concerned that part of the reason for the Bill being introduced and pushed through 'accelerated passage' is precisely down to increasing delivery of the existing General Measures.

65. In *summary* the impact of the Bill will be:

- To debar the **Police Ombudsman** from investigating legacy complaints (we understand from the Ombudsman's office there are around 450 outstanding such complaints). The Stormont House Agreement bill contained transitional provisions for the Ombudsman to complete cases that had been substantively progressed, other complaints would pass automatically into the caseload of the HIU for Article 2 compliant investigations. The Bill would prevent the Ombudsman from investigating and not transfer the cases.
- To prevent new **legacy Inquests** along with closing down many outstanding inquests already in the NI judiciary's five year planed programme of inquests. We understand there are 22 inquests into 34 deaths currently before the courts. The Bill's approach is in contrast to the SHA, which provided for inquests to continue as a separate process. Families who have waited many years or decades for inquests but who happen to be in the latter years of the inquest programme will have their inquest curtailed.
- The Bill will debar indefinitely the initiation or continuation of any criminal investigation, this will therefore end '**Call In'** investigations, including the current investigations by Operation Kenova (there are also restrictions on the subsequent publication of reports resulting from such investigations) and PSNI investigations. There will be no Article 2 compliant investigative mechanism to investigate these cases. The SHA would have transferred outstanding police legacy investigations to the HIU with a transitional arrangement, these cases (which include many against the military which have not had previous Article 2 compliant investigations) will not be transferred.
- The Bill will debar all new **civil claims** relating to the conflict. There are currently over 500 such claims against the military alone for which considerable reparations are being paid out to settle. Having engaged lawyers we are not aware of a single case where a civil claim has been found to be invalid. Civil litigation can also recover information, including highlighting previous 'sham' investigations.

[52] 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

66. Further information on these mechanisms is provided for below.

67. It is notable that the Secretary of State for Northern Ireland at the time of introducing the Bill, implied and expressed concerns that the process of independent judicial assessment of evidence was 're-writing history'. The Secretary of State raised concerns this was casting the State in a bad light and must be 'halted'.[53] From this it is difficult not to conclude that this desire to reassert an 'official Truth' that denies any State responsibility for human rights violations is also a driving force behind the Bill shutting down judicial and independent investigation processes.

Inquests as a route to information recovery and historical clarification

68. The list of questions to the UK, '*has noted with concern the proposal to terminate pending inquests that have not reached substantive hearings. Please explain in why there is a need to terminate all inquests that have not reached substantive hearings by a set date, particularly given the progress that has recently been made to combat the backlog further to a range of important measures taken?*'

69. In 2021, the NI judiciary carried out a case management of both legacy inquests, civil actions and judicial reviews in an effort to streamline these processes,[54] which follows the previous Lord Chief Justice's Five-Year Plan on legacy inquests.

70. 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.[55] We understand that there are 22 inquests into 34 deaths pending before the Coroners' Courts.[56] This does not include applications made to the Attorney General for Northern Ireland to order fresh inquests into legacy related deaths.[57]

71. Part 3 of the 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

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[53] "Specialist law firms who campaign on legacy issues, funded primarily by legal aid, have been able to peddle false hope and profit from the pain of those seeking answers about what happened to their loved ones. Until now, the primary way to do that has been through protracted and adversarial legal processes that are delivering neither justice nor information in the overwhelming majority of cases. … This feeds a pernicious and distorted view of the past, promoted and peddled by those with a vested interest in presenting the British state as the aggressor, when the truth is that terrorist organisations were responsible for the vast majority of deaths in Northern Ireland. …We must halt the rewriting of history and set the events of the Troubles in their appropriate historical context… https://conservativehome.com/2022/06/09/brandon-lewis-my-northern-ireland-legacy-plan-no-longer-will-our-veterans-be-hounded-for-about-events-that-happened-decades-ago/

[54] https://www.judiciaryni.uk/legacy-litigation

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

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

[57] 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).

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.

72. 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.

73. For example, in the Ballymurphy Massacre inquest completed in July 2021, after 100 days of evidence Mrs Justice Keegan (now Lady Chief Justice- LCJ) 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.[58] 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.

74. 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'.[59]

75. It is simply unconscionable that 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. Ministers have put forward no justification for doing this other than the above desire to curtail judicial information recovery.

Civil actions as route to reparations and information recovery

76. Civil litigation on legacy issues initiated by victims and survivors has provided reparations, accountability and information recovery in relation to conflict-related incidents.

77. A recent question in the UK Parliament stated there are currently 575 legacy civil claims against the UK Ministry of Defence (MoD) alone relating to the Northern Ireland Conflict. 43 claims had been completed in the last three years, 29 resulting in financial settlements from the MoD, totalling £GBP 632,000, and 14 claims discontinued or resolved by other means.[60] This does not include claims against other state agencies.

[58] https://www.judiciaryni.uk/ballymurphy-inquest

[59] 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.'

[60] https://www.theyworkforyou.com/wrans/?id=2022-05-19.HL374.h

78. The Bill proposes to bar all Troubles-related civil action from the date it was introduced into the UK Parliament. The Bill would preclude both reparations and information recovery, including on past unlawful investigations, for those victims and survivors who did not bring civil action before its introduction.

79. 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.

80. For example, in the Sean Graham bookmakers killing on the Ormeau Road in 1992, the loyalist paramilitary UDA[61] 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. 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 Ombudsman. Without the availability of the civil courts as a route for families, the failure to disclose these materials might never have been unearthed.[62]

81. Similarly, in December 2021 the UK MoD and PSNI paid £GBP1.5 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.[63]

82. We are not aware of a single civil claim that has been determined to be invalid and ill founded. The Bill would shut down proceedings in what the UK must know will be numerous valid claims.

Police Ombudsman information recovery in 2022

83. In January 2022, the Police Ombudsman released her Operation Greenwich[64] investigation report covering 19 murders and multiple attempted murders committed across several counties around the north west of Northern Ireland between 1989 and 1993 by the Loyalist paramilitary group the Ulster Defence Association (UDA), a legal organisation until 1992.

84. The Operation Greenwich report, which includes the death of Patrick Shanaghan – (the subject of Individual Measures in this present group of cases), provides 338 pages of legacy information recovery and raises significant concerns regarding

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[61] The UDA – which was not outlawed until 1992- routinely used the fictitious cover name the 'Ulster Freedom Fighters' UFF.

[62] For further information see the Police Ombudsman Operation Achille report referred to in section below.

