The Road to the Northern Ireland Troubles (Reconciliation and Legacy) Act 2023

A narrative compendium of CAJ submissions

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1. Introduction

The Northern Ireland Troubles (Reconciliation and Legacy) Act 2023 ('The Act' or 'The Bill') completed passage in the UK Parliament and obtained Royal Assent on the 18 September 2023.

The main effects of the legislation are broadly three-fold. The Act will:

1. Shut down all the existing investigative and legal processes into legacy cases dealing with the Northern Ireland Conflict or 'Troubles' (1966-1998).
2. Introduce a form of amnesty, in the form of a 'conditional immunity scheme' with a conspicuously low eligibility threshold.
3. Set up a new temporary legacy body—the Independent Commission for Reconciliation and Information Retrieval (ICRIR)— to 'review' certain legacy cases.

Domestic and international actors, including United Nations (UN) and Council of Europe (CoE) bodies and the National Human Rights Institution (NHRI) have raised significant concerns the Act is not compatible with the European Convention on Human Rights (ECHR) or other treaty based international obligations of the United Kingdom (such as the UN Committee Against Torture, or International Covenant on Civil and Political Rights). The Act has faced immediate legal challenge domestically with almost two dozen judicial review applications lodged before the High Court in Belfast within weeks and the Irish government also to decide as to whether to take an interstate case to the European Court of Human Rights.

The road to the legacy bill could be seen to start with the March 2020 Written Ministerial Statement by the then Secretary of State for Northern Ireland Brandon Lewis. This signalled the abandonment of the 2014 UK-Ireland Stormont House Agreement, which would have provided for new overarching transitional justice mechanisms to deal with legacy past, as well as the continuation of inquests and civil proceedings.

Inquests and civil proceedings were part of the existing approach to legacy cases that resulted from a 'package of measures' agreed by the UK on the back of European Court of Human Rights (ECtHR) rulings. These mechanisms also include Police Ombudsman, legacy Police Service of Northern Ireland (PSNI) and independent police investigations, changes to prosecutorial decision making and public inquiries.

In recent years, following years of obstruction and limitation, the Package of Measures have begun to deliver like never before for many families in legacy cases, particularly truth recovery and historical clarification. This includes, often for the first time, for victims of the state, with cases highlighting patterns of human rights violations.

The origins of the present bill can be dated back pre-2020 to unease and alarm among Ministers and other figures, particularly within a section of the Conservative party, over what these ECHR-compliant investigations, overseen by independent law officers and investigators, were revealing. The then NI Secretary of State Theresa Villers 'pernicious counter narrative' speech of 2016 provides one example, as do the subsequent 2017 proposals by the Westminster Defence Committee calling for a 'statute of limitations' to curtail legacy cases against the security forces. This occurred in the context of the first two decisions to prosecute soldiers as a

result of legacy investigations, and a subsequent mobilisation of a section of the Conservative party, veterans and right-wing UK newspapers framing judicial and official independent investigations in legacy cases as a 'witch hunt' against the military.

Whilst the pressure to shut down legacy investigations, dispense with Stormont House and the existing package of measures may have been building, it was not proceeded with by Theresa May's government. That administration, with Secretary of State Julian Smith, stuck to Stormont House and, whilst seeking to roll back on key aspects what was agreed, did not seem willing to proceed with a policy of shutting down investigations given the clear conflicts with international law and the ECHR.

The commitment to honour the Stormont House Agreement was repeated in the UK-Ireland *New Decade New Approach* Deal of January 2020 negotiated by Julian Smith. This committed the UK to legislate for the SHA, within 100 days. By this time Boris Johnson had become Prime Minister, he then removed Julian Smith as Secretary of State and replaced him with Brandon Lewis who unilaterally signalled, in the Ministerial Statement of March 2020 the abandonment of the SHA for the approach that ultimately resulted in the legacy Act.

The Bill was developed in an irregular manner, largely behind closed doors, and without transparency by Government. An internal NIO 'working group' was established but its membership and work remain confidential to date. At the beginning there was no engagement at all with NGOs, victims groups and political parties. Duties around public consultation were sidelined, as were requests from the Westminster Northern Ireland Affairs Committee. The Equality Commission for Northern Ireland twice investigated the NIO finding on both occasions it had breached procedural duties on policy development its statutory Equality Scheme.

A Command Paper was ultimately produced in July 2021, advocating for an amnesty broader in scope than that introduced by General Pinochet in Chile and a new legacy body reliant only on voluntary testimony. It is these proposals that have evolved into the present Act ultimately introduced into Westminster in May 2022 and pushed quickly through the House of Commons. The Bill took much longer in the Lords, where Government does not have control of the timetable, and ultimately became law in September 2023. Ministers on a number of occasions promised 'game-changing' amendments to the Bill which ultimately did not materialise. The Act has met with universal political opposition in Northern Ireland, as well as from the Irish Government and opposition parties in Dublin and Westminster.

The Northern Ireland legacy cases (*the McKerr group of cases*) are still under the supervision of the Council of Europe Committee of Ministers, who placed the issue on the agenda of ministerial representatives periodically, raising serious concerns regarding the abandonment of the SHA and the new proposals. There was significant bad faith by the UK authorities in responding both to the Council of Europe and UN concerns.

Throughout this time the UK authorities have been attempting to promote two different and contradictory narratives regarding the Bill. The first, often expressly articulated by Minsters reiterates the 'pernicious counter narrative' and 'witchunt' concerns and seeks to assure backbenchers in particular that the bill will shut down legacy investigations into the military who no longer will have to fear 'a knock at the door' as a result of its provisions. The second

narrative articulated to the international community and in broader official discourse seeks to argue that the Bill will be able to deliver ECHR-compliant investigations and really is a swich away towards an 'information-recovery' approach from the criminal justice system.

Significant official misinformation has been presented in support of this latter contention which has created a questionable official narrative as to why the Act has been put in place despite often clear statements from minsters themselves indicating an alternative agenda, and the factual matrix- i.e. the sequence of events, that has led to the Act.

Throughout this time CAJ has worked closely with academic colleagues in the Law School of Queen's University Belfast to produce authoritative critiques of the proposals and legislation and has followed the process closely. This includes regular CAJ submissions to the Committee of Ministers that have meticulously documented developments throughout the process, including critiquing the numerous amendments in the House of Lords.

In the context that the 'official truth' regarding the origins of the legislation continues to be articulated in its defence the purpose of this present compendium of submissions is to provide detailed narrative reference on the broad process of the Bill and its origins.

We anticipate this being a particularly useful resource capturing factual information regarding the purpose and origins of the legislation and the context it was introduced.

To this end:

Section 2 covers the process from the Good Friday Agreement (GFA) to Stormont House to the legacy bill. In the context that the contention legacy investigations have unduly focused on the security forces the first section (2.1) will examine the proportionality and effectiveness of legacy investigations into state actors. It will then (2.2) outline the process from the GFA through the package of measures to Stormont House. Section 2.3 will then provide a detailed narrative regarding the derailment and failures to implement the Stormont House Agreement, with up to the 2020 Written Ministerial Statement and 2021 Command Paper.

Section 3 of this report will then cover evidence the extent to which in recent years the 'Package of Measures' – (inquests, PSNI, Call In, Police Ombudsman investigations, civil litigation) have delivered information recovery for families, and how they were previously subject to limitation and obstruction. This reference material may be of assistance both in highlighting a broader pattern of official attempts to limit legacy investigations but also to challenge the official contention that the current system 'has not delivered for anyone'.

Section 4 of the report then covers the background narrative to the legislation. Section 4.1 captures ministerial objectives behind the bill from the 'pernicious' counter narrative speech of 2016, tabloid campaigns and more recent statements by ministers. Section 4.2 assesses contradictory official narratives behind the Bill.

Section 5 covers the passage of the Bill through Westminster, including the amendments made or declined to it, and the procedural irregularities in developing the policy and legislation.

Section 6 then captures the reaction to the Bill and legacy policy by United Nations and Council of Europe entities and mandate holders.

Section 7 covers further reference material on the Independent Commission on Reconciliation and Information Retrieval (ICRIR) that will be established by the Act. This covers (7.1) the UK position on ECHR obligations in legacy cases; the temporary nature of the ICRIR (7.2), and issues of ICRIR independence and effectiveness with reference to ECHR obligations (7.3-10).

It is foreseeable that the primary UK response to challenges that ECHR-compatible mechanisms are being closed will hinge on the argument that affected persons can instead avail of an ICRIR 'review' which can meet ECHR-standards and that the amnesty can be justified as it is necessary for reconciliation. This compendium we would hope assists in challenging these contentions as to the origins, purpose and provisions within the Act.

CAJ, November 2023

2. The Process: From Good Friday to Stormont House and the Legacy Act

2.1 The application of the rule of law to state actors during the conflict

Synopsis:

- *Whilst some state discourse and the mobilisation for a military amnesty was grounded in the contention that soldiers are being treated 'unfairly' and disproportionately subject to legacy cases, this is not borne out by statistics.*
- *There is evidence that the rule of law was often not adequately applied in practice to state actors during the conflict. This is most notable in arrangements at the start of the Troubles whereby there were no police investigations at all into military killings, hence the need of legacy cases to rebalance past practice.*

Proportionality in relation to prosecutions[1]

Given the official contestation over 'bias' in the justice system we feel it is important to set out first some statistical evidence.[2] This task is not as straight forward as it may seem. Pablo De Grieff, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, was invited by the UK Government as part of his mandate to assess the Northern Irish (NI) situation and undertook official visits in 2015 and 2016. His November 2016 report documents that despite 'requests to various relevant parties, surprisingly no entity could provide the Special Rapporteur with comprehensive data on the prosecution of State or non-State actors relating to the conflict.'[3]

Officially cited estimates of the number of republican and loyalist paramilitary prisoners during the conflict range from around 20,000–40,000.[4] These figures will relate to a range of offences.[5]

Convictions of state actors are more quantifiable given small numbers. In relation to fatal shootings, the British Army's official report of its operations in Northern Ireland (known as *Operation Banner*) cites that there were only four convictions of soldiers during the whole of

[1] This section is taken from: Submission from the Committee on the Administration of Justice (CAJ) to the United Nations Human Rights Committee in response to the Concluding Observations on the 7th Periodic Report of the UK under the International Covenant on Civil and Political Rights (ICCPR), June 2017, Follow up Procedure: "accountability for conflict-related violations in Northern Ireland" (CCPR/C/GBR/CO/7, paragraph 8).

[2] While international humanitarian law (such as the Geneva Conventions) did not apply during the NI conflict, criminal law did apply, including to state actors. During the NI conflict, there was a parallel justice system, with emergency legislation, separate categories for conflict and non conflict crime ('scheduled offences'), separate non-jury courts, separate prisons, and prisoner release following the GFA.

[3] UN DOC A/HRC/34/62/Add.1, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland, 17 November 2016, paragraph 49.

[4] OFMDFM 'Report of the Review Panel, Employers' Guidance on Recruiting People with Conflict-Related Convictions', March 2012, page 14.

[5] Up to 500 prisoners of conflict-related offenses were subject to an early release scheme provided in the 1998 Good Friday Agreement, after serving two further years.

the conflict, one of which was subsequently overturned on retrial.[6] In other cases the soldiers served only a small part of their sentences before being released under an Executive Order and returned to the army.[7]

The UK government's command paper estimates that state actors were *directly* responsible for around 360 conflict deaths, around 10% of the total.[8] This figure does not include however deaths attributable to security force collusion with paramilitary organisations. One NGO representing victims of the state estimates that when factoring in collusion state culpability would rise to around a third of deaths.[9]

It has not been possible to determine an accurate figure in the absence of effective investigations into the past. It has now been widely accepted including in clear authority from the courts and in decisions by policing bodies that effective and independent investigations have not yet taken place in relation to most deaths at the hands of the security forces.[10]

Official claims the 'vast majority' of state killings were 'lawful'

The UK government's July 2021 Command Paper contends that 'the vast majority of [Troubles related deaths perpetrated by Security Forces] were lawful.'[11] This claim remains very controversial. Of the deaths directly attributable to state actors in the conflict, academic research found that 63% of victims were undisputedly unarmed, with only 12% (24 people) having been in possession of a weapon, and a further 14 deaths listed as 'possible armed.'[12] The

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[6] "Operation banner in Northern Ireland an analysis of military operations, prepared under the direction of the Chief of the General Staff Army Code 71842", July 2006 (Operation Banner Official Report [subsequently withdrawn]), paragraph 427. The cases were namely R v Thain (1984) R v Clegg (1993) (acquitted on retrial in 1999) and R v Fisher and Wright (1995).

