

Addendum Rule 9 Submission to the Committee of Ministers
McKerr group v. the United Kingdom (Application No. [28883/95](#))
Supervision of the execution of the European Court's judgments
May 2023

Introduction

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. This Rule 9 addendum to the Committee of Ministers (CM) is for consideration at the 1468th meeting (June 2023) (DH), alongside CAJ's May 2023 Rule 9 communication.¹
3. The focus is on the Northern Ireland Troubles (Legacy and Reconciliation) Bill ('the Bill').² Which will close down the 'package of measures' of transitional justice mechanisms established as a result of this group of cases; introduce a broad amnesty scheme and establish a new legacy body – the 'Independent Commission for Reconciliation and Information Recovery' (ICRIR) to conduct 'reviews' of selected cases.
4. This addendum focuses on events since the issuing of our Rule 9 submission namely:
 - The announcement on 11 May that the Chief Commissioner of the ICRIR had already been appointed and launch of ICRIR online.
 - The final day of Committee Stage debate in the House of Lords on 11 May.
 - The potential for further UK Government amendments.
5. In summary on each of the above areas this submission provides detail that:
 - The process for the appointment of the ICRIR Chief Commissioner appears to have bypassed even the usual safeguards that are in place for such appointments, including regulation by the Commissioner for Public Appointments; and the role of an independent public body for judicial appointments in Northern Ireland established further to the peace process. It also conflicts with commitments previously given to the CM by the UK.
 - At the Committee Stage debate on the 11 May the Minister was again pressed to confirm it was the case that the ICRIR would not in fact be able to use its police investigation powers against any person granted immunity by the ICRIR (and hence not be able to conduct Article 2 compliant investigations in such cases). The Minister declined to answer this or address assurances previously given by the Secretary of State that ICRIR police powers would not be used against military veterans.
 - The Secretary of State at the time of the Committee stage promised further 'game changing' amendments to the Bill within two weeks. However, no such amendments have since appeared and there is good reason to be sceptical given previous such commitments that did not address the Bill's ECHR incompatibility issues.

¹ <https://caj.org.uk/publications/submissions-and-briefings/com-sub-may-23/>

² <https://bills.parliament.uk/bills/3160/stages>

Appointment of Chief Commissioner of ICRIIR and launch of ICRIIR online

6. The UK issued a response to the Committee of Ministers (CM) on the 4 May 2023.³ This made no reference to the appointment of a Chief Commissioner of the ICRIIR being at an advanced stage, this was not also publicly known.
7. On the 11 May 2023 during the Committee Stage debate on the Bill in the House of Lords the Minister announced that the Chief Commissioner of the ICRIIR had already been recruited, despite the Bill not completing passage. The Minister announced former NI Lord Chief Justice Sir Declan Morgan would be the Chief Commissioner of the ICRIIR, that the formal ministerial appointment would take place once the Bill had passed but the Chief Commissioner would commence work prior to this in early June.⁴
8. There was a concurrent Written Ministerial Statement⁵ issued on the same day by the Secretary of State and Ministerial correspondence dated the 18 April setting out the process applied for the recruitment that was also made public.⁶
9. Online presence of the ICRIIR was also established with the entity already having a dedicated website <https://icrir.independent-inquiry.uk/>
10. CM Decisions have strongly reiterated calls upon the UK authorities, if the bill was progressed, to address issues of ECHR compliance. Among the ‘key issues’ identified by the CM was for the UK to ensure: *“that the Secretary of State for Northern Ireland’s role in the establishment and oversight of the ICRIIR is more clearly circumscribed in law in a manner that ensures that the ICRIIR is independent and seen to be independent;”*⁷
11. In this instance the establishment of the ICRIIR and recruitment of Chief Commissioner were not circumscribed in law as the Bill has not completed passage.
12. The Bill provides that the ICRIIR Chief Commissioner is to be a judge or retired judge. Judicial appointments in Northern Ireland are undertaken by an independent body- the *Northern Ireland Judicial Appointments Commission* (NIJAC). This body was established under the Justice (Northern Ireland) Acts 2002 & 2004 as a result of the Criminal Justice Review in Northern Ireland that flowed from the Belfast/Good Friday Agreement. Peace process reform therefore led to the establishment of NIJAC as an *“independent public body established to bring about a new system for appointing members of the judiciary in Northern Ireland.”*⁸ The documents and statements on the current appointment make no reference to NIJAC. Government also rejected an opposition amendment to the Bill that would have vested the role of appointing the ICRIIR Chief Commissioner in NIJAC as the appropriate body to make such an appointment.⁹
13. Public appointments by UK Ministers are regulated by *the Commissioner for Public Appointments*. The Commissioner has a number of functions set out in the Public

³ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680ab245c

⁴ [Hansard House of Commons 11 May 2023, vol 829 column 1968](#)

⁵ [HCWS767 WMS Secretary of State for NI, ICRIIR Implementation, Hansard Vol 732: 11 May 2023](#)

⁶ [Deposited paper DEP2023-0341 - Deposited papers - UK Parliament](#)

⁷ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a93a84

⁸ <https://www.nijac.gov.uk/>

⁹ [Amendments 12 & 16 introduction by Lord Browne; Response from Minister.](#)

Appointments Order in Council 2019.¹⁰ The functions of the Commissioner are to ensure that “*ministerial appointments are made in accordance with the Governance Code and the principles of public appointments.*”¹¹

14. The *Commissioner for Public Appointments* and the *Governance Code* and *Principles of Public Appointments* are therefore an official UK safeguard, with a basis in legislation for regulating public appointments by ministers. The Commissioner regulates public appointments by the Northern Ireland Office that are made by the Secretary of State for Northern Ireland (SOSNI). These are set out in a schedule to the legislation.¹² They include the Northern Ireland Human Rights Commission (NIHRC). During debates on the legislation Ministers have argued (in response to criticism as to the lack of ECHR independence of the SOSNI role in making ICRIR appointments) that the SOSNI appoints NIHRC Commissioners and this is commensurate with ICRIR commissioners.¹³ Whilst we do not see this comparator as valid (the NIHRC is not set up to conduct Article 2 compliant investigations) this comparator has been argued by UK Ministers in the knowledge that appointments to the NIHRC are regulated by the Commissioner for Public Appointments and fall to the Governance Code and Principles of Public Appointments.
15. It should be noted that the present UK Government has watered down the regulatory role of the Commissioner for Public Appointments granting Ministers much greater discretion. In 2016 the Government replaced the independent Code of Practice issued by the Commissioner with a Government-issued Governance Code and rejected recommendations from a Parliamentary inquiry.¹⁴
16. Notwithstanding this, it is notable that the existing recruitment process of the Chief Commissioner of the ICRIR appears to have even bypassed this regulatory process. It is not on the list of regulated appointments by the *Commissioner for Public Appointments*. CAJ has asked the NIO if there was any role for the Commissioner in the process but has not received a substantive response.¹⁵
17. There is limited detail available regarding the actual process followed. It has not been conducted publicly it is unclear when it commenced. The Ministerial document dated the 18 April, that is now on the UK Parliament website, provides a list of criteria for the post and sets out the process as follows:

The Chief Justices of England & Wales, Scotland and Northern Ireland will be provided with the criteria and asked to advise the Secretary of State who, among the current or retired senior judges of the United Kingdom, would be in a position to

¹⁰ <https://publicappointmentscommissioner.independent.gov.uk/regulating-appointments/orders-in-council/>

¹¹ <https://publicappointmentscommissioner.independent.gov.uk/>

¹² <https://publicappointmentscommissioner.independent.gov.uk/wp-content/uploads/2020/03/NIO.pdf> and [List of Business 6th November 2019 \(independent.gov.uk\)](#)