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

[64] https://www.policeombudsman.org/Media-Releases/2022/Collusive-behaviours-but-no-prior-knowledge-of-att

collusive activity by the Police in relation to the killings finding complaints by families that had led to the long running investigation had been 'legitimate and justified'. The Ombudsman's statement references the definition of collusion provided in the Stevens Inquiries as including the "wilful failure to keep records, the absence accountability, the withholding of intelligence and evidence, through to the extreme of agents being involved in murder", and reports that the Ombudsman investigation has "identified all of these elements in the conduct of former RUC [police] officers" in relation to a number of the cases examined in the Operation Greenwich report.[65]

85. The Police Ombudsman in particular upheld family members complaints about collusive activity in the following areas:

- Intelligence and surveillance failings identified by [the previous Ombudsman] Dr Maguire in his report of the Loughinisland attacks;
- The failure to adequately manage the risk to the lives of a number of victims outlined in this public statement, and in particular the failure to warn those individuals of the threats to their life;
- The passing of information by members of the security forces to paramilitaries has been identified as collusion by Sir Desmond De Silva. The failure by police to adequately address the passing of UDR[66] officers passing information is in my view a serious matter that can be described as collusive behaviour;
- I have identified that the deliberate destruction of files, specifically those relating to informants that police suspected of serious criminality, including murder, is evidence of collusive behaviour. The absence of informant files and related documentation is particularly egregious, where there was suspicion on the part of handlers or others that informants may have engaged in the most serious criminal activity engaging Article 2 of the Convention;
- Failures identified in this public statement by Special Branch to disseminate intelligence to the CID [detective] teams investigating the murders;
- Failures in the use and handling by Special Branch of an informant suspected of being involved in serious criminality, including murder;
- Failures by Special Branch in the North West region to adequately manage those high risk informants, which they suspected of being involved in serious criminality, including murder;
- The passive '*turning a blind eye'* to apparent criminal activity, or failing to interfere where there is evidence of wrongdoing on the part of an informant, in particular to the deliberate failure of informants to provide information on a specific attack, and the continued use of an informant suspected of involvement in serious criminality, including murder.

86. In February 2022 a further Police Ombudsman investigation report Operation Achille, provided a further 344 pages of information recovery in relation to 11 killings

[65] As above paragraph 22.133.

[66] Ulster Defence Regiment – an NI recruited and specific regiment of the British Army.

by the UDA in the south Belfast area in the 1990s including the Sean Graham Bookmakers massacre in 1992 in which five people were killed.[67]

87. The Police Ombudsman's report identified "significant investigative and intelligence failures" and "collusive behaviours" by the RUC [police] and found that the concerns of the complainants, representing families of the bereaved were "legitimate and justified". The report identified a range of collusive behaviours by the RUC including:

- Intelligence and surveillance failings which led to loyalist paramilitaries obtaining military grade weaponry in a 1987 arms importation;
- A failure to warn two men of threats to their lives;
- A failure to retain records and the deliberate destruction of files relating to the attack at Sean Graham Bookmakers;
- The failure to maintain records about the deactivation of weapons – "indicating a desire to avoid accountability for these sensitive and contentious activities";
- The failure of police to exploit all evidential opportunities;
- Failures by Special Branch to disseminate intelligence to murder investigation teams;
- An absence of control and oversight in the recruitment and management of informants;
- The continued, unjustifiable use by Special Branch of informant(s) involved in serious criminality, including murder and the passive 'turning a blind eye' to such activities.

88. There are a range of Police Ombudsman legacy investigations still to report, which are complex investigations (i.e. dealing with multiple issues). In a media interview following the publication of the above report the Police Ombudsman Marie Anderson suggested that the outstanding investigations would 'complete the picture' regarding police conduct in relation to loyalist paramilitaries in the time period in question. The Ombudsman also asserted that the 'collusive behaviours' between police and paramilitaries identified in the Operation Achille's report were 'systemic'.[68]

89. In June 2022 the Police Ombudsman issued a further legacy report into the 'Derry 4'. This relates a miscarriage of justice against four young men in 1979 who were wrongly convicted following what the Ombudsman held was having been 'subjected to coercion and oppression before "confessing" to terrorist crimes.'[69]

90. The Bill, once relevant provisions are commenced, would end all Police Ombudsman investigations into Troubles-related cases. Debarring any further action on police complaints, even those already in the system. The accelerated passage of the Bill will

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[67] https://www.policeombudsman.org/Media-Releases/2022/Investigative-and-intelligence-failures-and-collus
[68] https://www.irishnews.com/news/northernirelandnews/2022/02/08/news/police-ombudsman-collusive-behaviours-identified-in-operation-achille-are-systemic--2584061/
[69] https://www.policeombudsman.org/Media-Releases/2022/Young-men-were-subjected-to-coercion-and-oppressio

assist in preventing, to paraphrase the Ombudsman, the 'completion of the picture' regarding police collusion with loyalist paramilitaries.

'Call in': Operation Kenova – criminal investigations

91. Another of the General Measures is the ability of the. Police Service to 'call in' an independent policing team from outside Northern Ireland to undertake an investigation.

92. At present the team led by former Chief Constable Jon Boucher, named after its first investigation Operation Kenova (into the running of an alleged state agent in the IRA) are "investigating and reviewing a number of historic offences which occurred during the Troubles including more than 200 murders as well as offences of kidnap and torture" across four major inquires.[70]

93. In October 2021 the Operation Kenova team conducted a public consultation on a draft Protocol on a process for publishing interim and final investigation reports. In relation to three investigations the draft Protocol states the content of interim reports will:

> … address generic, high-level themes and issues and concentrate on organisations, rather than individuals, and confirm - at a relatively high level of generality and without going into specifics - our findings about what was, and was not, happening during the Troubles as between (a) organisations, (b) the Provisional IRA and its Internal Security Unit, (c) the police, armed forces and intelligence services and (d) their agents and informants. In particular, we intend to make clear where we have, and have not, found patterns of State intervention or non-intervention in particular types of circumstance and address types of circumstance in which steps were, or were not, taken in relation to the disclosure of intelligence about serious criminal conduct, either prospectively before it happened or retrospectively when it was being investigated.[71]

94. Operation Kenova investigations have, and have used, full police powers. By October 2022 Kenova had "provided the Director of Public Prosecutions of Northern Ireland (DPP NI) with more than 50,000 pages of evidence relating to a total of 17 murder victims and 12 abductions."[72] In this context the Operation Kenova reports provide a further considerable vehicle for information recovery 'with teeth' though the planned reports.

95. The Bill will prevent all criminal investigations –including 'call in'– from being continued or commenced on a day currently two months after its passage. The Bill will also ban the production of any reports for family members or publication that resulted from such investigations, after either 1 May 2023, or when the ICRIR commences its functions, whichever is sooner.[73]

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[70] https://www.kenova.co.uk/consultation-opens-into-kenova-plans-to-release-interim-report-of-findings The four are: Operation Kenova ('Stakeknife'); Operation Mizzenmast (Jean Smyth-Campbell); Operation Turma (Sean Quinn, Paul Hamilton & Allan McCloy); Operation Denton (The Barnard/Glenanne Series Review).

[71] https://www.kenova.co.uk/consultation-proconsultation-exercise-draft-protocol-on-publication-of-reports

[72] https://www.kenova.co.uk/more-than-200-murders-being-reviewed-by-kenova

[73] Clause 33, Bill as introduced to House of Commons.