[7] http://www.patfinucanecentre.org/q-there-witch-hunt-against-ex-british-soldiers#_ftn3

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

[9] CAJ Apparatus of Impunity? Human rights violations and the Northern Ireland conflict (January 2015), p3. See further K. McEvoy (2017) Amnesties Prosecutions and the Rule of Law in Northern Ireland, Briefing Paper to the HC Defence Select Committee. Available https://www.dealingwiththepastni.com/project-outputs/expertevidence/house-of-commons-defence-select-committee Obviously, any state actor involved in collusive activities could also be liable for historical prosecutions. By way of illustration, in the Police Ombudsman report into the murders at Loughinisland, the Ombudsman documents the involvements of paid state agents "at the most senior levels within Loyalist paramilitary organisations" including their involvement in the importation of large amounts of weapons from Apartheid South Africa in the mid to late 1980s. The Ombudsman further documents that, according to police figures, these weapons were used in at least 70 murders and attempted murders and that the weapons were imported when a Brian Nelson, a Force Research Unit (FRU – A British Army unit in the UDA) was dispatched to South Africa for this purpose. Office of the Police Ombudsman Northern Ireland (2016) The Murders at the Heights Bar Loughinisland, 18 June 1994, p445. Belfast: OPONI. In addition, as noted elsewhere, the Operation Kenova inquiry is investigating approximately 50 murders involving the alleged state agent Stakeknife. In addition to investigating the actions of Republican paramilitaries Operation Kenova's terms of reference explicitly include 'whether there is evidence of criminal offences having been committed by members of the British Army, the Security Services or other Government agencies, in respect of the cases connected to the alleged agent known as Stakeknife.' See further Operation Kenova Terms of Reference: www.opkenova.co.uk/operation-kenova-terms-of-reference/.

[10] See pages 9-10 of Model Bill Team, Prosecutions, Imprisonment and the Stormont House Agreement.

[11] https://www.gov.uk/government/publications/addressing-the-legacy-of-northern-irelands-past, page 21.

[12] Prof Kieran McEvoy, evidence to Defence Select Committee of UK Parliament, 7 March 2017 (http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-

claim in the command paper that the 'vast majority' of killings by the security forces were 'lawful' is not backed by any evidence.

Through a Freedom of Information request we sought a copy of any assessment or analysis by the Northern Ireland Office (NIO) that led to this conclusion. Despite the statement being a clear-cut claim of legal fact the response from the NIO was that it would cost too much to search through their records to recover any documents that had informed it.[13] It would be reasonable to expect that such a conclusion in the command paper would be supported by some sort of prior assessment. No such evidence was presented to us. In the absence of independent, effective investigations into killings by the security forces it is not possible to reach a conclusion as to whether they were lawful.

In response to an appeal to the freedom of information request the NIO sought to rely on the low number of convictions of soldiers as an indicator of lawfulness. As further detailed below the notable a lack of prosecutions and convictions of state actors at the time is not however a reliable indicator of lawfulness, given the lack of effective investigations (or in many cases no investigations) and concerns over prosecutorial decisions at the time.

It is important to emphasise that the only circumstances whereby the use of lethal force by the security forces would be 'lawful' would be where the victim at the time was reasonably believed to be engaged in activity that constituted an imminent threat of death or serious injury to another person and the only preventative measure possible was the use of potentially lethal force. If in such circumstances a bystander was killed by the security forces the legality of the use of force would depend on whether all feasible preventative precautions had been taken.[14]

The claim in the command paper therefore implies many if not most victims of the state were 'guilty' of a serious offence at the time they were killed. It is notable that in some of the most high-profile mass state killings of the conflict such as the Bloody Sunday and Ballymurphy massacres, the official position has been that the use of force was so justified, until the facts of the incidents have been independently determined.

Deficiencies in investigations into state killings during the Troubles

Between 1970 and 1973 (the most violent period of the conflict), investigations into the soldiers' actions were not conducted by the regular police but by the Royal Military Police (RMP) in a process characterised by procedural anomalies. As contemporary military documents produced for the Saville Inquiry confirmed 'the RMP investigator was out for information for managerial, not criminal purposes.'[15] This practice was strongly criticised by the former Lord Chief Justice of Northern Ireland, and was ultimately stopped at the insistence of the then

committee/investigations-into-fatalities-in-northern-ireland-involving-british-military-personnel/written/48436.html) citing research by Professor Fionnuala Ní Aoláin (Ulster University and Minnesota Law School) .F. Ní Aoláin (2000) 'The Politics of Force: Conflict Management and State Violence in Northern Ireland - A Brief Historical Overview.' Minnesota Legal Studies Research Paper No. 12-12, p.23.

[13] NIO FOI/21/130, response of 26 August 2021.

[14] In accordance with Article 2 (right to life) of the ECHR, for fuller detail see: 'European Court of Human Rights, Guide on Article 2 of the European Convention on Human Rights, Right to life, Updated on 30 April 2021.'

[15] Saville Inquiry Volume IX, para 173.23.

newly appointed DPP for Northern Ireland Sir Barry Shaw, himself a former soldier.[16] There is clear authority from the domestic courts that RMP investigations, when judged by the standards of 1971-72, did not meet legal requirements under Article 2 of the ECHR.[17]

This process has also been alluded to in 2021 by O'Hara J in his ruling relating to the prosecution of Soldiers A and C, over the killing of Joe McCann in 1972:

> At that time, in fact until late 1973, an understanding was in place between the RUC and the Army whereby the RUC did not arrest and question, or even take witness statements from, soldiers involved in shootings such as this one. This appalling practice was designed, at least in part, to protect soldiers from being prosecuted and in very large measure it succeeded.[18]

The effect was that between 1969 and 1974 there were no criminal prosecutions against state actors in relation to deaths. In this period 189 people were killed by state actors, 170 by the military.[19] There is archival evidence of political intervention in the prosecutorial process and other irregularities.[20] There is also similar evidence of digression from the standard prosecutorial process in relation to aspects of security policy.[21]

In examining the process, the Special Rapporteur concludes that in addition to the exclusive focus on deaths in legacy cases, 'The impunity gap in Northern Ireland does not come so much from early release as from apparent selectivity in the deployment of prosecutorial resources.' The report also concludes that the figures on the prosecution of state actors do not coincide even with the figure of 10% of deaths directly attributed to the state and warns, 'Manifest unevenness in the distribution of investigatory and prosecutorial initiatives undermines confidence in rule of law institutions.'[22]

Until 2022 there was not a single conviction of a member of the security forces because of a legacy investigation. In November 2022 the first conviction of a solider in a legacy cases occurred with a guilty verdict for manslaughter for the 1988 shooting of Aidan McAnespie. A sentence of three years in prison was handed down but suspended and no jail time was served.[23]

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[16] Sir Robert (later Lord) Lowry, R v Foxford, [1974] NI 181, at p. 200.
[17] *In the Matter of an Application by Mary Louise Thompson for Judicial Review [2003] NIQB 80*
[18] R v Solider A and C, [2021] NICC 3
[19] Prof Kieran McEvoy, citing research by Professor Fionnuala Ní Aoláin (as above).
[20] CAJ Apparatus of Impunity? Human rights violations and the Northern Ireland conflict (January 2015), chapter 8.
[21] The De Silva review into the death of Pat Finucane declassifies records that highlight a policy of running informants within the middle ranks of proscribed organisations which it states "meant they would have to become involved in terrorist activity and operate with a degree of immunity from prosecution." This was part of a system of holding pack information from the judicial process, which the record concedes was 'technically' in breach of guidelines Declassified Records of a high level RUC–NIO meeting in March 1987, in the The Report of the Patrick Finucane Review Volume 1 [de Silva Review], paragraph 4.36.
[22] UNSR report, paragraphs 54 and 59. Further exploration of this matter is found in the CAJ-QUB Model Bill Team: response to Command Paper Addressing the Legacy of Northern Ireland's Past: The Model Bill Team's Response to the NIO Proposals, September 2021
[23] https://www.amnesty.org.uk/press-releases/northern-ireland-ex-soldier-guilty-manslaughter-aidan-mcanespie-troubles-case

2.2 The GFA, 'Package of Measures' and Stormont House Agreement

Synopsis:

- *The GFA contained no transitional justice mechanism. Rather, following a series of cases to the European Court of Human Rights a 'package of measures' was agreed to by the UK, to deliver ECHR-compatible investigations into conflict-related deaths.*
- *There was official obstruction of the Package of Measures delivering its work by the UK authorities (patterns include delayed disclosure, withholding resources, and control of appointments). This obstruction—coupled with undoubted gaps—led to a series of negotiations for new dedicated transitional justice mechanisms which ultimately led to the UK & Ireland, along with most NI parties to agree the Stormont House Agreement in 2014.*
- *The SHA had four main mechanisms: the Historical Investigations Unit (HIU), the Independent Commission on Information Retrieval (ICIR), the Oral History Archive (OHA), and the Implementation and Reconciliation Group (IRG). The SHA also provided for Inquests and civil litigation to remain intact.*

European Court of Human Rights Cases and the 'Package of Measures'

While there were a range of 'past facing' elements contained in the 1998 Good Friday Agreement (GFA)—including provisions for support for victims and the early release of prisoners convicted of conflict-related offences—the Agreement contained no overarching mechanism such as a Truth and Reconciliation Commission to comprehensively 'deal with the past.' The GFA did commit to the incorporation of the ECHR into NI law, undertaken through the Human Rights Act (HRA) of 1998.

A series of cases to the ECtHR (the *McKerr* group of cases) found procedural violations of Article 2 ECHR in relation to cases involving both direct killings by the security forces and security force collusion with loyalist paramilitary groups.

These cases, still under supervision by the CoE Committee of Ministers (CM), led to the United Kingdom agreeing a 'package of measures' of changes to existing judicial and investigative bodies, to deliver ECHR-compatible investigations into conflict-related cases.

In the intervening years, in part to meet legal obligations under the ECHR and to honour commitments made in negotiations during the peace process, a 'package of measures' (or 'piecemeal') approach to the past in Northern Ireland emerged.[24] This package of measures included:

[24] As a result of the UK having been found to have been in breach of its human rights obligations under the ECHR in a number of important Northern Ireland conflict-related judgments (often referred to as 'the McKerr group of cases') the government have repeatedly cited the package of measures (including the SHA) as its way of addressing those legal obligations. See e.g. CAJ (March 2020) Submission to the Committee of Ministers in Relation to the Supervision of the Cases Concerning the Action of the Security Forces in Northern Ireland (January 2020). See also K. McEvoy (2013) Dealing with the Past? An Overview of Legal and Political Approaches Relating to the Conflict in and about Northern Ireland; United Nation (2016) Report of the Special Rapporteur on the Promotion of Truth,

- public inquiries into controversial events;
- the work of the Office of the Police Ombudsman (OPONI, investigating allegations of historical police malfeasance);
- coronial inquests into conflict-related deaths;
- police-led investigations and reviews under first the Historical Enquiries Team (HET) and now the Police Service of Northern Ireland (PSNI) Legacy Investigation Branch (LIB);
- Changes into prosecutorial decision making.

There was also further litigation by affected families in the domestic courts and the European Court of Human Rights.[25]

UK authorities broadly sought to limit or obstruct the work of the package of measures to prevent effective investigations into conflict related cases. Numerous battles were fought by families, non-governmental organisations and their legal reps, along with the CM to ensure that the mechanisms could finally deliver ECHR compatible investigations. These negotiations over the package of measures led to lengthy negotiations that resulted in the Stormont House Agreement (SHA) in 2014.

However, the UK government never legislated for the SHA, so the 'package of measures' remained the ad hoc or de facto series of mechanisms available for dealing with the past in Northern Ireland.

The Stormont House Agreement

After lengthy negotiations, in 2014, the British and Irish governments and the five main political parties in Northern Ireland agreed to create four mechanisms to deal with legacy the past.[26] The following four mechanisms were proposed by the SHA (but were never implemented, despite the UK government's repeated promises to do so):

- **Historical Investigations Unit (HIU):** An independent investigative institution to take over the past-focused work previously undertaken by the HET and OPONI. It was given the equivalent powers of the PSNI to arrest, stop, search, question, retain evidence and so forth. Under the terms of the SHA, the HIU would have been required to carry out investigations in a manner which is compatible with Article 2 of the ECHR (e.g., initiated by the state, independent, effective, prompt, transparent, with family participation and capable of leading to a prosecution). The HIU would have been required to produce a report for the affected families in the case of each of the deaths that it investigates. The Director of Public Prosecutions would decide whether the threshold was met to initiate a

Justice, Reparation and Guarantees of Non-Recurrence on his Mission to the United Kingdom of Great Britain and Northern Ireland.