¹³ [Hansard House of Lords 31 January 2023 vol 827 clm 583](#)

¹⁴ <https://www.civilserviceworld.com/professions/article/ministers-accused-of-watering-down-public-appointments-safeguards> See for example the comments of the outgoing public appointments commissioner <https://www.prospectmagazine.co.uk/politics/37987/outgoing-public-appointments-commissioner-ive-been-concerned-about-the-balance-on-panels>

¹⁵ E-correspondence to NIO, 22 May 23.

fulfil the role of Chief Commissioner of the ICIR, so that the Secretary of State can consider them for appointment.¹⁶

18. It appears from this that the Chief Justices were asked for a list of current or retired judges who could fill the role and beyond this the SOSNI made the decision at his discretion.

19. The UK Communication to the CM in March 2023 contained the following response to the CM concerns about the lack of independence in the SOSNI making ICIR appointments:

Regarding CMDH's concerns that the Secretary of State for Northern Ireland's role in the establishment and oversight of the Commission is more clearly circumscribed in law in a manner that ensures that the Commission is independent and seen to be independent, we will stipulate in legislation that the Secretary of State for Northern Ireland must consult individuals and bodies before appointing the Chief Commissioner, and have regard to relevant international experience in appointing Commissioners."¹⁷

20. The Bill currently provides that the SOSNI must 'consult' the relevant senior judges before appointing the Chief Commissioner. Ministers had also tabled an amendment to extend this consultation requirement to other bodies.¹⁸ However, this it appears has also now been bypassed as the recruitment has already occurred.

21. At a time when the Bill is completing passage the Permanent Secretary of the NIO (the Department's most senior official who took up post in January 2020) will depart to take up a position of Chair of the Joint Intelligence Committee (JIC). The JIC supports the UK Prime Minister and National Security Council. The appointment notice makes reference to the postholder having previously been the UK Deputy National Security Advisor and having held other national security roles in the UK and overseas prior to her appointment to the NIO.¹⁹ In this context and the issue of Article 2 ECHR compliance CAJ has written to the NIO to seek clarification as to whether any issues or arrangements regarding any potential conflicts of interest between the past roles and any role in the ICIR recruitment were considered. At the time of writing, we have not received a response.²⁰

22. As reported in our May 2023 Rule 9 submission the recruitment process for the ICIR Commissioner for Investigations was already underway and is restricted to British citizens.

¹⁶ [NIO Lord Caine ICIR Appointments Processes 18 April 2023.docx \(live.com\)](#)

¹⁷ [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2023\)87E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2023)87E%22%5D%7D)

¹⁸ <https://bills.parliament.uk/bills/3160/stages/17158/amendments/94304>

¹⁹ <https://www.gov.uk/government/news/joint-intelligence-committee-chair-appointed-madeleine-alessandri-cmg#:~:text=Madeleine%20Alessandri%20has%20served%20as,on%20National%20Resilience%20and%20Security.>

²⁰ E Correspondence of 22 May 23.