The ICRIR and procedural duties of Articles 2 & 3 ECHR

96. The Committee of Ministers asks a number of questions as to how it will be "*ensured that the reviews undertaken by the ICRIR are adequate and effective investigations…"*

97. We concur with the assessment of the NI Human Rights Commission that:

> 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.[74]

UK position on domestic ECHR procedural obligations

98. The last UK submission to the Committee of Ministers argues the ICRIR will be capable of conducting effective investigations compliant with ECHR Article 2 & 3.[75]

99. It is notable that the UK Governments' own ECHR Memorandum published with the Bill contradicts this. The Memorandum states that "*in those cases where the Article 2 procedural obligation arises*" the ICRIR will be capable of an investigation which complies with '*most'* of the procedural requirements of Article 2.[76] Clearly the ECHR obligation requires complying with all of the law rather than 'most' of it.

100. It appears the UK has added on the possibility of the ICRIR exercising police powers to be able to argue that the ICRIR will be capable of ECHR-compliant investigations "*in those cases where the Article 2 procedural obligation arises*." It should be noted however that the UK has strenuously argued that an Article 2 procedural obligation *does not* usually arise, at least as a matter of domestic law, in most Troubles-related cases. This includes the argument that obligations do not arise pre-October 1990 cases, ten years before the commencement of the Human Rights Act.[77]

101. The logic of this is that the UK will consider the ICRIR free as a matter of domestic law to conduct the type of light-touch ICRIR 'reviews' the Bill is designed to provide for and only use police powers in the circumstances where an ECHR procedural obligation is determined. It is notable that ECHR Memorandum indicates the UK would not be able to sustain such a position in relation to legacy inquests, in the context of a Supreme Court ruling that once a legacy inquest is open it must satisfy all the requirements of Article 2.[78]

Temporary nature of ICRIR and ban on future investigations

102. The Committee of Ministers questions ask: "*How will effective investigations into Troubles related deaths be ensured after the five year limitation period on the*

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[74] https://committees.parliament.uk/writtenevidence/109473/html/ paragraph 2.1.

[75] DH-DD(2022)579: Communication from the United Kingdom. 30/05/2022 https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2022)579E%22]}

[76] Northern Ireland Troubles (Legacy and Reconciliation) Bill, European Convention on Human Rights Memorandum ["ECHR Memorandum"], paragraph 21 referencing back to the procedural obligations listed in paragraph 14. https://bills.parliament.uk/bills/3160/publications

[77] See ECHR Memorandum, paragraphs 16-21.

[78] ECHR Memorandum, paragraph 16 "The Supreme Court has also found that if for whatever reason an inquest is opened into a historic death (see below), the inquest must satisfy the requirements of the Article 2 procedural obligation (*McCaughey* [2011] 2 WLR 1279). See also position of State in UK Supreme Court cases McQuillan and Finucane, and reference in pending Dalton case https://krw-law.ie/good-samaritan-bombing-uksc/

making of requests for reviews and the winding up of the ICRIR, including for example if new evidence comes to light?

103. The Bill would close down all criminal investigations permanently from the outset of the ICRIR. Once the ICRIR completes its work this prohibition on investigations would remain, regardless of whether new evidence arises, including new evidence reaching the *Brecknell* threshold to trigger a fresh procedural obligation.

104. The Bill provides that no requests for an 'ICRIR' review can be made after five years of its operations.[79]

105. As further detailed in the section on independence, the ICRIR will be subject to a high level of control by the Secretary of State through control of appointments, budget, caseload and other matters. This may assist in producing the type of outcomes and official narrative the Secretary of State wishes for. It is notable that the Secretary of State nevertheless retains a power for 'winding up' the ICRIR at any point. This is regardless of whether the five years have passed or whether there are outstanding cases. The only criteria is whether the Secretary of State themselves is 'satisfied' the 'need' for ICRIR has ceased.[80]

106. The ICRIR Commissioners therefore will discharge their functions in the shadow of a Ministerial Sword of Damocles, capable of curtailing the ICRIR's work at any point.

ICRIR 'reviews' v investigations with police powers

107. 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**.**

108. The Bill does alter this to introduce powers to compel testimony to the ICRIR and also the possibility of some ICRIR officers being designated to exercising police powers. As alluded to below statements from Ministers and the structure of the provisions for the ICRIR however are indicative of there not being an intention for police powers to be used, particularly against State actors.

109. The functions set out in the bill for the ICRIR expressly restrict its remit to conducting 'reviews' rather than 'investigations'.[81]

110. The separate formulation of 'reviews' and 'investigations' has long been a feature in NI legacy investigations. 'Reviews' have largely referred to desk top reviews of papers, with 'investigations' referring to criminal investigations with full police powers.

111. This was the approach of the former PSNI Historical Enquiries Team (HET) which would 'review' cases producing reports of variable quality, with some reports then progressing to full PSNI criminal investigations exercising full police powers. The manner in which not a single HET *review* led to an *investigation* in a military case

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[79] Clauses (9)8 and 10(3) (as introduced HC)
[80] Clause 32(1) of the Bill as introduced.
[81] Clause 2(4) of the Bill (as introduced HC)

contributed to the assessment by the Inspector of Constabulary that the HET had not been operating lawfully in line with Article 2 ECHR obligations.[82]

112. The draft SHA Bill codified 'review' and 'investigation' approaches for the proposed Historical Investigations Unit (HIU). In all cases a 'review' of papers could lead to a family report, where however there was new evidence or 'reasonable grounds for believing that a criminal offence relating to the death has been committed and that there are reasonable investigative steps that could lead to' identification or prosecution of a suspect a full criminal investigation could be launched using police powers.

113. The current Bill removes any such formulation for the ICRIR and refers only to 'reviews' of the ICRIR.[83] An ICRIR Commissioner will decide on the steps to 'review the case referred to it'. Reviews are only to 'look into' the death or injury in question rather than investigate it.[84] Indeed aside from the title of the lead ICRIR officer (now named curiously a 'Commissioner of Investigations') the only specific reference in the clause on ICRIR reviews is a prohibition on the ICRIR from duplicating any aspect of a previous investigation, unless the ICRIR can make a case that it is 'necessary' to do so.[85] 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.

114. 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 as the threshold for using police powers – linked to investigations of criminal offences- is likely no longer to be reached.

115. The Secretary of State for Northern Ireland in introducing the Bill has also given military veterans assurances that imply police powers such as arrest and questioning will not be used against them by the ICRIR.[86]

116. Ensuring legacy investigations in Northern Ireland are Article 2 compliant has been a complex and contested area, with a considerable number of non Article 2 compliant investigations by the PSNI (including HET) and a former Police Ombudsman having been overturned by the Courts.

117. As a consequence of this the draft SHA legislation sought to build in safeguards to ensure the HIU would conduct Article 2 compliant investigations. For example, 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. It is notable that the UK has stripped out all of these safeguards from the current Bill and does not apply them to the ICRIR.

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[82] For a narrative on this see "THE APPARATUSOF IMPUNITY? Human rights violations and the Northern Ireland conflict' CAJ, January 2015. HET chapter.

[83] See clauses 13 and 2(4) of the Bill (as introduced HC).