[25] MBT: Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland 2020 [p6]. Further detail on obstruction of the package of measures is set out on each mechanism in the CAJ/Queens University 'Apparatus of Impunity' report 2015.

[26] The following information taken from: MBT: Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland 2020 [p6-7]

prosecution. Anyone convicted of a conflict-related offence would serve a maximum of two years under the terms of the Good Friday Agreement.

- **Independent Commission on Information Retrieval (ICIR):** An independent international body established by treaty by the UK and Irish governments. This body would have allowed victims and survivors to seek and privately receive information about the circumstances surrounding the Troubles-related death of their next of kin. Where an individual requests information through this process, the ICIR would seek to engage with those who may have knowledge of their relative's death. To facilitate those with such information coming forward, the SHA would not have used information provided for criminal or civil proceedings. In addition, there would be guarantees that the process would operate confidentially and the ICIR would not make public, nor disclose to families, the names of persons who provide information nor persons identified as being responsible for the deaths.
- **Oral History Archive (OHA):** Designed to provide a central place where people from all backgrounds (and from throughout the UK and Ireland) could share experiences and narratives related to the Troubles. The SHA noted that, as well as collecting new material, the OHA would attempt to 'draw together and work with existing oral history projects.' The SHA also stipulated the OHA to be 'independent and free from political interference.'
- **Implementation and Reconciliation Group (IRG):** This body would oversee themes, archives and information recovery. Under the terms of the SHA, the IRG would commission a report on themes from 'independent academic experts.' The evidence base for patterns and themes would be referred to the IRG from any of the other legacy mechanisms. The IRG was envisaged in the SHA as consisting primarily of political nominees, with the DUP appointing three members, Sinn Féin two, and the other parties which were signatories to the Agreement appointing one each, as would the two governments – with an independent chair of international standing appointed by First Minister and Deputy First Minister. The work of the IRG was designed to 'promote reconciliation' and a 'better understanding of the past' and to 'reduce sectarianism.' In the context of that work, the UK and Irish governments would consider 'statements of acknowledgement' and 'would expect others to do the same.'

The SHA was concluded after a decade and a half of prevarication in the course of which two major reports (from the Consultative Group on the Past and from Richard Haass and Meghan O'Sullivan) were published but not implemented.[27] This agreement was described by the Committee of Ministers of the Council of Europe, which oversees implementation of the

[27] Consultative Group on the Past, *Report of the Consultative Group on the Past* (2009), https://cain.ulster.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf; An Agreement Among the Parties of the Northern Ireland Executive on Parades, Select Commemorations, and Related Protests; Flags and Emblems; and Contending with the Past (2013), https://www.northernireland.gov.uk/publications/haass-report-proposed-agreement.

decisions of the ECtHR, as a 'key turning point' in the fulfilment of the UK's international law obligations.[28]

In a context whereby the UK had yet to implement satisfactory remedies to address the rulings of the ECtHR, the UK government repeatedly pointed to the promise to implement the SHA (and in particular to establish the HIU) as the mechanism through which it would finally do so.

However, the UK never legislated for the SHA and began delaying the legislation to create these mechanisms almost immediately after the SHA was agreed.

2.3 The derailment of the Stormont House Agreement

Synopsis:

- *The United Kingdom and Ireland agreed to the bilateral Stormont House Agreement in 2014.[29] The United Kingdom also agreed to a bilateral implementation treaty with Ireland on the ICIR in 2015.*
- *However, in 2015, the first UK rollback stalled the process of implementing the SHA: the UK published a policy paper, followed by leaked legislation that would have provided for ministers to hold a 'national security veto' over the contents of otherwise independent HIU investigation reports.*
- *The UK government, however, never legislated for the SHA, seeking to roll back on its provisions before abandoning it completely with the adoption of the Legacy Bill.*
- *Ministers in introducing the legacy bill have sought to promote an alternative narrative regarding the derailment of the SHA. This section sets out the sequence of events as recorded in our submissions.*

UK policy paper and leaked legislation (2015)[30]

On 23 September 2015, the UK Government published a policy paper detailing elements of a draft Bill to establish the HIU and other bodies contained in the Stormont House Agreement. In addition to outlining the HIU's investigative powers, the policy paper stated that the HIU would, 'be required to refer decisions on the disclosure of any information which might prejudice national security to the United Kingdom Government, which may prevent disclosure if necessary.'[31]

This provision was outside the terms of the Stormont House Agreement, and essentially stalled the process. Draft legislation was widely leaked to the media and contained detailed national

[28] The commentary by the Committee at its March 2021 meeting is available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a18992.
[29] https://www.gov.uk/government/publications/the-stormont-house-agreement.
[30] The following is taken from a CAJ submission to the UN Human Rights Committee in 2017: Submission from the Committee on the Administration of Justice (CAJ) to the United Nations Human Rights Committee in response to the Concluding Observations on the 7th Periodic Report of the UK under the International Covenant on Civil and Political Rights (ICCPR), June 2017, Follow up Procedure: "accountability for conflict-related violations in Northern Ireland" (CCPR/C/GBR/CO/7, paragraph 8).
[31] McKerr v UK (Lead) status of execution.

security exemptions never seen in UK legislation. The draft bill provided for this category of 'sensitive' material to include any information which hypothetically could prejudice UK 'national security' interests, but also extended the category of 'sensitive' material to any information which was supplied by the security and intelligence services, or any intelligence information from the police or military.

The draft bill contained a mandatory duty on any 'Relevant Authority' (government, military, police, ombudsman, ministers, and security/intelligence agencies) to pre-classify any information they have as 'sensitive information'. A 'relevant authority' could also identify information held by another relevant authority as 'sensitive information'. So even if the police decided some information they held was not to be treated as 'sensitive,' a minister or the security services could overrule them. There would have also been a mandatory duty on the HIU to identify any information it held in the category of 'sensitive' information. Once materials were classified as being 'sensitive' national security information the HIU would not be permitted to disclose the information, notwithstanding two exemptions. The first exemption would be when the information was supplied to the Secretary of State, or under certain circumstances to criminal justice bodies. The second exemption would be when the Secretary of State gave permission for the disclosure. There was no right to appeal.

Essentially therefore the decision maker on what 'sensitive' information could be disclosed to families in relation to findings of investigations would be a government minister. Should a member of the HIU, past or present, disclose sensitive information to a family without the permission of the Secretary of State, they would have committed a criminal offence with penalty of up to two years in prison. By contrast, unusually, there was no penalty against public authorities for failing to disclose requested documents to the HIU.

The UK committed to consulting on draft legislation in June 2015 and introducing the bill into the UK Parliament in the autumn session in October 2015. This did not happen. There were further talks with the British and Irish governments and Northern Ireland political parties on this and a range of (non-legacy) SHA implementation issues leading to a fresh implementation agreement in November 2015.

The 'Fresh Start' SHA Implementation Agreement (2015)

In November 2015 a new agreement to address implementation of the Stormont House Agreement entitled 'A Fresh Start' was published by the UK. This addressed other elements of the SHA but did not include any agreement on the SHA legacy institutions. There is wide consensus that the stumbling block was the ministerial national security veto. Northern Ireland's then First Minister, Peter Robinson MLA, stated that the national security caveat on disclosure was the only issue on which consensus had not been achieved in the negotiations on changes to the draft bill. The Minister for Foreign Affairs for the Republic of Ireland, Charlie Flannigan TD stated:

> The issue that remains unresolved is the issue of disclosure and national security and I don't believe it's acceptable that the smothering blanket of national

> security should on all occasions be used in the manner you've seen in Northern Ireland over a number of years.[32]

The report of the UN Special Rapporteur (2015)

On 18 November 2015 the Special Rapporteur Pablo de Grieff issued preliminary observations and recommendations at the conclusion of his ten-day visit to the UK. He noted that 'the legacies of the past have not been successfully or comprehensively addressed on any of these four dimensions (truth, justice, reparations and guarantees of non-recurrence).'

He also recommended that:

> Any future arrangements for truth-disclosure and for justice will need to take on board the fact that none of the stakeholders can assume the position of neutral arbiters of "the troubles" and therefore will have to incorporate procedures to guarantee both the reality and the appearance of independence and impartiality.[33]

On the matter of national security, he noted:

> Although everyone must acknowledge the significance of national security concerns, it must also be acknowledged that particularly in the days we are living in, it is easy to use "national security" as a blanket term. ...In particular, national security, in accordance with both national and international obligations, can only be served within the limits of the law, and allowing for adequate means of comprehensive redress in cases of breaches of obligations.[34]

The Committee of Ministers (2015-2016)

The UK reply on 20 November 2015 to a previous CAJ submission to the Committee of Ministers of the Council of Europe makes the following statement, in relation to the HIU, which misinterprets the positive duties under Article 6 ICCPR/Article 2 ECHR (right to life):

> The UK Government, like other member states, is subject to a positive duty under Article 2 of the Convention to take appropriate steps to safeguard the lives of those within its jurisdiction. To permit the disclosure of information which would prejudice national security would be incompatible with this duty.[35]

The UK also sought to portray the impasse over Stormont House Agreement implementation as one created by disagreements between the unionist and nationalist parties in Northern Ireland.[36]

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[32] Charlie Flanagan critical of national security 'smothering blanket' *Irish News* 27 November 2015.
[33] Preliminary observations and recommendations by the Special Rapporteur on his visit to the United Kingdom of Great Britain and Northern Ireland, London, 18 November 2015.
[34] As above.
[35] Communication from a NGO (Committee on the Administration of Justice (CAJ)) (24/11/2015) in the McKerr group of cases against the United Kingdom and reply from the authorities (30/11/2015) (Application No. 28883/95), p16.
[36] DH-DD(2016)528: Communication from a NGO (Committee on the Administration of Justice (CAJ)) (19/04/2016) in the McKerr group of cases against the United Kingdom (Application No. 28883/95) and reply from the authorities (26/04/2016).

This position was contradicted by Northern Ireland's former First Minister of the Democratic Unionist Party (DUP), Arlene Foster MLA, who has consistently maintained that the impasse on this matter was one between the UK government and the nationalist parties.

The UK government subsequently stated that during the talks it had 'proposed a dedicated appeals mechanism that would allow families or the HIU Director to appeal the Secretary of State's decision directly to a High Court judge.'[37] However, no further details of this mechanism, its thresholds, powers or costs were set out at this point. Implicit in the proposal was that the Secretary of State, and not the head of the HIU, would still be the primary decision-maker regarding disclosure of investigations reports. Implicit also was that the UK intended to still maintain the undefined blanket concept of 'national security' as the criterion for non-disclosure of information to families.[38]

In the summer of 2016, the Secretary of State was replaced in a cabinet reshuffle with James Brokenshire MP. On the 9 September 2016 Mr Brokenshire gave a speech which outlined that he had been meeting groups of victims and survivors of the conflict, reaffirmed commitment to delivering the Stormont House Agreement legacy mechanisms, and in relation to disclosure stated, 'I am determined to strike the right balance between the obligation to the families to provide comprehensive disclosure, and my fundamental obligation as Secretary of State to protect lives and keep people safe and secure.'[39] The Secretary of State indicated discussions with political parties had been ongoing, and that there would be public consultation on taking the proposals forward. The consultation did not occur until 2018.

The Council of Europe Ministers' Deputies most pronounced on the Northern Ireland legacy cases at their 1273rd meeting – 6-8 December 2016. In summary they:

- Expressed concern that the HIU and other Stormont House Agreement institutions had still not been legislated for;
- 'Called upon the authorities to take all necessary measures to ensure the HIU can be established and start its work without any further delay, particularly in light of the length of time that has already passed since these judgments became final, and the failure of previous initiatives to achieve effective, expeditious investigations;'
- Called on the authorities to ensure that a proposed public consultation on the SHA legislation was launched and legislation introduced into Parliament to establish the HIU without further delay; and

[37] As above, page 18.

[38] CAJ and academic colleagues have published both a Model Bill which would implement the Stormont House Agreement in a human rights compliant manner (http://www.caj.org.uk/contents/1413), along with an alternative model on how to deal with information redaction from the HIU – this is available at: https://amnesties-prosecution-public-interest.co.uk/themainevent/wp-content/uploads/2017/04/Independent-Mechanism-to-Oversee-Redactions-for-Dealing-with-the-Past-Final-3rd-April-2017.pdf.

[39] https://www.gov.uk/government/speeches/secretary-of-states-speech-to-2016-british-irish-association-conference.

- Regretted the necessary resources had not been provided for the Legacy Inquest Unit and strongly urged the authorities as a matter of urgency to implement the Lord Chief Justices plan and to ensure timely disclosure to inquests.