Committee Stage debate in the House of Lords on 11 May

23. The final day of Committee Stage took place on the 11 May. The date for the final substantive stage, Report Stage, is presently scheduled for the 21 June 23.²¹ Remaining stages are likely to be completed before the summer recess in July.
24. One of the concerns regarding the ability of the ICRIR to conduct investigations compliant with Articles 2 and 3 ECHR has been the question of when and whether ICRIR officers can use police powers in its ‘reviews’. Use of police powers (rightly) requires the meeting of certain thresholds of being able to investigate a suspect for an offence they can potentially be charged and prosecuted for. It appears clear therefore such powers could not be used against a person who has availed of immunity for an offence through the ICRIR. In addition, in earlier stages of the bill Ministers gave assurances that police powers such as arrest and questioning would not be used against military veterans. In this context Baroness Margaret Ritchie put the following question to the Minister, Lord Caine, in the Committee Stage 11 May debate:
- Some of the amendments dealing with the question of investigations consider many of those issues. In the past the Minister has confirmed that the ICRIR can use police powers in some circumstances. However, can he confirm that such powers would not be exercisable against a person who has immunity for the offence under investigation? He has stated that police powers can be used by the ICRIR. In introducing the Bill a year ago in the other place, the former Secretary of State for Northern Ireland stated that the Bill would mean military veterans would no longer face a knock at the door or be taken in for questioning—that is, police powers would not be used against veterans. Is that still the Government’s position, given the contradictions?²²
25. The Minister gave no answer to these questions in his response.²³
26. The CM has also urged the UK authorities to reconsider provisions of the Bill that would prevent new civil claims and legacy inquests from continuing.
27. In relation to the CM concerns regarding the ending of civil legal proceedings the Minister in his response declined an opposition amendment to alter the present position in the Bill which would curtail civil proceedings that were taken after the Bill’s introduction back in 2022 and reiterated the Government’s justification for this approach. This indicates the UK has no intention of moving on this issue.²⁴
28. In relation to Coronial inquests the Minister did indicate some consideration of amending the date as the cut-off date for inquests which had not reached an advanced stage in the Bill of 1 May 2023 is a date that has already passed. It is not clear however from the response as to what the Ministers’ intentions are and to whether there will be

²¹ <https://bills.parliament.uk/bills/3160/stages> [accessed 25 May 23]

²² [Hansard House of Lords 11 May 2023 vol 829 clm 1964](#)

²³ [Hansard House of Lords 11 May 2023 vol 829 clm 1971](#)

²⁴ As above.

an extension to this timeframe, or a further curtailment of inquests via future amendments.²⁵

The potential for further UK Government amendments

29. In Northern Ireland Questions on the 10 May 2023 in response to the UK opposition shadow Secretary of State pressing the UK Government to have a ‘total rethink on legacy’ in light of the broad opposition to the present Bill, the Secretary of State for Northern Ireland claimed that Government would be tabling ‘game changing’ amendments to the legacy bill ‘over the next couple of weeks.’²⁶
30. The Minister in the Lords, in the Committee Stage debate the following day, declined to elaborate on what these amendments would cover.²⁷
31. To date several weeks on from this statement no amendments have been tabled.
32. There is good reason to be sceptical about the prospect of such amendments being tabled by Government. Firstly, the UK continues to contend its bill is ECHR compliant and does not need amending. Secondly, substantive amendments have been promised at previous stages and when issued addressed none of the ECHR incompatibility issues identified. In addition, Ministers in their responses to opposition amendments to the Bill have already ruled out changes to areas identified by the CM, including reconsideration of the amnesty scheme.
33. The possibility that Government amendments will be tabled at the very last minute before Report Stage is also foreseeable given this occurred at the previous Committee stage drawing criticism from, among others, UN High Commissioner for Human Rights Volker Türk, in that the late tabling prevented meaningful scrutiny.²⁸

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²⁵ “[As noble Lords will be aware, the original working assumption was that the ICRIR would be fully operational by 1 May 2023 at the latest, on the assumption that Royal Assent would have been received some time before then. At that point, the intention was that those inquests which had reached an advanced stage would continue, while those which had not would move into the new commission. It will not have escaped the attention of noble Lords that 1 May 2023 has come and gone without Royal Assent, and that the establishment of the new commission has not yet happened, largely due to the extra time that we have given for thorough consideration of this legislation. However, this raises important issues that we must address. I will discuss this further with noble Lords between now and Report.](#)”

²⁶ <https://hansard.parliament.uk/commons/2023-05-10/debates/0FE81124-6ADC-410F-85FC-E395C4A0045E/PowerSharing>

²⁷ [Hansard House of Lords 11 May 2023 vol 829 clm 1974](#)

²⁸ <https://www.ohchr.org/en/press-releases/2023/01/uk-rights-victims-and-survivors-should-be-centre-legislative-efforts-address>