[84] Clause 13(3)

[85] Clause 13(5)

[86] "This month I brought forward the Northern Ireland Troubles (Legacy and Reconciliation) Bill….. no longer will our veterans be hounded and hauled in for questioning about events that happened decades ago." https://conservativehome.com/2022/06/09/brandon-lewis-my-northern-ireland-legacy-plan-no-longer-will-our-veterans-be-hounded-for-about-events-that-happened-decades-ago/

118. The powers the HIU had to conduct investigations that related to grave and exceptional police misconduct leading to the death of a person (rather than to criminal offences) have also been stripped out, without explanation, of the Bill. This has been a key provision for investigations by the Police Ombudsman.

119. An opposition amendment during the passage of the Bill sought to introduce some minimum standards for the ICRIR reviews based on Operation Kenova investigations. Whilst this provision would have been limited and not reached the threshold of ensuring Article 2 investigations it is notable that even this minimum standard was *rejected* by the UK Government and does not form part of the Bill.[87] This provides a further indication there is no real intention of ensuring the ICRIR conducts 'investigations' rather than light touch reviews.

120. 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.

121. 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.

122. 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 and that an alternative should be fielded.[88] This is not limited to employees of agencies but could also include state agents. This therefore could lead to the scenario whereby a former informant is summonsed to testify before the ICRIR, and on the basis of fears the individual will make disclosures regarding human rights violations the security services or police object to their giving testimony and seek to field an alternate.

Disclosure: powers, family reports and the national security + veto

123. The list of questions to the UK asks: *How will the ICRIR have access to all the information that it requires from state agencies, in particular given past concerns about the failure of various authorities to disclose relevant evidence and information in the context of other investigatory processes? Will there be any grounds for restricting access and, in the affirmative, who will decide on such restrictions?*

124. It also asks how ICRIR reviews will be '*capable of determining whether any force used was justified and identifying and where appropriate punishing those responsible*' and also "*How will provisions preventing public disclosure on national security grounds operate in practice*?"

[87] Amendment 111 tabled by Peter Kyle Shadow Secretary of State https://hansard.parliament.uk/commons/2022-06-29/debates/A4AE77AB-06EF-41D1-8E82-D207F01D4BC7/NorthernIrelandTroubles(LegacyAndReconciliation)Bill

[88] Clause 14(7)) of the Bill (as introduced HC).

125. In relation to disclosure to the ICRIR the list of questions alludes to the long history of state agencies delaying and obstructing disclosure to the existing package of measures mechanisms.

126. The Bill provides that a 'relevant authority' must make available to the ICIRIR documents (etc), that the ICRIR "may reasonably require for the purposes of, or in connection with, the exercise of the review function or the immunity function."[89]

127. There is no sanction for failure to provide such information. On past experience the qualification "may reasonably require" is likely to be the subject of legal contestation as to whether a 'relevant authority' is obliged to provide particular information.

128. It is notable that the investigations being conducted Operation Kenova under the 'Call in' measure, in the context of being criminal investigations that can use full police powers have managed to obtain information from State agencies that previous legacy investigations have not had access to.[90]

129. In evidence on the Bill the Officer in Command of Operation Kenova Jon Boucher has queried the qualification that material must be 'reasonably required' by the ICRIR, stating "*That sort of language concerns families. It should not, but, because there is a history here of families not getting information and having to have a tug of war through various civil cases, the reality is that there is a lack of trust.*"[91]

130. The UK rolled back on the provisions of the SHA by introducing a 'national security +' veto into the work of the proposed HIU and Independent Commission for Information Retrieval (ICIR). The veto granted powers in the Secretary of State to redact reports before they are given to families or published to remove material on 'national security +' grounds. This means material can be excluded from reports on general vague 'national security interests of the UK' grounds. The power however goes beyond this to also cover information that originates with covert policing bodies, including the security and intelligence services, and intelligence branches of the police and military.

131. The purpose of structuring the 'national security +' veto in this manner primarily appears to be able to exclude information relating to the use of agents and informants. This has to be taken in the context of Police Ombudsman reports in particular having revealed patterns and practices of human rights violations relating to collusive actions between the police and informants engaged in serious crime.

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[89] Bill (as introduced HC) clause 5.

[90] See Written evidence submitted by Jon Boutcher, Officer in Overall Command, Operation Kenova (LEG0041) to Northern Ireland Affairs Committee of UK Parliament: https://committees.parliament.uk/writtenevidence/7650/html/ "2.19 Kenova has staff embedded within the PSNI and as a result we have been able to search records and obtain information not previously accessed by other legacy investigations." "2.20 We have access to records held by the MOD and MI5 through agreed protocols and information handling arrangements. Kenova staff have been granted access to the estate of the MOD and MI5 not previously given to previous legacy investigations."

[91] Northern Ireland Affairs Committee Oral evidence: Addressing the Legacy of Northern Ireland's Past: The UK Government's New Proposals, HC 284, Tuesday 21 June 2022 https://committees.parliament.uk/oralevidence/10440/html/

132. The ‘national security +’ veto is replicated in the Bill for the ICRIR and its reports. This will allow ministers to conceal improper and unlawful conduct by informants and other agents of the state.

133. Whilst under the draft SHA legislation there were specific provisions that each HIU family report ‘must be as comprehensive as possible.’ This has been removed from the current Bill. There is no specific provision in the current bill as to what ICRIR reports to families should actually contain.

134. Whilst the relevant clause of the report is entitled ‘Production of reports on the findings of reviews’ there is no specific provision that ICRIR reports will contain any findings, including whether the use of force was justified and lawful.

135. The Committee will be aware that the issue of findings in reports of existing mechanisms has been heavily contested by some former members of the security forces. This has related to a contention that the Police Ombudsman does not (or should not) have powers to make findings in her reports relating to police collusion. As referenced below representatives of retired police officers have again sought to judicially review the Police Ombudsman to challenge whether she had the powers to make such findings in her reports. Previous judicial reviews that have been unsuccessful. Police Ombudsman reports have been heavily reliable on intelligence based information – it would be no exaggeration to state that a number of landmark reports that have exposed patterns and practices of human rights violations in covert policing, could have been redacted beyond comprehension by the type of ‘national security +’ redactions powers now proposed. Such Ombudsman reports have considerably contributed to subsequent police reform and hence guarantees of non-recurrence.

136. It is therefore a matter of concern that the Bill contains both the ‘national security +’ veto, but also that the stipulation of maximum permissible disclosure, contained in the draft SHA legislation, has also been stripped out of the current Bill.

Independence

137. The Committee asks about the independence of the ICRIR referencing its composition, appointment process, funding and other resources and its terms of reference.

138. As the Committee will be aware 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 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.

139. It is worth noting that there is precedent for appointments to bodies established as part of the Northern Ireland peace process not to be undertaken on a ‘UK only’ basis. This is due to the hitherto bilateral nature of the peace process between the UK and Ireland up until the unilateral departure from the SHA in March 2020 by the UK.

There had also been broader international involvement in peace process mechanisms.

140. The Independent International Commission on Decommissioning (IICD) which oversaw the destruction of paramilitary weapons 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.