Westminster Defence Committee call for a statute of limitations (2017)[40]

In April 2017 the Defence Committee of the UK Parliament published an inquiry report calling for an amnesty, referred to as a statute of limitations, covering all conflict-related incidents until 1998 involving members of the armed forces.[41] This was in the context of the first two decisions to prosecute soldiers for NI conflict-related deaths because of legacy investigations. The proposal from the Committee was in part predicated on a position that there was disproportionate focus on military cases in PSNI legacy investigations, although this assertion is not supported by relevant data.

In November 2017 the UK government response to the Committee indicated it would include a recommendation on a 'statute of limitations' for members of the armed forces in the SHA consultation, despite this being outside the terms of the SHA. This question was ultimately not explicitly included in the consultation although a question on alternative approaches was. In November 2017 supporters of the proposed amnesty in the UK Parliament also introduced a (non-government) Armed Forces (Statute of Limitations) Bill.[42] The Bill would prevent proceedings being taken against members of the armed forces if ten years had passed, which would include all NI legacy cases. The issue of a statute of limitations led to a split in the UK cabinet which delayed the SHA consultation, as discussed further below.

Strong legal arguments have been presented against a statute of limitations.[43] There has been an acknowledgement within the UK Government by the Secretary of State for Northern Ireland that a statute of limitations for the military only would conflict with international law. The Secretary of State therefore ruled out support for such a proposal.[44] However, the statute of limitations came back on the table in 2019.

Delayed public consultation on SHA (2017-2018)

At the time of the publication of the Council of Europe decision, the Secretary of State for Northern Ireland announced a further and potentially indefinite delay to the establishment of the HIU. The Secretary of State introduced a pre-condition of 'political consensus' between

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[40] The following information taken from pages 9-11 of the CAJ Rule 9 submission to the Committee of Ministers of February 2019.

[41] The Committee also sought a truth-recovery mechanism and urged the government to consider extending such an amnesty to the police and other security personnel and, in implicit recognition that this may be discriminatory, stated that it would be a matter for a future government to determine whether such an amnesty should cover all conflict-related incidents. (House of Commons Select Committee 'Investigations into fatalities in Northern Ireland involving British military personnel'HC1064 April 2017).

[42] https://services.parliament.uk/bills/2017-19/armedforcesstatuteoflimitations.html

[43] https://www.theguardian.com/commentisfree/2018/may/11/investigations-troubles-ex-soldiers-northern-ireland?CMP=share_btn_tw

[44] Troubles legacy: Karen Bradley rules out statute of limitations BBC News 1 October 2018. https://www.bbc.co.uk/news/uk-northern-ireland-45701869. See also http://eamonnmallie.com/2018/09/exclusive-sos-karen-bradley-writes-for-eamonnmallie-com-on-legacy-of-the-troubles/.

Northern Ireland parties for any further progress, essentially providing for a veto for those opposed to independent investigations, despite ECHR Article 2 imposing binding procedural requirements on the UK.[45]

The Northern Ireland Executive collapsed in January 2017 and fresh elections took place on the 2 March 2017. The failure to implement the SHA legislation and other previous agreements was cited as one reason amongst others for the collapse of the Executive.

The British and Irish Governments and the Northern Irish political parties then entered further negotiations on a range of issues including the implementation of the SHA. Deadlines for agreement were extended several times but no agreement was reached through these negotiations to allow the restoration of the Northern Ireland Executive. The talks were subsequently suspended in light of the decision to call a UK General Election in June 2017.

After the snap election in June 2017, the minority Conservative administration entered into a Confidence and Supply agreement with the Democratic Unionist Party (DUP – the largest NI party). This agreement committed to the SHA consultation and the SHA's implementation, with the qualification that the SHA bodies did not 'unfairly' focus 'on former members of the armed forces or police.'[46]

In February 2018 an agreement was briefly reached between the DUP and Sinn Féin (the two main NI parties) to restore power sharing. Reportedly this included commitments from the UK government to Sinn Féin to proceed with the SHA consultation; not to include a question of a 'statute of limitations' for the security forces in the consultation, and to release funding for legacy inquests for that financial year.[47] Within a few days however the DUP withdrew its support for the deal.[48]

As the consultation on the SHA was not dependent on consensus between NI parties there were further calls for its publication at this point. Whilst the UK had long committed to do so there was then a further delay until May 2018 due to reported strong opposition within the UK Executive (cabinet) primarily from the Ministry of Defence. The opposition reportedly focused on the question of an amnesty (in the form of a statute of limitations, discussed more below) being added to the SHA, which would have been outside the terms of the SHA.[49]

There was also around this time a proposal for a veto to be vested in the UK Attorney General over soldier prosecutions.[50] This proposal was reportedly put forward by Conservative MPs and members of the UK Government who support a military amnesty. The Attorney General was reported to be considering such a proposal at a time that Conservative members of the UK

[45] http://www.bbc.co.uk/news/uk-northern-ireland-38147206

[46] DUP-Tory Confidence and Supply Agreement – financial Annex, UK Financial Support for Northern Ireland https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/uk-government-financial-support-for-northern-ireland

[47] http://eamonnmallie.com/2018/02/questions-no-answers%E2%80%8B-legacy-deal-brian-rowan/

[48] http://eamonnmallie.com/2018/02/new-light-shone-draft-agreement-eamonn-mallie/

[49] https://www.theguardian.com/uk-news/2018/may/11/consultation-launched-unit-investigate-troubles-era-killings-northern-ireland

[50] The following information taken from pages 9-11 of the CAJ Rule 9 submission to the Committee of Ministers of February 2019.

Parliament, including former a defence minister and former heads of the military, petitioned the UK Prime Minister to drop the SHA.[51]

CAJ wrote to the Advocate General to raise concerns that any such proposal would mark a reversal of the reforms of the NI Peace Settlement. The Criminal Justice Review, established under the Belfast Good Friday Agreement, when considering the question of the AG's role recommended that 'there should be no power for the Attorney General to direct the prosecutor, whether in individual cases or on policy matters.'[52] The Review Group noted in their report that 'it is clear from comments made to us throughout the consultation period that independence from political influence is what is sought above all else.'[53] They therefore went on to say that 'We see the Attorney General [for Northern Ireland] as a non-political figure drawn from the ranks of senior lawyers.'[54] They recommended that legislation should 'confirm the independence of the prosecutor' and 'make it an offence for anyone without a legitimate interest in a case to seek to influence the prosecutor not to pursue it.'[55] Many of the recommendations of the Review Group were enacted in the Justice (Northern Ireland) Acts 2002 and 2004, and the NI Attorney General no longer has the powers of superintendence over the Director of Public Prosecutions. Such a proposal would have therefore considerably reversed the justice reforms of the peace settlement and endanger Article 2 compliance.

The UK government finally conducted its public consultation on the SHA, starting in May 2018, which ran for 21 weeks. There were over 17,000 written responses to the consultation. In July 2019, the UK government published an analysis of those public responses.[56] The subsequent UK Command Paper, following the abandonment of the SHA, failed to mention that, according to the NIO's own analysis of the consultation process, 'there was majority broad support for the institutional framework of the SHA' (p.12) and that a 'clear majority of all respondents' opposed an amnesty or statute of limitations, with many arguing such a move 'could risk progress towards reconciliation'.[57]

Amendments to NI legislation to consider Statute of Limitations (2019)

Despite acknowledging that a statute of limitations would conflict with international law, and despite stated support for the SHA, Conservative and DUP MPs in July 2019 voted to amend other legislation in the UK Parliament to work towards the objective of the introduction of measures that would provide a level of immunity from prosecution for the security forces.

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[51] Northern Ireland: Tory MPs urge Theresa May to ditch unsolved killings probe, BBC News Online, 23 October 2018, https://www.bbc.co.uk/news/uk-politics-45947678

[52] Review of the Criminal Justice System in Northern Ireland. HMSO. March 2000 Para. 4.162

[53] Ibid. Para. 4.157

[54] Ibid. Para. 4.160

[55] Ibid. Para. 4.163

[56] Northern Ireland Office, *Addressing the Legacy of the Northern Ireland's Past: Analysis of the Consultation Responses* (2019)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814805/Addressing_the_Legacy_of_the_Past_-_Analysis_of_the_consultation_responses.pdf

[57] Ibid, p.21 – emphasis in the original. This information was taken from CAJ-QUB Model Bill Team: response to Command Paper Addressing the Legacy of Northern Ireland's Past: The Model Bill Team's Response to the NIO Proposals, September 2021

The Northern Ireland (Executive Formation) Act 2019 obliges the Secretary of State to publish a report on progress towards forming an NI Executive (section 3). This provision was amended in the UK House of Commons to include two extra reporting duties, namely (in summary):

- Report on protecting the security forces from 'repeated' investigation through a presumption of non-prosecution where there is not compelling new evidence through a Statute of Limitations or by another legal mechanism;
- Report on progress towards developing prosecution guidance by the Attorney General for Northern Ireland in respect of certain Troubles-related incidents differentiating where the alleged offender had been lawfully or unlawfully 'supplied' with a weapon.[58]

The first amendment was pressed to division and carried by 308 votes (including all Tory and DUP MPs voting) to 228 by other parties. The second amendment was then also approved.

These changes to prosecutorial process, limiting the independence of the Director of Public Prosecutions (DPP), would not only conflict with the SHA[59] and dismantle key reforms introduced by the peace settlement, but would also rollback the General Measures agreed to by the UK, in relation to independent prosecutorial decisions, because of the current group of cases.

A cornerstone of the current reformed justice system is that prosecutorial decision making is vested in an independent Director of Public Prosecutions (DPP) and that prosecutorial decisions are made based on the statutory Code for Prosecutors. The Statutory Code for Prosecutors is issued by the DPP (not the Attorney General for Northern Ireland nor either legislature) under s37 of the Justice Northern Ireland Act 2002.[60]

In *Shanaghan v the UK* the Court concluded the DPP was institutionally independent at the time, but went on to state that 'where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance

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[58] Section 3 http://www.legislation.gov.uk/ukpga/2019/22/contents/enacted
3: Reports on progress towards forming an Executive and other matters
(1)The Secretary of State must, on or before 4 September 2019, publish a report explaining what progress has been made towards the formation of an Executive in Northern Ireland (unless an Executive has already been formed).
……
(8)The report under subsection (1) must include a report on progress made towards protecting veterans of the Armed Forces and other security personnel from repeated investigation for Troubles-related incidents by introducing a presumption of non-prosecution, in the absence of compelling new evidence, whether in the form of a Qualified Statute of Limitations or by some other legal mechanism.
(9)The report under subsection (1) must include a report on progress made towards developing new prosecution guidance for legacy cases of Troubles-related incidents by the Attorney General for Northern Ireland to take into account whether or not the person who allegedly committed an offence had the means to do so because that person had been lawfully supplied with a deadly weapon, with a presumption in favour of prosecuting in cases where a person who has allegedly committed an offence had the means to do so because that person had been unlawfully supplied with a deadly weapon.

[59] The SHA maintains that in relation to legacy investigations by the Historical Investigations Unit (HIU) "the decision to prosecute is a matter of the DPP." Stormont House Agreement, paragraph 35.

[60] https://www.legislation.gov.uk/ukpga/2002/26/section/37

of independence in his decision-making.'[61] A General measure on the giving of reasons for prosecutorial decision was closed in 2007 following the adoption of the statutory Code for Prosecutors.[62]

To progress the first envisaged provision of a presumption for non-prosecution for members of the security forces where there is not 'compelling' new evidence would usurp the function of decision making in the Code for Prosecutors. The provision also confuses and conflates the investigative and prosecutorial functions. This evidential threshold is higher than the *Brecknell* threshold[63] that required investigation and potential prosecution.

The then Attorney General for Northern Ireland (AGNI), John Larkin, had previously advocated for an unconditional amnesty.[64] In relation to guidance it is no longer the role of the AGNI to issue prosecutorial guidance, rather, as above, this function is vested in the DPP. These reforms took place against a backdrop of controversial political interventions by former Attorney Generals to prevent prosecutions of members of the security forces. The Criminal Justice Review, an outworking of the 1998 Belfast/Good Friday Agreement, recommended that legislation should 'confirm the independence of the prosecutor' and 'there should be no power for the Attorney General to direct the prosecutor, whether in individual cases or on policy matters.'[65]

A central tenant of the framing of the envisaged AGNI Guidance would have been to differentiate a presumption of prosecution on the basis as to whether the suspect had been lawfully or unlawfully 'supplied' with the weapon, rather than what is then done with the weapon.

The intention therefore appeared to be to introduce a presumption against prosecution in Troubles-legacy cases only where the accused person had been 'lawful supplied' with the weapon in question.

It is not clear if the scope of 'lawfully supplied' is only intended to cover service issue weapons to the RUC (police) or armed forces, or also to seek to stop prosecutions in 'collusion' cases where agents within paramilitary groups were supplied with weapons by members of RUC Special Branch or British Army intelligence, that were then used in killings (presuming such services still wish to try and maintain such activities were 'lawful').

For example, the 1992 Ormeau Road Bookmakers massacre Report by the Police Ombudsman was one of those currently held back by PSNI material not having been previously disclosed to the Ombudsman. Legal representatives of a victim have argued the evidence in this case suggested that members of the loyalist paramilitary gang that carried out the atrocity were working as State Agents and that the weapons used in the shooting, including a Browning

[61] Shanaghan v United Kingdom (Application no. 37715/97, 4th August 2001), paragraphs 107-108.
[62] Committee of Ministers Interim Resolution CM/ResDH(2007)73.
[63] Namely evidence/ information / credible allegation relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing (Brecknell v UK, [71])
[64] For a critique see Professor Bill Rolston 'Amnesty: some thoughts in response to the Attorney General' Rights NI 2013
[65] Review of the Criminal Justice System in Northern Ireland. HMSO. March 2000 Para. 4.162-3

handgun and VZ58 rifle, were supplied 'to the murder gang as a result of deliberate actions and/or culpable omissions of the security forces and security services.'[66]

Such a differentiation of presumption of non-prosecution on this basis would unduly interfere with the procedural duties under Article 2 ECHR, given as it would leave circumstances where it was not possible to prosecute killings that were unlawful by virtue of Article 2. The UN Committee Against Torture stated that it:

> Remains concerned by recent statements by high-level officials that they are contemplating measures to shield former public officials from liability.

And recommends that the UK:

> Refrains from enacting amnesties or statutes of limitations for torture or ill-treatment, which the Committee has found to be inconsistent with the States parties' obligations under the Convention. [67]

In relation to the second provision the AGNI confirmed to CAJ he is not currently preparing such Prosecutorial Guidance.[68]

On 4 September 2019, the Secretary of State issued his first report to Parliament on the subject. This distanced government from the proposed suggestion of re-instating the Attorney General for Northern Ireland into the prosecutorial process. The report states:

> Under the Justice (Northern Ireland) Act 2002, the AGNI does not superintend the DPP for Northern Ireland and therefore is not able to either issue prosecution guidance to the DPP or direct the DPP to issue such guidance... The UK Government has no plans to alter the current division of responsibilities, and independence as between, the DPP and the AGNI.[69]

Committee of Ministers 'serious concerns' over delays (2019)

In September 2019, a meeting of the Committee of Minsters reiterated 'serious concerns' about the delay in the establishment of the HIU and other legacy institutions under the SHA. The Ministers Deputies:

> 'Strongly encouraged the authorities to act on this commitment, to provide an estimated timetable for the next steps and to ensure that the legislation introduced to Parliament will guarantee the Historical Investigations Unit's independence in both law and practice and enable it to conduct effective

[66] Challenge to appointment by Karen Bradley of new Police Ombudsman KRW Law, 4 May 2019.
[67] Ibid, Para 40 and Para 41(f)
[68] CAJ correspondence from AGNI 2 August 2019.
[69] Secretary of State for Northern Ireland "Report pursuant to sections 3(1), 3(6), 3(7), 3(8), 3(9) and 3(10) of the Northern Ireland (Executive Formation etc) Act 2019 - regarding Executive formation; transparency of political donations; higher education and a Derry university; presumption of non-prosecution; Troubles prosecution guidance; and abortion law review" 2019. This information and the following taken from: The CAJ January 2020 Rule 9.

> investigations which are sufficiently accessible to the victims' families in full compliance with Article 2 of the Convention.'[70]

Commitment to legislate for SHA in Queen's Speech (2019)

A new UK Conservative government entered office following the UK General Election on the 12 December 2019. On the 19 December 2019 the new Government set out its legislative programme, which committed to 'prompt implementation' of the SHA.

In a section on 'The Armed Forces,' a subsection entitled 'Historical allegations/Vexatious litigation' provides the following commitment:

> To deal with NI legacy issues we will seek the prompt implementation of the Stormont House Agreement in order to provide both reconciliation for victims and greater certainty for military veterans.

However, the next paragraph, in contradiction, goes on to state:

> In parallel with the Stormont House Agreement institutions we will tackle the inappropriate application of the Human Rights Act to issues that occurred before it came into force.[71]

The UK government's stated intention to amend the Human Rights Act 1998 and disapply its duties prior to the year 2000 when it came into force is deeply concerning. This move is aimed precisely to limit the domestic application of the procedural duties under ECHR Article 2 to investigate deaths at the hands of the military.

The government has provided no evidence whatsoever of 'inappropriate application' of the EHCR, or of 'vexatious' litigation. In addition to conflicting entirely with the SHA and UK duties under the ECHR any such legislative amendment would also constitute a clear breach of the 1998 Belfast/Good Friday Agreement (GFA). The GFA commits the UK to incorporating the ECHR into Northern Ireland law without any arbitrary cut-off date as follows:

> The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.[72]

Finally, in the Northern Ireland section of the legislative program, the following statement is made:

> The Government remains fully committed to finding a solution for dealing with the legacy of the Troubles which works for everyone. Following our consultation on the Stormont House institutions, the UK Government is engaging with the main parties in Northern Ireland, MPs in Westminster and wider society across Northern Ireland on the issues raised in the consultation to enable us to reach a

[70] CM/Del/Dec(2019)1340/H46-30, paragraph 6.
[71] THE QUEEN'S SPEECH 2019, Background Briefing Notes, Prime Ministers Office 19 December 2019, page 128
[72] Belfast/Good Friday Agreement 1998, UK Treaty Series 51 (2000), Rights, Safeguards and Equality of Opportunity Section, paragraph 4.

> broad consensus. The Government will then move as quickly as possible to set out detailed, balanced and fair proposals on the best way forward, to implement the Stormont House Agreement.[73]

In this statement, the UK commits to implementation of the SHA but also to making revised proposals. This appears to reference unspecified changes to the SHA prior to introduction.

The New Decade, New Approach deal (2020)

In January 2020, as part of the agreement to re-establish devolution in Northern Ireland, the UK government promised to implement the SHA mechanisms within 100 days.[74]

On 9 January 2020 the British and Irish Governments published NDNA following negotiations with the NI political parties as an agreed basis for which the power-sharing government in Northern Ireland would be restored. Consequently, the devolved Northern Ireland Assembly and Executive were re-established, until the Assembly collapsed again in 2022.

The NDNA document contained the following SHA commitment:

> As part of the Government's wider legislative agenda, the Government will, within 100 days, publish and introduce legislation in the UK Parliament to implement the Stormont House Agreement, to address Northern Ireland legacy issues. The Government will now start an intensive process with the Northern Ireland parties, and the Irish Government as appropriate, to maintain a broad-based consensus on these issues, recognising that any such UK Parliament legislation should have the consent of the NI Assembly.[75]

Written Ministerial Statement of March 2020 signalling abandonment of SHA

On the 18 March 2020, without any forewarning the UK, through a Written Ministerial Statement (WMS) to the UK Parliament, signalled the unilateral abandonment of the commitment to implement the SHA.[76] The WMS instead proposed in vague terms an unclear alternative 'fast track' process.

The UK set out a changed approach to dealing with NI legacy in a Written Ministerial Statement by the NI Secretary of State on 18 March 2020. The WMS coincided with the introduction into the UK Parliament of the Overseas Operations (Service Personnel and Veterans) Bill, which limits the ability to prosecute British soldiers for war crimes abroad. Noting the introduction of that Bill, the statement made clear its intent was 'to ensure equal treatment of Northern Ireland veterans and those who served overseas.'[77]

The WMS signalled an explicit departure from the UK commitment to implement the SHA, with the suggestion that the 2014 SHA was an important milestone that *'did not stop the debate*

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[73] As above, page 125.
[74] Northern Ireland Office (2020) *New Decade, New Approach* p. 48.
[75] Northern Ireland Office 'New Decade New Approach' 9 January 2020, UK Commitments Annex A, paragraph 16.
[76] https://www.gov.uk/government/news/addressing-northern-ireland-legacy-issues
[77] Secretary of State for Northern Ireland, Addressing Northern Ireland Legacy Issues: Written statement - HLWS163 (18 March 2020) https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2020-03-18/HLWS163/

continuing.' It suggests that the proposals have evolved in alignment with the 'principles of the Stormont House Agreement,' rather than the Agreement itself.

This new approach committed the UK to focusing more on information recovery than justice, whilst stating there will be a route to justice in a small number of cases, with a suggestion this will assist reconciliation and deliver for victims.

The WMS proposed 'one independent body' to oversee and manage the information recovery and investigative aspects of the legacy system, providing 'every family' with a Family Report for each death. The WMS remained essentially silent on the fate of the HIU, OHA, and ICIR—three important SHA mechanisms.[78] It left unclear whether those mechanisms would be subsumed into the new unnamed 'one independent body', or if that body would 'oversee and manage' the existing SHA mechanisms.

The WMS included the line 'The Government is committed to the rule of law but…' The desire to 'swiftly implement' an information recovery mechanism appears to justify interference with the rule of law. At the same time, the WMS committed the UK to the conduct of quick police investigations in select cases of 'new compelling' evidence and a 'realistic prospect of a prosecution.' There was no mention of grave or serious security force misconduct being investigated. Once such 'quick' investigations are completed, there would be a statutory bar on the same case ever being investigated again.

Cases that lack sufficient 'compelling new evidence' to require investigation and potentially referral to the Public Prosecution Service would be 'closed and no further investigations or prosecutions would be possible.' This was intended to give all participants 'the confidence and certainty' to enable persons with information about deaths to engage with the information recovery process.[79] Whilst vague and contradictory, the proposals appeared to run contrary to the investigative duty (under the EHCR and other international obligations) in most cases.

The WMS made a distinction between cases in which 'investigations … are necessary' and others. Only cases with 'a realistic prospect of a prosecution as a result of new compelling evidence' would proceed to a 'full police investigation and if necessary, prosecution.' Cases not meeting this threshold would be closed and a 'family report' provided to the victim's loved ones—it is difficult to see how this could meet the Article 2 requirements for an effective investigation. Furthermore, under this criterion, most cases would not merit full investigations given the challenges in meeting the 'realistic prospect' threshold.

Key benchmarks in assessing whether such a process could be Article 2 compliant would be (a) the independence of those involved in the review/investigation; (b) its effectiveness: whether those involved had access to all of the relevant information in order to make an informed decision regarding which route to take; (c) how access to all information could be achieved

[78] Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland establishing the Independent Commission on Information Retrieval (signed 15 October 2015, not yet in force) https://ptfs-oireachtas.s3.amazonaws.com/DriveH/AWData/Library3/FATRdoclaid210116_100026.pdf
[79] Secretary of State for Northern Ireland, Addressing Northern Ireland Legacy Issues: Written statement - HLWS163 (18 March 2020) https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2020-03-18/HLWS163/

without full police powers being exercised in the information gathering phase; and (d) a sufficient element of public scrutiny of the investigation or its results.

CAJ was concerned that this new process outlined by the WMS would not be Article 2 compliant. With too high a threshold for the use of police powers to investigate, and an obligation to close cases forever once the process is completed, the process would not adequately expose human rights violations, and thus would not facilitate guarantees of non-recurrence, justice, or truth recovery.

The prospect of no investigations into grave and serious security force misconduct, in a context where evidence of official criminal wrongdoing will likely have been destroyed therefore precluding investigation, also falls short of EHCR duties.

The language suggests the 'new evidence' trigger would be set higher than the threshold required by the EHCR. In addition, the subsequent blanket 'closed cases' procedure prevents investigation when there is subsequently new evidence, however 'compelling' it may be.

With regards to the duty for a 'prompt' investigation, the WMS bemoaned the fact that 'many families have waited too long to find out what happened to their loved ones' and suggested the 'cycle of investigations' has undermined attempts to come to terms with the past. It failed, however, to acknowledge the UK responsibility for these delays, including because of failure to implement the SHA agreed in 2014.

The Irish government, the other State Party to the SHA, strenuously objected to the announcement in the WMS.[80] In addition to human rights NGOs concerns that the proposals would be unlawful, the NI Human Rights Commission also expressed its 'deep initial concerns' the proposals would not be ECHR compliant.[81]

In October 2020 the victims group WAVE Trauma Centre– 'the largest cross community victims and survivors support group in Northern Ireland' wrote an open multi-signature letter to UK Parliamentarians. This noted that the WMS 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 most 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.'[82] The victims' group has also raised concerns

[80] https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2020/march/statement-by-tanaiste-on-uk-government-legacy-announcement.php. Information in this paragraph taken from CAJ CM submission October 2022.