141. Legacy cases have also benefited from the involvement of NI specific institutions and accountability mechanisms resultant from the peace process. Bodies exercising police powers are accountable to the NI Policing Board (oversight) and Police Ombudsman (complaints). The Police Ombudsman itself when 'lowering independence' in relation to its legacy directorate during the mandate of the second Ombudsman was held to account by another institution - the Criminal Justice Inspector (leading to the resignation of the Ombudsman and reform of the Office). The PSNI Historical Enquiries Team, was ultimately disbanded following an investigation by Her Majesty's Inspector of Constabulary finding that its differential treatment of state involvement cases was unlawful in relation to the requirements of Article 2 ECHR.

142. Independence from the UK government and independent oversight was 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.[92]

143. 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.[93]

144. In stark contrast there is clear evidence in the current 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, and all other Commissioners, of the proposed ICRIR will be undertaken the Secretary of State alone. 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

[92] Draft Northern Ireland (Stormont House Agreement) Bill 2018, Schedule 2, Part 1.
[93] https://www.gov.uk/government/publications/the-stormont-house-agreement

information that could heavily shape the case load of the ICRIR despite clear conflicts of interest. As alluded to above 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.

145. The Bill removes the SHA role of the NI Minister of Justice, Department of Justice and oversight role the Policing Board would have had over the HIU. 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 SOSNI will also assume the role of 'oversight' with a duty (clause 31) to 'review' within three years the work of the ICRIR. This duty is followed (clause 32) by a SOSNI power to shut down the ICRIR if the SOSNI is 'satisfied' that it no longer needs to exercise functions. The independent accountability to the NI Policing Board is removed. There is also no oversight by the Police Ombudsman leaving the ICRIR as potentially the only body that can exercise police powers in NI outside the reach of the Ombudsman.

146. In relation to composition 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.

147. As the Committee is aware Article 2/3 compliant investigations must include the potential for state-initiation of investigations. Whilst there is some provision for this again we are concerned that the broadest set of powers are vested in the SOSNI alone, giving Ministers broad powers to unduly shape the caseload of the ICRIR. This could be used to ensure that the ICRIR deals with very few State involvement cases and focuses predominantly on non-state actors – a stated goal by Ministers.

148. The ICRIR starts with a blank caseload. This is despite Judicial, policing and oversight processes in Northern Ireland having already established a body of cases whereby Article 2 ECHR-compliant investigations have been adjudged to not having taken place. This includes military cases previously 'reviewed' unsatisfactory by the HET for which commitments had been made to a proper Article 2 compliant investigation. Such cases were to form, alongside other 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.

149. 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 UK Advocate General.

150. 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 SOSNI therefore is granted broad powers that could heavily shape the case load of the ICRIR despite clear conflicts of interest.

151. Given this, alongside the context that many victims' families are likely to avoid the ICRIR given the broad concerns about it, it is foreseeable that the ICRIR run in a manner which will ensure it will deal with very few state involvement cases. This is despite of the existing backlog and deficit in relation to such investigations.

Objectives of the UK legacy bill

152. The Bill displays a clear desire on the part of the UK 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.

153. There is a notable contrast between the message being given to the Council of Europe by the UK as to the objectives of the bill, and the message being given by Ministers to domestic audiences.

154. In the UK's recent communication to the secretariat on the Northern Ireland Troubles (Legacy and Reconciliation) Bill, after its introduction into the UK Parliament in May 2022 the UK sets out the purpose of the bill as follows:

> The UK Government is clear that the objective of the legislation is to deal with legacy issues in a way that supports information recovery and reconciliation, complies fully with international human rights obligations, and responds to the needs of individual victims and survivors, as well as society as a whole.[94]

155. The cover letter to this communication from the Secretary of State for Northern Ireland Brandon Lewis MP similarly stresses that the legislation aims to create a legal framework for reconciliation, information recovery and to deliver for victims and survivors, and to help Northern Ireland society 'look forward'.[95]

[94] DH-DD(2022)579 Communication from the UK May 2022 https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2022)579E%22]}

[95] As above, cover letter

156. The Secretary of State omits however to mention that the primary purpose and driver behind the legislation, which has been openly articulated by Ministers elsewhere, is to end investigations and related proceedings into military veterans of the Northern Ireland conflict.

157. As previously alluded to and set out further below Ministers have gone further than this in extolling that the legislation will end the current independent judicial and investigative processes for fear that the facts and findings emerging from such processes currently are damaging the official narrative about the conflict.

158. The objective of the current Bill is further set out therefore as one whereby the UK can 'take back control' of the narrative around the Northern Ireland conflict. As outlined above the bill has notably been introduced and rushed through the House of Commons at a time when the existing General Measures committed to by the UK as the 'Package of Measures' –such as the inquest system and Police Ombudsman- are increasingly delivering significant amounts of independent information recovery and historical clarification that challenges what has hitherto been the official truth.

159. This issue of a military amnesty has dominated political and UK media discourse surrounding the bill. There is however notably only passing reference to it in the communication to the Council of Europe. The section on objectives of the immunity from prosecution scheme that forms part of the bill makes a passing reference to it aiming to deliver 'on our commitments to those who served [in the military] in NI'.[96]

160. This is in reference to commitments in the 2019 Conservative Election Manifesto. Notably this manifesto did not commit to an amnesty for NI military veterans or ending investigations, rather it made reference to striving for 'better outcomes for victims and survivors' as well as general reference to 'giving veterans the protections they deserve,' The latter, in a democratic society, should be read as to reference to the safeguards of due process in rule of law processes, rather than to impunity. A different section of the Manifesto on the military forces committed to ending what it referred to as 'vexatious legal claims that undermine our armed forces'. This section was not specific to Northern Ireland.[97] This led to the introduction of the Overseas Operations (Service Personnel and Veterans) Bill into the UK Parliament. The Joint Committee on Human Rights of the UK Parliament warned that the Overseas Bill "breaches the UK's international legal obligations under international humanitarian law, human rights law and international criminal law."[98] The Overseas Bill nevertheless proceeded to be enacted with limited amendment. This Overseas legislation provides for a statute of limitations for past military operations. Allegations of war crimes continue to come to light (for example see the recent BBC Panorama documentary *SAS Death Squads Exposed: A British War Crime?*' regarding

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[96] As above.

[97] 'Get Brexit Done: Unleash Britain's Potential' The Conservative and Unionist Party Manifesto, 2019. 'Strengthening our Union' UK section, Northern Ireland page 45 "*We will also never forget the immense contribution of the police and Armed Forces in standing firm against terrorists in the past and the debt we owe them for peace today. We will continue to seek better ways of dealing with legacy issues that provide better outcomes for victims and survivors and do more to give veterans the protections they deserve*."

[98] https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/120321/operations-service-personnel-and-veterans-bill-is-unjustifiable-ineffective-and-will-prevent-justice-from-being-done-say-joint-committee-on-human-rights/

special forces killings in Afghanistan[99]) but cannot be subject to proceedings. It should be recalled that the March 2020 UK Written Ministerial Statement that announced the abandonment of the SHA and the development of alternative proposals that have resulted in the current NI Bill was made intentionally on the same day as the Overseas Bill was introduced into the UK Parliament and with the express intention of providing the same levels of immunity for military veterans who had served in Northern Ireland.