[81] https://www.belfasttelegraph.co.uk/news/northern-ireland/nis-human-rights-chief-says-legacy-plans-might-not-be-legal-39207801.html

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

that the Secretary of State is 'dangerously deluded' if he believes the WMS proposals will aid reconciliation.[83]

The Northern Ireland Human Rights Commission (NIHRC) is the UN-accredited NHRI for NI set up further to the 1998 Good Friday Agreement. The NIHRC consists of one Chief Commissioner and six Commissioners, its composition, in accordance with the UN Paris Principles (on which its UN status as an NHRI depends) must ensure "pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights."[84] Shortly after the WMS the NIHRC wrote to the Secretary of State for NI, Brandon Lewis MP, "expressing concerns that this new approach by the UK Government is not human rights compliant, particularly regarding Article 2 ECHR".[85] Following this, in September 2020 the Secretary of State appointed six new human rights commissioners, half of whom were from an NI policing background, despite a broader pool of approved candidates having been presented to him for selection. The Equality Coalition, a network of around 100 NGOs and trade unions led by CAJ and the public sector trade union UNISON, have (without questioning the integrity of any individual commissioner) lodged a formal complaint that the appointments do not meet the diversity and pluralism requirements of the UN Paris Principles.[86] There was a particular concern that this change of composition has occurred at a time when the NIHRC is to advise on the NI legacy bill.

A cross-party UK Parliamentary Inquiry has also 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. The WMS was a unilateral and emphatic announcement of intent rather than part of a meaningful consultation process.' Noting seven months had passed since the WMS the Inquiry also stated it was 'deeply worrying' that the UK Government had not provided any further policy detail since. For its part, the Inquiry branded the proposals in the WMS as 'unilateral and unhelpful.'[87]

Having shown remarkable patience with the UK, the Decision at the September 2020 Committee of Ministers meeting issued an ultimatum that the UK submit the concrete information by the 22 October, to enable the Committee to conduct a comprehensive assessment at its December 2020 meeting.

The UK ignored this deadline and request. Shortly after the deadline, the UK issued a communication. The information in this on the future approach further to the WMS is limited to one brief paragraph 'reiterating' its commitment to reforming the process but indicating

[83] 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

[84] The UN Paris Principles, including provisions on "composition and guarantees of independence and pluralism" are available here: https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx

[85] Letter from NI Human Rights Commission to Secretary of State for NI, Brandon Lewis MP, 1 April 2020, cited in NIHRC submission to Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, January 2021, page 3.

[86] For details see: https://www.theguardian.com/uk-news/2021/jan/11/high-status-of-northern-ireland-human-rights-body-being-put-at-risk and https://caj.org.uk/2020/11/04/just-news-november-2020/

[87] NIAC October 2020 report, paragraphs 24 ,4 & 6.

'further discussions' with key stakeholders will need to take place first. No concrete information on the legacy bill was provided whatsoever and no proposed legislative timetable was set out.[88]

The UK Government also declined to engage with the Parliamentary inquiry into the WMS proposals. The inquiry, by the Northern Ireland Affairs Committee of the House of Commons, described the failure to provide written information as an abandonment of convention. The Secretary of State had been called to give oral evidence in September but withdrew from doing so at a late stage.[89] The Chair of the Committee, Simon Hoare MP, raised a range of questions about the WMS, including the threshold for reopening cases. He stated that the Committee had 'expected those questions and others to be answered in the usual way in written and/or oral evidence, but the Government failed to provide any such evidence' and urged the UK Government to 'urgently provide' this information. The Chair noted that despite assurances that the policy would be addressed in a 'speedy manner' seven months had passed with 'nothing more' known about the proposals, adding 'This delay and uncertainty will only perpetuate an unacceptable wait for victims and the families affected that has already gone on far too long.'[90]

The Parliamentary Inquiry cited the reason given by the Secretary of State for withdrawing from giving oral evidence was that the NIO was at an 'important stage of policy consideration, including sensitive engagement with key stakeholders.' It was not clear whom such 'key stakeholders' were and whether they were limited to those within Government, the military and security services. The Chief Constable of the Police Service for Northern Ireland (PSNI) confirmed in oral evidence to the inquiry that the PSNI were still awaiting further detail of the content and implications of the WMS.

The Chief Constable of the PSNI did clarify an internal NIO policy working group had been set up in late March to take forward the WMS proposals. The PSNI had declined to take part in this group due to fear of their impartiality being tainted by association with such a process.[91] Following passage of the Bill CAJ sought to obtain the terms of reference, membership and minutes of this internal working group. The request was declined, citing cost exemptions, and is subject to appeal.

The communication by the UK, as per previous submissions, boldly sought to attribute the delay in clarifying their intentions further to the WMS to Ministers focusing on meeting the challenges of Covid 19. The Parliamentary Inquiry Report however noted that 'While covid-19 has

[88] Information provided by the UK Authorities 26 October 2020 "The UK Government wishes to reiterate its commitment to reforming the current approach to addressing the legacy of Northern Ireland's past. Further discussions with the Northern Ireland parties, Irish Government and other key stakeholders will need to take place before progress can be made to address these complex and sensitive issues and help Northern Ireland society move forward." The remaining seven pages of the UK submission largely focused on historical information regarding this group of cases and other information already previously provided; this appears to have been added to make the submission look longer.

[89] NIAC October 2020 report, paragraph 3.

[90] https://committees.parliament.uk/committee/120/northern-ireland-affairs-committee/news/120267/legacy-proposals-unilateral-and-unhelpful-say-mps/

[91] NIAC October 2020 report, paragraphs 3 & 21.

presented a challenge across government, policy development has continued across Whitehall, and the Northern Ireland Office has digital platforms to facilitate its work.'[92]

The UK Government breached parliamentary convention in declining to submit written information or appear before this Parliamentary Inquiry into the WMS. The Committee issued a damning Interim Report on the 26 October 2020.[93] The UK Government on 13 January 2021 ultimately submitted a brief written response to this report. This continues to focus on promoting 'information recovery' (as per WMS) and not Article 2 compliant investigations (as envisaged under the SHA.) It repeats highly discredited claims that there has already been a 'cycle of investigations' into the military and reiterates UK commitments to military veterans who served in NI.[94] It should be noted that whilst the UK submission to CM attributes delays in taking forward legacy policy to a desire for further engagement with key stakeholders, the parliamentary inquiry was highly critical over a lack of engagement since the WMS, despite commitments to do so.

UK adherence to the rule of law: The broader policy context (2020-2021)

During the same time as their delays on clarifying further the WMS, the UK Government advanced a pattern of deeply worrying interventions against the application of the rule of law within the UK. This encompasses legislation and commitments to diminish the incorporation of the ECHR in domestic law (also a requirement in NI of the GFA):

2020: Independent Review of Administrative Law

The ability of citizens and NGOs to challenge unlawful practices of public authorities and failures to properly discharge statutory duties, has been key to the progress of legacy cases in Northern Ireland, including those in the present group of cases. Concerningly the UK Government moved quickly to set up an 'Independent Review of Administrative Law' which launched a fast-tracked public consultation process. The purpose of the review appeared to be to seek to limit the powers of the judiciary to prevent unlawful practices by Government and other public authorities. The focus was on limiting the provisions for Judicial Review of decisions, with the Terms of Reference focusing on limiting such provisions and related matters such as Governments' duty of candour to the Courts.[95] The review was followed by the Judicial Review and Courts Act 2022, which made changes to judicial review and other procedural changes mostly in England and Wales, with some provisions applying in Northern Ireland.[96]

[92] NIAC October 2020 report, paragraph 6.
[93] HC 329 Northern Ireland Affairs Committee Addressing the Legacy of Northern Ireland's Past: the Government's New Proposals (Interim Report) Published on 26 October 2020. For further analysis see CAJ submission to Committee of Ministers, October 2020. The CAJ February 2021 rule 9 submission to the committee of ministers
[94] Addressing the Legacy of Northern Ireland's past: the Government's New Proposals: Government Response to the Committee's Third Report of Session 2019–21 HC 1153, 13 January 2021.
[95] For further information see CAJ's submission to the Review: https://caj.org.uk/2020/10/27/caj-response-to-the-independent-review-of-administrative-law-iral/
[96] https://www.lawsociety.org.uk/topics/human-rights/judicial-review-reform and the Act https://www.legislation.gov.uk/ukpga/2022/35/contents

2020: Harmful Discourse Towards Lawyers

From the highest level of Government (the then Prime Minister Boris Johnson and Home Secretary Priti Patel) politically discriminatory attacks were launched against the legal profession.[97] Such discourse risks creating a climate of hostility against the legal profession and undermining the rule of law. The case of Pat Finucane and the demonising political discourse that preceded his murder are a chilling reminder as to the dangers lawyers can face in such contexts. In this instance the attacks were largely focused on lawyers upholding the rule of law in relation to immigration cases and were followed by a widely reported racist knife attack on a firm of lawyers in London where threats were made to kill a member of staff. A suspect was charged in relation to this attack.[98] On 25 October 2020 a letter was issued signed by over 800 former UK judges, lawyers and legal academics raising concerns that the Prime Minister and Home Secretary had endangered "the personal safety of lawyers through their abusive attacks on the profession" had displayed "hostility" towards lawyers had undermined the rule of law and effectively risked the lives of those working in the justice system.[99]

2021: Overseas Operations (Service Personnel and Veterans) Bill

As alluded to above the WMS abandoning the Stormont House Agreement was intentionally made on the same day as the UK government introduced the Overseas Operations (Service Personnel and Veterans) Bill into the UK Parliament. The Bil as introduced, including through regression of domestic incorporation of the ECHR, provided for curtailing domestic proceedings for past war crimes (including torture and extrajudicial killings) committed by the UK military abroad. The WMS expressly links the UK abandonment of the SHA for an alternative process to seeking to 'ensure equal treatment of Northern Ireland veterans and those who served overseas.'

In response to questions during parliamentary debates on the bill as to whether the commitment that the NI bill will provide for 'equal and comparable treatment' for members of the armed forces who served in NI, Ministers expressly reaffirmed they stood by this commitment. The Veterans' Minister stated in the debate 'The commitment of equal treatment in any Northern Ireland Bill that comes forward will be absolutely adhered to.'[100]

[97] https://www.theguardian.com/law/2020/oct/06/legal-profession-hits-back-at-boris-johnson-over-lefty-lawyers-speech

[98] https://www.theguardian.com/uk-news/2020/oct/23/man-faces-terror-charge-over-alleged-attack-at-immigration-law-firm

[99] https://www.theguardian.com/politics/2020/oct/25/lawyers-ask-johnson-and-patel-to-apologise-for-endangering-colleagues "The signatories include three former justices of the UK supreme court, five retired appeal court judges, three former high court judges, the lawyer heads of four Oxford University colleges, more than 80 QCs, 69 law professors from leading English universities, the directors of Liberty and Justice, as well as hundreds of law firm partners, barristers and solicitors."

[100] Hansard Vol 680 Overseas Operations Bill Second Reading House of Commons 23 September 2020. (Column 1022, Minister Johnny Mercer MP)

The Joint Committee on Human Rights (JCHR) of the UK Parliament has found that the Overseas Bill 'breaches the UK's international legal obligations under international humanitarian law, human rights law and international criminal law.'[101]

In observations that could equally be made in relation to Northern Ireland legacy cases the JCHR highlights investigations by the Ministry of Defence into allegations relating to overseas operations that: 'The evidence indicates overwhelmingly that investigations into incidents have been inadequate, insufficiently resourced, insufficiently independent and not done in a timely manner to gather adequate evidence. This has resulted in repeated investigations to try to remedy the flaws of previous investigations.'[102] This Bill, with some amendments, was given royal assent in April 2021.