161. In introducing the current NI Bill in May 2022 into the UK Parliament the Secretary of State for Northern Ireland Brandon Lewis expressly linked the purpose of the bill to ending investigations against military veterans:

> No longer will our veterans, the vast majority of whom served in Northern Ireland with distinction and honour, have to live in perpetual fear of getting a knock at the door for actions taken in the protection of the rule of law many decades ago. With this Bill, our veterans will have the certainty they deserve and we will fulfil our manifesto pledge to end the cycle of investigations that has plagued too many of them for too long.[100]

162. A backbench Conservative MP during this debate on the legislation stated that the legislation had been "advertised as bringing vexatious prosecutions [sic] to an end" against military veterans and sought an assurance from the Secretary of State that the Bill would do this. The Secretary of State responded "Yes, I can give that assurance." Stressing that Government was 'absolutely determined' that the bill would 'resolve' and not embed the alleged problem of 'vexatious [sic] prosecutions' against the military.[101]

163. The Secretary of State in an article for the Conservative Home publication, went further regarding the purpose of the bill. The headline of the piece makes no reference to information recovery or victims but is entitled "*Brandon Lewis: My Northern Ireland legacy plan. No longer will our veterans be hounded about events that happened decades ago*."[102]

164. The Secretary of State set out that as a result of the Bill military veterans would no longer face questioning and that investigations into their actions would end:

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

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[99] https://www.bbc.co.uk/programmes/m0019707

[100] Official Record (Hansard) House of Commons Tuesday 24 May 2022 Northern Ireland Troubles (Legacy and Reconciliation) Bill Volume 715: debated on Column 115 https://hansard.parliament.uk/commons/2022-05-24/debates/9A7C93DC-8187-47B9-8786-CA602DA2BB39/NorthernIrelandTroubles(LegacyAndReconciliation)Bill#256

[101] Official Record (Hansard) House of Commons Tuesday 24 May 2022 Northern Ireland Troubles (Legacy and Reconciliation) Bill Volume 715: debated on Column 115.

[102] https://conservativehome.com/2022/06/09/brandon-lewis-my-northern-ireland-legacy-plan-no-longer-will-our-veterans-be-hounded-for-about-events-that-happened-decades-ago/

165. A similar line was taken by a further NIO Minister in a publication in the Parliamentary House Magazine.[103]

166. In a previous report by CAJ and academics in the 'model bill team' critically assessed the contention that there had been a 'witch hunt' against the military or the suggestion that there had been 'vexatious' or 'malicious' prosecutions or investigations by the criminal justice institutions. We found these assertions, regularly repeated by ministers, to be neither factually nor legally accurate and lacking in intellectual credibility.[104]

167. The Secretary of State in the same aforementioned piece also attacked lawyers working on legacy cases. There have subsequently been defamation claims issued by law firms.[105] The Secretary of State blamed independent judicial processes through the courts for 're-writing history'. He went on to set out that the memorialisation and oral history provisions in the bill were designed to stop this, and in essence return to an official narrative:

> Specialist law firms who campaign on legacy issues, funded primarily by legal aid, have been able to peddle false hope and profit from the pain of those seeking answers about what happened to their loved ones. Until now, the primary way to do that has been through protracted and adversarial legal processes that are delivering neither justice nor information in the overwhelming majority of cases.
>
> This feeds a pernicious and distorted view of the past, promoted and peddled by those with a vested interest in presenting the British state as the aggressor, when the truth is that terrorist organisations were responsible for the vast majority of deaths in Northern Ireland.
>
> We must halt the rewriting of history and set the events of the Troubles in their appropriate historical context. That is why the Bill will also set up a major new oral history initiative…[106]

168. According to a media interview with the former Minister for Veterans Johnny Mercer MP the whole genesis of the current bill centres on ending proceedings against members of the military.[107] Mr Mercer resigned as veterans minister largely as the Bill had not been delivered at an earlier stage. Whilst there had been previous proposals from the Defence Select Committee for a 'statute of limitations' for the military, these had not been adopted by the UK Government which remained committed to the Stormont House Agreement.

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[103] https://www.politicshome.com/thehouse/article/we-must-protect-veterans-and-support-victims-and-survivors Jonathan Gullis MP a PPS to the SOSNI.

[104] https://www.dealingwiththepastni.com/project-outputs/project-reports/prosecutions-imprisonment-and-the-stormont-house-agreement-a-critical-analysis-of-proposals-on-dealing-with-the-past-in-northern-ireland , P8-15.

[105] https://www.bbc.co.uk/news/uk-northern-ireland-61930789

[106] https://conservativehome.com/2022/06/09/brandon-lewis-my-northern-ireland-legacy-plan-no-longer-will-our-veterans-be-hounded-for-about-events-that-happened-decades-ago/

[107] https://www.instituteforgovernment.org.uk/ministers-reflect/person/johnny-mercer/

169. During the campaign for a new Conservative leader and Prime Minister following the departure of Theresa May, Mr Mercer recounts launching a campaign with military contacts and *The Sun* Newspaper for a 'Veterans Pledge' to be publicly signed by leadership candidates so 'whoever became PM couldn't get out of [delivering] it'. The former Minister recounts that three elements were listed to the pledge the third of which was "an end to the vexatious pursuit of those who served in the military in Northern Ireland". The pledge was signed by Boris Johnston who then became Prime Minister. Commitments to 'ending the pursuit' of the military who served in NI were then discussed as part of the commitment to the Prime Minister appointing Mr Mercer as veterans minister in the Ministry of Defence. Mr Mercer then wished to work on 'configuring legislation' that would end (in his words) the 'industrialised nature of human rights claims' for overseas operations but also to afford equivalent protections against what he refers to as 'lawfare' for military personnel who served in Northern Ireland.[108]

170. Mr Mercer recounts engagement with Brandon Lewis the new NI Secretary of State who he describes as giving 'unequivocal commitments' that he would 'walk hand in hand' to bring Northern Ireland legislation in line with the UK's Overseas Operations Bill so that veterans in Northern Ireland's would also be protected from litigation. Mr Mercer resigned in April 2021 having felt these commitments were not being delivered. They are however reflected in the current Bill. The Secretary of State Brandon Lewis credited Mr Mercer and other Conservative MPs who had campaigned for immunities for the military in introducing the current Bill.[109]

The Conditional Immunity Scheme

171. The list of questions to the UK asks:

*How can the central pillar of the Bill to allow **immunity** from prosecution to persons who cooperate with the ICRIR, be considered to meet the procedural obligations under Articles 2 and 3 of the Convention, as well as other provisions of international law, to prosecute and punish grave breaches of human rights such as torture and intentional killings of civilians?*

• What test and what standard of proof will the immunity requests panel apply in establishing whether an applicant's account is true ta the best of the applicant's "knowledge and belief'?