Covert Human Intelligence Sources (Criminal Conduct) Act 2021

The UK Government also introduced and rushed through the House of Commons in ten days (5-15 October 2020) the Covert Human Intelligence Sources (Criminal Conduct) Bill (CHIS Bill/Act), passed in March 2021.[103] The CHIS Bill was in response to the 'Third Direction' litigation from CAJ, PFC, Reprieve and Privacy International, that challenged the ECHR compatibility of MI5 Guidelines to authorise criminal offences by informants. The CHIS Bill allows police, security and other bodies to authorise crimes by informants, and for such authorised criminal offences to be 'lawful for all purposes' not attracting civil or criminal liability. In essence, for the first time such crime is put beyond the reach of the rule of law entirely.[104] There are no express limits in the CHIS Bill as to which crimes can be authorised with. Government rejected amendments tabled by cross-party MPs to set limits preventing authorisation of offences that would constitute breaches of ECHR rights (killings, torture, sexual violence, kidnap, false imprisonment). These issues were later addressed in part in the Code of Practice and PSNI policy. The CHIS Act unravels key non-recurrence General Measures introduced because of the *McKerr* group of cases. In particular, the legislation undermines the reforms that ensure the independence of prosecutorial decisions in Northern Ireland, and the related giving of reasons for decisions not to prosecute in cases involving the security forces, or suspected security force collusion through informants in paramilitary groups. The CHIS Act precludes a prosecutorial decision being taken at all, as the crime in question will not constitute a criminal offence that can be prosecuted. The CHIS Act also expressly provides for authorisation for criminal offences to be committed outside of the UK, including in the jurisdiction of Ireland.

[101] 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/

[102] HC 665 HL Paper 155 Joint Committee on Human Rights 'Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill: Ninth Report of Session 2019–21, Published on 29 October 2020, paragraph 34.

[103] https://services.parliament.uk/Bills/2019-21/coverthumanintelligencesourcescriminalconduct.html

[104] For further information see the joint briefing to Parliament by the Third Direction applicants. https://caj.org.uk/2020/10/01/briefing-for-second-reading-of-the-covert-human-intelligence-sources-criminal-conduct-bill/

Legacy bill developed behind closed doors (2021)

In May 2021 over a year after the WMS the UK government further indicated its policy intention. Media leaks, which coincided with elections in England, set out an intention to introduce an amnesty, in the form of a Statute of Limitations 'to end all conflict related prosecutions. Instead 'all sides would be encouraged to come forward to talk about historical events without fear of prosecution' to a new legacy commission.[105]

On the 11 May 2021, the UK Government set out its updated legislative programme to the UK Parliament (the Queen's Speech).[106] Despite the UK position to the Committee, this expressly removed the commitment in the previous December 2019 legislative programme to legislate for the SHA, replacing it with a general reference to Northern Ireland legacy legislation.

The consecutively published 163-page Prime Minister's 2021 Background Briefing Note on the legislative programme contained further details on almost every other proposed bill except the NI legacy bill. The Prime Ministerial introduction to the background briefing does make passing reference to purpose of the legacy bill being to 'deliver better outcomes for victims, survivors and [military] veterans.' A section of the background briefing on 'strengthening the Union (UK)' also makes passing reference to the purpose of the legacy bill expressly stating that the bill is aimed at ending 'investigations' 'in line with our commitments to veterans'.[107] Again here the UK promotes the position that there has been a 'cycle of investigations' against the military, despite the findings of the Court and domestic courts that Article 2 compliant investigations have not taken place.

No further details were set out at this stage. Legislators from the ruling Conservative party stated to the UK Parliament that the Secretary of State for Northern Ireland had given private assurances to military veterans that legislation with the purpose of protecting soldiers who served in NI from proceedings would be introduced by Summer 2021.[108] Johhny Mercer who had been Veterans' Minister, until a first resignation from the role in April 2021, also asserted the purpose of NI legacy legislation was to protect soldiers from prosecutions, and that the UK Government had committed to doing so by the Summer 2021.[109]

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[105] DH-DD(2021)101 Communication from the UK, 25 January 2021. For further detail see: https://eamonnmallie.com/2021/06/nio-legacy-bill-a-blueprint-for-burying-the-and-impunity-for-veterans-by-daniel-holder/. This section taken from the CAJ Rule 9 of December 2021.

[106] https://www.gov.uk/government/speeches/queens-speech-2021

[107] https://www.gov.uk/government/publications/queens-speech-2021-background-briefing-notes P7 "We will introduce legislation to address the legacy of the Troubles in Northern Ireland, ensuring that our proposals deliver better outcomes for victims, survivors and veterans, while ending the cycle of investigations." P15: "We will introduce legislation to address the legacy of the Troubles in Northern Ireland, ensuring that our proposals deliver better outcomes for victims, and survivors, focuses on information recovery and reconciliation, and ends the cycle of investigations – in line with our commitment to veterans."

[108] See comments of Mark Francois MP Hansard 14 July 2021, column 401. https://hansard.parliament.uk/commons/2021-07-14/debates/DAD888A0-ED03-4052-8C36-AB90644BAB8B/LegacyOfNorthernIreland%E2%80%99SPast

[109] See for example: https://www.standard.co.uk/news/uk/johnny-mercer-northern-ireland-londonderry-conservative-british-b943939.html

In the run up to summer 2021 it appeared that the UK was going to unilaterally introduce such legislation. There was a strong resistance to this, including from the Irish Government, co-guarantors of the SHA, who have not resiled from their SHA commitments.

On the 24 June 2021 there was a meeting of the British-Irish Intergovernmental Conference (BIIGC), which took place at Dublin Castle. The BIIGC was established under the Good Friday Agreement as a forum to promote bilateral co-operation, particularly on NI issues. As a result of the BIIGC a Joint Communiqué was published by both Governments on a range of issues. In relation to NI legacy the following statement was made:

> 'The Conference discussed the urgent need to make progress on a collective basis on Northern Ireland legacy issues in a way that supports information recovery and reconciliation, complies fully with international human rights obligations, and that responds to the needs of victims and survivors, and society as a whole.
>
> 'The UK and Irish Governments agreed there was a need for a process of intensive engagement in the period immediately ahead with the Northern Ireland parties and others on legacy issues. It was agreed that this would need to build on previous discussions around the implementation of the Stormont House Agreement and to take account of the views of all participants including new proposals which the UK Government intended to bring forward. 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.
>
> 'The UK and Irish Governments also discussed issues of concern in respect to a number of individual legacy cases.'[110]

UK Command Paper on NI Legacy Issues (July 2021)

The UK Government then issued a parliamentary Command Paper setting out their 'proposals' in July 2021. It appears therefore that the UK pulled back on unilaterally introducing legislation based on the Irish Government agreeing a process whereby the new UK proposals would be discussed alongside the SHA. As its content is not known it cannot be said for certain but from context this draft bill is likely to have reflected the proposals in the Command Paper.

There was no consultation on the Command paper which evolved into the legislation that was ultimately unilaterally introduced in May 2022. As set out later in this section the *Telegraph* reported that the delay was attributable to wrangling between the MoD and NIO with the former not wanting any power that could compel former soldiers to engage with the legacy body.

As set out further in the later section on 'ministerial objectives behind the bill' There were conflicting and contradictory messages from the UK as to the objective behind and status of the Command Paper. At times the UK argued its proposals were designed to further 'information

[110] 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

recovery'. On other occasions the UK authorities openly linked the proposals to commitments to ending proceedings against military veterans.

Whilst the official Joint Communiqué provides for the UK proposals to be *considered* alongside SHA implementation, and the UK has described its Command Paper as proposals, it has also on other occasions indicated that it nevertheless intended to introduce implementation legislation.

The Command Paper set out a proposal for a sweeping unconditional amnesty for all 'Troubles-related incidents' in the form of a statute of limitations. Notably this definition was not tied to the 1998 GFA.

The Command Paper also provided for legislating to end all meaningful investigations and legal proceedings, including:

- Ending all prosecutions for conflict related offences, including stopping ongoing cases already before the courts.
- Ending all police investigations for conflict related offences.
- Ending all Police Ombudsman Investigations into legacy deaths.
- Ending all conflict related coronial inquests.
- Ending the power of affected families to take civil proceedings.

The Command Paper proposed the establishment of an Information Recovery Body (IRB) to conduct desktop reviews into some legacy cases. The proposed 'IRB' was far more limited in its powers than the existing package of measures or SHA mechanisms. The Command Paper provided that IRB powers will be limited to a desktop review of papers and an ability to take statements. It is clear this would not constitute an 'effective' investigation under the terms of Article 2 ECHR.

Whilst the Command Paper presented by the Secretary of State stated it would 'expect all relevant parties' to make commitments to cooperate with the IRB, this was subsequently contradicted by the Secretary of State himself in a media interview in which he stated he had no expectation republicans would cooperate with the IRB.[111]

The Command Paper asserts that civil, coronial processes relating to the Troubles, like criminal processes, 'involve an approach that can create obstacles to achieving wider reconciliation.'[112] In response to this unsubstantiated claim, the paper makes the unprecedented proposal to end judicial activity in relation to 'Troubles-related conduct across the spectrum of criminal cases, and current and future civil cases and inquests.'[113]

[111] https://www.thetimes.co.uk/article/justice-system-is-holding-back-peace-argues-brandon-lewis-lwrp5lh6n "I am not suggesting for one minute that I can see republican terrorists stepping up and owning the heinous crimes they committed, which was what happened in South Africa. Much as I would like to see them do it I am not expecting that to happen," Lewis says."
[112] Command Paper, paragraph 37.
[113] Command Paper, paragraph 380.

The 'IRB' – is the same acronym as that used by the Irish Republican Brotherhood, the predecessor organisation to the IRA, and the body was ultimately renamed in the Bill.

Engagement on the Command Paper

There were several meetings over Summer 2021 involving the two governments and the five parties to the Northern Ireland Executive. CAJ and academic colleagues engaged in these meetings, in a format whereby we presented our views and took questions from the parties. By October 2021 the NIO stated there had been around 14 of these engagement sessions.[114]

It appears such sessions have followed a similar format of external presentations and discussion. There were no 'talks' or 'negotiations' as such on the Command Paper. This should be read in the context of a general rejection of the UK proposals by most stakeholders, including the NI political parties and legislature, the Irish government and human rights and victims' NGOs.[115]

The only groups to support the UK Command Paper proposals are *some* groups representing military veterans. However, there are differing views among the veterans' groups with many also opposed to an amnesty.[116]

The UK declined to elaborate further on the Command Paper for several months. This includes in the UK submission to the Council of Europe of the 18 October 2021 which provided no further detail.[117] On the 27 October 2021, the Secretary of State again declined to elaborate on any aspect of the proposals but did state that the Command Paper did not represent the UK's 'final proposals.' The Secretary of State also confirmed that the publication of the Command Paper did not constitute a 'formal consultation'. [118] On the same day the UK Parliament was however told that the intention was still to introduce legislation in the autumn of 2021.[119]

Critique of the Command Paper by the CAJ and Queen's University 'Model Bill Team'

CAJ, with academics from the School of Law in Queen's University Belfast, published a detailed critique of the Command Paper in September 2021.[120]

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[114] 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/

[115] 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

[116] https://www.belfasttelegraph.co.uk/news/northern-ireland/divide-between-veterans-across-uk-sayscommissioner-kinahanafter-group-endorses-troubles-amnesty-plans-40765943.html

[117] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a43c4d

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

[119] https://hansard.parliament.uk/commons/2021-10-27/debates/81B40744-AE51-4F81-9E67-644B60B1CDD7/LegacyOfTheTroubles

[120] Also available at: https://www.dealingwiththepastni.com/project-outputs/project-reports/model-bill-team-response-to-the-uk-government-command-paper-on-legacy-in-ni

In relation to the proposed 'statute of limitations' the critique argued the use of this term in this context was a misnomer as what was being proposed by the UK was irrefutably a broad, unconditional amnesty. Drawing on comparative research it was noted that such an amnesty is even more expansive than that introduced under the dictatorship of General Augusto Pinochet.

The critique also noted that key elements of the Command Paper were deeply misleading. The official narrative of the proposals sought to portray all existing mechanisms as focusing on prosecutions and convictions, rather than also encompassing information recovery. The Command Paper went as far as arguing that retaining a route to justice itself is responsible for stifling information recovery. The critique also argued the proposed IRB would be the least effective of all proposed mechanisms in providing for information recovery.

The concern was expressed that the Command Paper:

> Deliberately misrepresents both the existing "package of measures" and the HIU as "focused on criminal justice outcomes." Rather, as noted by the UN Special Rapporteur on Transitional Justice, Pablo de Greiff, in his report on legacy matters in Northern Ireland in 2016, they "resemble more truth-seeking initiatives than justice measures". As he also noted, the "distinctions between truth and justice initiatives are more often than not overdrawn". [This] is precisely what occurs in this command paper. In a context where there has long been universal acceptance that only a small number of cases will ever result in a prosecution, the [Command] Paper ignores and misrepresents the primary information recovery focus of much of the work of the SHA mechanisms and the "package of measures" in order to justify and rationalise the proposed IRB which is much less likely to deliver information for families.

The critique also noted deeply misleading comparisons in the Command Paper with the South African Truth and Reconciliation Commission, despite the proposals bearing no resemblance to this mechanism.