• Would the ICRIR only be able to grant immunity for crimes disclosed by individuals or would there be discretion to grant general immunity for all actions an individual has taken even if not disclosed? How will that work in practice?

172. In 2021, the UK government Command Paper 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.

[108] https://www.instituteforgovernment.org.uk/ministers-reflect/person/johnny-mercer/

[109] Official Report: Northern Ireland Troubles (Legacy and Reconciliation) Bill Second Reading House of Commons24 May 2022, Volume 715: Column 177. https://hansard.parliament.uk/commons/2022-05-24/debates/9A7C93DC-8187-47B9-8786-CA602DA2BB39/NorthernIrelandTroubles(LegacyAndReconciliation)Bill

In this bill, the UK 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 in practice may provide a similar level of impunity to an unconditional amnesty for all who apply.

Subjective low threshold test for Immunity in the Bill

173. The 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 to expose the person to prosecution for one or more serious troubles-related offences.

174. Criterion B is of course central to the extent to which the immunity scheme will be able to contribute to information recovery. There are a few elements that raise concerns on the extent to which this would be effective.

175. First, Clause 18(4) of the Bill (as introduced HC) 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)'.

176. The Bills' 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.

Broad scope of eligible offences – sexual offences and torture

177. '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 was no specific prohibition on certain kinds of crime, such as crimes of sexual violence in the Bill as introduced.

178. As alluded to above the substantive opposition amendment accepted by Government was to exclude sexual offences from the scope of the immunity provisions. As also noted this exemption does not remove the prohibition on any criminal investigation into the same offences. In this lay sense perpetrators may still benefit from a form of *de facto* immunity for sexual offences.[110] Furthermore, an individual who is responsible for sexual offences alongside other serious offences would still be able to apply for immunity for the offences; they could just omit to mention the sexual offences as they are outside the scope of the immunity process. If they did disclose sexual offences, this would not preclude them from getting immunity for other disclosed offences. As such, sexual offenders can still get immunity under this scheme for all other serious crimes they committed (this is contrary to some MPs' assertions that there would be no immunity for rapists).[111]

179. Applicants who had been involved in other forms of torture, whether relating to the actions in custody by the security forces, or 'punishment shootings' by paramilitaries, or indeed the covering up of such crimes within paramilitary or state organisations, would be entitled to apply for immunity under this Bill.

Application to State and non-State Actors

180. 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.[112]

181. In a context where there were comparatively few state actors convicted for conflict related offences,[113] 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.

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[110] For further details on these provisions in the Bill as introduced see: 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) https://committees.parliament.uk/writtenevidence/109448/html/

[111] E.g. https://www.ireland-live.ie/news/uk/848527/troubles-legislation-to-be-changed-to-prevent-immunity-for-rapists-says-minister.html

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

[113] 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 at: http://www.vilaweb.cat/media/attach/vwedts/docs/op_banner_analysis_released.pdf p. 46, para 431.

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

182. There is an inherent tension in this Bill between the clear desire to grant an immunity for military 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. It is also unclear how an immunity request could interact with decisions by the Director of Public Prosecutions on whether to prosecute for a file that had already been referred to it.

183. Clause 2(5) of the Bill requires that annual statistics are provided on the number of applications and 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.

184. The 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 ICRIR decides not to open a review. The lack of requirements for the ICRIR 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.

185. 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.[114] However, as detailed above, such flexibility can only occur in the context of investigations which are fully compliant with Article 2 of the ECHR and not the reviews envisaged in this Bill. The ECHR case law does allow exceptions for where it is necessary to protect the nation, and where the measures are intended to promote reconciliation and fulfil victims' rights to truth. However, the possibility for the ICRIR to grant immunity without adequately corroborating the information received,

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

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 and reconciliation, means that there is very little prospect that it would be compatible with the ECHR.

186. In our assessment 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.

Oral History, Memorialisation and Academic Research

187. The Bill also contains provisions with regard to Oral History, Memorialization and Academic research on the conflict which also depart significantly from the Stormont House Agreement.

188. 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 Bill. 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 UK considers, however, that the Court may consider an exception to this in cases where a 'reconciliation process' has been put in place.[115]

189. The significantly expanded proposals on oral history, memorialisation and academic research on the conflict is, in our view, designed to provide legal and political cover for the conditional immunity scheme. Far from advancing 'reconciliation' this cynical instrumentalization of oral history and academic research – using it as a smokescreen for impunity – will thwart and impede the good work that could be developed in this space. 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. Far from furthering reconciliation, these provisions in the Bill 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.

190. 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-

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

related conduct, in order to unlock the potential for reconciliation-focused work including oral history and memorialisation. This is simply not true.

Independence of the mechanisms

191. In the Model Bill Team's detailed response to the 2018 Draft Bill on the implementation of the 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 (PRONI) 'direction and control' of the archive given that PRONI 'operates under the direction and control' of a government minister.[116]

192. The new proposals would appear to incorporate some of the improvements that we called for (the UK 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).

193. 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) as introduced HC) 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'.

194. This section of the Bill therefore replicates the pattern of placing mechanisms under the direct control of the Secretary of State for Northern Ireland.

195. The 'designated persons' appointed by the Secretary of State 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 ICRIR 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.

[116] 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

Links to broader work including an 'Official History'

196. 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.[117] 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'.[118] As Dr Anna Bryson of the CAJ-Queens University Model Bill Team 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.[119] 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.

197. 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 that would accrue otherwise from 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.

198. 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 instrumentalising 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.

199. 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.

200. We therefore repeat our concern that the extensive proposals on oral history, memorialisation and academic research on the conflict would appear to be designed

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[117] 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

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

[119] https://talks.ox.ac.uk/talks/id/5c672e56-1090-44c8-9562-b435be3d6311/ . A member of the CAJ-Queen's University Model Bill Team, Dr Anna Bryson, presented at this Oxford Irish History Seminar on 23 February 2022.

to provide cover, including the appearance of ECHR-compliance, for an indirect route to impunity.

Individual Measures

201. The Committee asks: *How will the proposals affect the individual measures still required and long awaited in this group (for example, McKerr: awaiting an inquest since 2007; Kelly and Others: awaiting an inquest since referral in 2015; and Finucane: awaiting a decision on the next investigatory steps further to the Supreme Court judgment of 27 February 2019)?*

202. As alluded to in the above the Bill would close down the potential for future criminal investigations, Police Ombudsman investigations, civil proceedings and inquests in the manner described. There are no exemptions for the cases currently subjected to individual measures.

203. The following is an update on the individual measures.

Jordan

204. The inquest is completed as are all related challenges to the verdict. On 15 November 2019 the Court of Appeal directed the Chief Constable of the PSNI to pay £GBP5000 damages to the next of kin for breach of Article 2 ECHR arising from the delay in holding the inquest. An application for permission to appeal to the UK Supreme Court (UKSC) and a cross appeal by the Chief Constable was dismissed by the UKSC on 29 March 2021 and the next of kin, Teresa Jordan lodged an application with the ECHR on 27 September 2021. This was declared inadmissible on 16 June 2022 by the ECHR. Separately a decision remains outstanding from the Public Prosecution Service (PPS) in relation to whether two police officers who were referred to PPS by the Coroner pursuant to s.35(3) of the Justice (Northern Ireland) Act 2002 should be prosecuted for perjury.

Finucane

205. Mrs Geraldine Finucane made an application for leave to apply for judicial review on 19 February 2021 of the decision taken by the Secretary of State for Northern Ireland on 30 November 2020 not to hold a public inquiry 'at this time'. Leave to apply for judicial review was granted by Mr Justice Scoffield on 15 April 2021 and the case was fixed for hearing on 28–30 June 2021. The hearing date had to be vacated because the Secretary of State failed to file his evidence and an extension until the end of August 2021 was granted to the Secretary of State to file his evidence. The substantive hearing was re-fixed to take place on 15–19 November 2021. The Secretary of State failed to file his evidence until 19 October, resulting in the hearing date in November being vacated. This application for judicial review proceeded on 15 and 16 June 2022 and judgment has been reserved by Scoffield J.

McCaughey

206. The ECtHR has granted the NIHRC permission to intervene and a submission was filed on 13 December 2020. On 6 January 2021 the UK Government filed its replying observations on the questions posed by the Court and the applicants filed its response to Government's submission and its claim for just satisfaction on 22 February 2021. This application was dismissed by ECtHR on 17 February 2022.

207. In October 2021 the Chief Constable of the PSNI agreed to pay the next of kin of Martin McCaughey and Desmond Grew £GBP5,000 in damages to reflect the anxiety and stress caused to the next of kin arising from the delay in holding the inquests.

McKerr

208. This case is now being case managed by Mr Justice O'Hara. A Public Interest Immunity (PII) hearing in respect of the deaths which occurred in the Kinnego explosion took place in late November 2021 and again on 21 December 2021. The Coroner reserved his judgment in relation to PII and it is still awaited. Further disclosure is anticipated in relation to the inquests in short course.

209. On 18 November 2020, the next of kin of Mr McKerr, Mr Toman and Mr Burns commenced judicial review proceedings challenging the delay in holding the inquest relying on Art 2 and domestic law. In October 2021, the Department of Justice in Northern Ireland agreed to pay £GBP5,000 in damages to each applicant to reflect the anxiety and stress caused to the applicants arising from the delay in holding the inquests.

Kelly & Others

210. A High Court Judge has been appointed to review the case however, like other pending inquests, there has been limited progress in recent months. We understand that the primary cause for delay is due to a failure by the Ministry of Defence and PSNI to provide disclosure to the inquest, despite having already conducted this exercise in earlier civil proceedings. The matter was listed for review on 21 March 2022 but this was adjourned. The issue for consideration was the venue for proceedings and whether the civil or coronial proceedings should be given priority.

Shanaghan v UK

211. The Public Statement by the Police Ombudsman into the death of Patrick Shanaghan was published on 14 January 2022 as part of an investigation into a series of 19 deaths and 3 attempted murders by the Derry/North Antrim UDA/UFF between 1989 and 1993, known as 'Operation Greenwich'. The Shanaghan family issued a public statement[120] and media comment[121] in response to the findings of this report. CAJ has represented the Shanaghan family.

212. The Shanaghan family has had their concerns about the occurrence of collusive activity acknowledged as 'legitimate and justified' within the statement about this group of cases, however they expressed disappointment and concern that key aspects of their complaints relating to the actions of (Royal Ulster Constabulary – police) RUC officers prior to Patrick Shanaghan's murder could not be dealt with due to the legislation restricting the ambit of the Police Ombudsman's investigation into matters previously investigated by the RUC itself and also due to the destruction of police records.

[120] https://caj.org.uk/2022/01/14/shanaghan-family-responds-to-police-ombudsmans-statement-on-operation-greenwich/

[121] https://highlandradio.com/2022/01/14/greenwich-report-highlights-failings-in-patrick-shanaghan-death/ https://twitter.com/CAJNi/status/1481988787089678339

213. The Ombudsman concluded that the VZ58 assault rifle used in Patrick Shanaghan's murder was part of the loyalist arms importation from apartheid South Africa. In relation to the RUC preventing a local doctor from accessing Mr Shanaghan after the attack, the Ombudsman concluded, 'The decision not to afford Mr Shanaghan urgent medical assistance at the scene was incorrect', recording that one RUC officer subsequently received a disciplinary sanction.

214. The Ombudsman, citing gaps in her powers in the form of a statute bar in investigating complaints that were already previously investigated by the police themselves, was unable to investigate the family's complaints that prior to his murder there were beatings in custody and death threats against Mr Shanaghan from RUC officers.

215. In relation to the allegations of assaults in custody the Ombudsman stated (with reference to the RUC (Complaints etc.) Regulations 2001[122]

> The 2001 Regulations state that complaints received under Section 52 of the 1998 Act can only be considered if 'the complaint has not otherwise been investigated by the police.' My Office cannot, therefore, investigate the assault allegations made by Mr Shanaghan as they were investigated by RUC Complaints and Discipline Branch at the time.[123]

216. The Ombudsman cited the same reason as precluding her from investigating the allegations that police officers threatened to kill Mr Shanaghan. Both complaints directly relate to matters occurring in the run up to Mr Shanahan's death at the hands of loyalist paramilitaries, that the family consider are linked to his death.

217. We consider this a limitation in the Ombudsman's powers to conduct effective investigations into deaths and hence the gap in powers should be remedied in order to ensure full compliance with Article 2 ECHR in such cases whereby complaints may engage matters previously investigated by the Police themselves, and hence cannot be looked at by the independent Police Ombudsman's Office. Despite a review of the Ombudsman's powers there is presently no proposal to legislate to remove this provision debarring Ombudsman investigations of such matters.

218. The Ombudsman was also unable to reach a conclusion on the family's complaints that the actions of the RUC in the run up to Mr Shanaghan's murder constituted harassment. This was on the basis of factors including the absence of records relating to arrests and repeated stop and searches. The Ombudsman does, however, 'fully acknowledge the family's perception that the nature and frequency of interactions with police amounted to harassment'.

219. We call upon the CM to continue its supervision of this individual measure given the restrictions on the Police Ombudsman's investigation as outlined above, and in particular would ask the CM to consider calling on the UK authorities to remove the statute bar on the Police Ombudsman investigating complaints previously investigated by the police themselves.

[122] https://www.legislation.gov.uk/nisr/2001/184/regulation/5/made
[123] Operation Greenwich report, Paragraph 11.60

220. The Public Statement issued by the Police Ombudsman into ‘Operation Greenwich’ is being challenged by the Retired Police Officers’ Association and the Police Federation as well as two other related judicial reviews into reports by the Police Ombudsman into legacy deaths.[124]

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[124] https://www.newsletter.co.uk/news/crime/police-ombudsman-reports-to-face-new-legal-challenge-date-set-for-hearing-3740500
https://www.irishnews.com/news/northernirelandnews/2022/05/20/news/retired-ruc-members-launch-operation-achille-report-legal-challenge-2716481/