The critique noted that the Command Paper would provide for the immediate shutting down of all other forms of investigation and inquiry, including cases that are currently before the courts, investigations sitting with the Police Ombudsman and legacy inquests.

Response to the Command Paper from UN Experts

In a joint statement on the 10 August 2021 Mr. Fabián Salvioli, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and Mr. Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions, expressed 'serious concern about the UK Government's plan to ban all prosecutions, impede investigations, and preclude victims' civil claims in connection with "the Troubles" in Northern Ireland, which would effectively institute a *de-facto* amnesty and blanket impunity for the grave human rights violations committed during that period.'[121]

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https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27371&LangID=E&utm_source=miragenews&utm_medium=miragenews&utm_campaign=news

The UN experts further stated:

> We express grave concern that the plan outlined in July's statement forecloses the pursuit of justice and accountability for the serious human rights violations committed during the troubles and thwarts victims' rights to truth and to an effective remedy for the harm suffered, placing the United Kingdom in flagrant violation of its international obligations.
>
> In his statement, the Secretary of State justified these measures, stating that criminal justice can impede truth, information recovery and reconciliation. The experts expressed concern that such a justification conflates reconciliation with impunity and noted that criminal justice is an essential pillar of transitional justice processes, alongside truth-seeking and reconciliation.
>
> In this regard, they recalled the importance of adopting a comprehensive approach in a transitional justice process that incorporates the full range of judicial and non-judicial measures. 'The essential components of a transitional justice approach—truth, justice, reparation, memorialization and guarantees of non-recurrence—cannot be traded off against one another in a "pick and choose" exercise,' the experts stressed.
>
> The experts urged the British authorities to 'refrain from regressing on their international human rights obligations through the establishment of a statute of limitations for conflict related prosecutions and barring all related investigations, inquests and civil claims.'[122]

The UNSR for the promotion of truth, justice, reparation and guarantees of non-recurrence, subsequently presented a report to the 48th regular session of the UN Human Rights Council in September-October 2021, which reiterated such concerns.[123]

Response from the Council of Europe Commissioner for Human Rights

In September 2021, the Council of Europe Commissioner for Human Rights, Dunja Mijatović, published correspondence to the UK in which she had warned that the proposals under the Command Paper 'would undermine human rights protections and would cut off avenues to justice for victims and their families.' Further stating that 'If adopted, the plan would lead to impunity and cannot be the foundation on which transitional justice is built.'[124]

The correspondence raised concerns about the conflict with the UK obligations under the ECHR and the Command Paper proposals which would include the introduction of:

> …a statute of limitations for all Troubles-related crimes, which would put an end to all ongoing and any future attempts at prosecution. This is accompanied by a statutory bar on the Police Service of Northern Ireland (PSNI) and Police

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[122] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27371&LangID=E&utm_source=miragenews&utm_medium=miragenews&utm_campaign=news

[123] https://undocs.org/A/HRC/48/60/Add.2

[124] https://www.coe.int/en/web/commissioner/-/northern-ireland-legacy-proposals-must-not-undermine-human-rights-and-cut-off-victims-avenues-to-justice

> Ombudsman to investigate Troubles-related incidents, as well as further steps to end all judicial activity in this area with regard to current and future criminal and civil cases and inquests.

The Commissioner stated that ECHR compliance would be 'particularly endangered by the proposed shutting down of the above-mentioned avenues, and their replacement with an information recovery body with limited investigatory powers that would fall short of the requirements under the ECHR, and which would mainly carry out investigations on request of next of kin.'

The Commissioner noted the UK position on a shift away from justice outcomes, expressing concerns that:

> This approach is based on a false dichotomy between investigations and prosecutions on the one hand, and truth and reconciliation on the other, as well as on problematic assumptions about how these interact. In addition to being an international legal obligation, fighting impunity through criminal justice is one of the well-established pillars of transitional justice. Virtually every effective transitional justice effort to date has relied on elements of both criminal justice and truth and reconciliation. Conversely, impunity and the absence of justice can be a major impediment to achieving lasting peace and reconciliation.
>
> …The interaction between criminal justice and truth and reconciliation mechanisms in the Northern Ireland setting has been recognised, for example, in the report of the former UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence following his 2015 visit to the United Kingdom. Some criminal investigations, even if they have not led to prosecutions, have had important consequences for truth recovery. And truth seeking efforts, not related to criminal justice as such, were sometimes instrumental in uncovering information that gave rise to further attempts to trigger criminal investigations. Importantly, whereas the command paper seems to suggest that information recovery cannot be effective without an end to criminal justice activities, the reverse may well be true: giving perpetrators unconditional guarantees against criminal prosecution may weaken incentives to participate in truth seeking. And the impunity this creates may undermine the trust necessary for truth and reconciliation efforts to be effective. As the command paper puts such a premium on truth seeking, to the detriment of criminal justice activities, oversimplifications of their relationship must be avoided.

The correspondence from the Commissioner concluded by stating:

> I am concerned that key elements of the command paper would not bring progress on legacy issues, but would rather represent significant steps backward. Crucially, an approach that would undermine human rights protections and would cut off avenues to justice for victims and their families, thus leading to impunity, cannot be the foundation on which transitional justice is built. Rather

than upending previously agreed approaches, I urge your government to focus on taking concrete action to remove barriers to a human rights compliant implementation of such approaches, with a view to delivering justice across all communities without further delay.

Response to the Command Paper from the NI Assembly

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" [125]

Response to the Command Paper from the NI Legal Profession

On the 24 September 2021 Mr Rowan White, the President of the Law Society for Northern Ireland, which represents all Northern Ireland's solicitors, issued a statement on behalf of the Society calling on the UK to uphold the rule of law and reconsider its legacy proposals.

The Law Society statement set out its position that the Command Paper proposals would contravene the UK's duties under the ECHR 'to hold independent and effective investigations into the deaths that occurred during the Troubles.'[126]

Delays in Introducing Legacy Bill After Publication of Command Paper

In late October 2021, Ministers, whilst also again declining to elaborate on any aspect of the proposals, told the UK Parliament that the intention was still to introduce legislation in the autumn of 2021.[127] This did not occur.

In December 2021, the *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.[128] 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 was 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, whereas, defence sources reportedly argued, non-state actors could evade fines by leaving UK jurisdiction and residing in the Republic of Ireland.[129] It was reported that that the Defence Minister conditioned his support to the bill to

[125] and was passed unanimously.
http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2021/07/20&docID=347308
[126] https://www.lawsoc-ni.org/society-calls-on-uk-government-to-uphold-the-rule-of-law
[127] https://hansard.parliament.uk/commons/2021-10-27/debates/81B40744-AE51-4F81-9E67-644B60B1CDD7/LegacyOfTheTroubles
[128] https://www.telegraph.co.uk/politics/2021/12/10/northern-ireland-prosecutions-bill-blocked-fears-preferential/
[129] Whilst there is limited information from the media reports, if they are correct, it would be remiss not to say the grounds for the apparent objections seem far fetched, being grounded in an understanding that republican suspects or witnesses would seamlessly be able to uproot and move house from Northern Ireland to the Irish Republic, presumably along with their families, to avoid paying a fine for not giving testimony to the UK legacy body. The contention is then that this is 'unfair' on British Soldiers who would want to remain living in the UK and

an alternative approach of qualifying benefiting from the Statute of Limitations to engagement with the legacy body, in order to compel non state actors to engage with it, and leave open the option of prosecution for non-cooperation. Sources from the Northern Ireland Office argue that the proposals had now been agreed in Cabinet, including by the Defence Minister.

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 delay and referred to the issue protecting soldiers whilst not giving 'carte blanche to terrorists' stated, 'Getting this balance right in the legislation that we bring forward is not simple, so although I regret the fact that this Bill has not come forward to the timetable that was hoped for and anticipated, there is good reason for that.'[130]

Into January 2022, media reports claimed that the legacy bill had been delayed until Spring or Summer 2022, potentially after scheduled NI Assembly Elections in early May 2022.[131]

In the UK Parliament on the 13 January 2022, Northern Ireland Ministers denied they had briefed the press about a delay to the bill, and that the bill was being blocked. In addition to claiming there had been a 'massive amount of engagement' NI Ministers stated, 'The delay is to ensure that we get this right and that it not only achieves the Government's objective to provide the necessary protections to those who served so courageously in Northern Ireland, but is also a measure that will advance the agenda of reconciliation and cross-community understanding in Northern Ireland.'[132]

hence would therefore be compelled to pay the fine for refusing to engage with the UK's own legacy body (or in the alternative cooperate with it). It is not clear if the circumstances of loyalist paramilitaries have been factored into the reported objections, as to whether he would consider they would also be at an 'unfair' disadvantage to their republican counterparts, or would in the alternative be considered more willing to give testimony, pay a fine, or relocate abroad. Should the reports be correct they provided a concerning insight into the levels of discussion that were taking place in Cabinet on such an important issue.

[130] https://www.theyworkforyou.com/debates/?id=2021-12-09b.575.0#g578.1

[131] https://www.newsletter.co.uk/news/crime/troubles-legacy-legislation-delayed-until-after-assembly-election-claim-3525071

[132] https://hansard.parliament.uk/commons/2022-01-13/debates/8D0ECAD5-0305-4799-8A01-45E845B5032E/PublicProsecutionServiceAndLegacyInNorthernIreland

3. The current 'Package of Measures' from limitation to delivery

Synopsis:

- *Despite repeated commitments to implement the Stormont House Agreement right up to March 2020, the legislation was not introduced.*
- *In the absence of the establishment of the SHA mechanisms, there remained an ad hoc set of mechanisms in place that were a result of the 'package of measures' agreed by the UK further to address the breaches of Article 2 of the ECHR found by the European Court of Human Rights (ECtHR) from 2001 onwards.*[133]
- *There are patterns of the UK authorities seeking to limit or obstruct the work of the package of measures to prevent effective investigations into conflict related cases. Numerous battles were fought by families, NGO and their legal reps along with the Committee of Ministers of the Council of Europe to ensure that the Package of Measures could finally deliver ECHR compatible investigations.*
- *This section covers the advent of the Package of Measures, official attempts to limit or obstruct its work, and examples of how it is now presently delivering.*

3.1 The 'Package of Measures': The UK response to ECtHR rulings

The UK agreed a package of measures with the Council of Europe to by way of remedy of the series of procedural failings found in ECtHR cases over state killings. These measures have functioned as an *ad hoc* set of legacy mechanisms in the absence of SHA legislation.

In summary, these include:

- **Police Ombudsman**: Powers to conduct investigations using full police and disclosure powers into past police criminality, and to investigate grave and exceptional police misconduct. In practice, the Police Ombudsman legacy directorate has operated largely as an information recovery and accountability mechanism with information in legacy cases being provided both to complainants (usually families of victims) and through Public Statements in the form of detailed reports. Reports such as the Ombudsman's Operation Ballast investigation and the report into the Loughinisland massacre made public significant evidence of past human rights violations. The Ombudsman, like the PSNI, could also pass files to the PPS for prosecutorial decisions on criminal matters.
- **Coronial Inquests:** Provided for a judicial inquiry led by a Coroner with powers to compel witnesses, disclosure etc. The main outcome from these hearings were information recovery and accountability through a civil process. Following the

[133] At the time of the GFA the existing justice and investigative mechanisms were not capable of delivering ECHR Article 2 compliant investigations. In a series of Strasbourg cases (McKerr group) procedural violations of Article 2 ECHR were found leading to the UK agreeing with the Council of Europe Committee of Ministers to adopt a remedial 'package of measures' reflected in the above mechanisms.

SHA (which would have retained inquests), the Lord Chief Justice established a Legacy Inquest Unit to deal with over 50 legacy inquests (some relating to multiple deaths). The withholding of resources meant this unit did not become operational until April 2020. Its work was also delayed by the pandemic but has subsequently progressed.

- **PSNI legacy investigations:** The PSNI established the Historical Enquiries Team (HET), which was put forward as a component of the package of measures. The HET was limited to conducting desktop reviews. Cases could be passed to the PSNI for *investigation* with police powers although this did not happen with any 'state involvement' cases. The main product of these HET reviews for the vast majority of families were reports produced on the relevant case and given to the families. These provided a measure of resolution to some families, but were limited for others. The PSNI Historical Enquiries Team (HET) ran from 2004 but was stood down following a critical inspectorate report finding the level of bias in state involvement cases was so pronounced it conflicted with ECHR Article 2. The HET was then replaced with the Legacy Investigation Branch (LIB) with police powers that has led to a small number of criminal cases, including of soldiers, resulting in decisions to prosecute from the PPS.[134]
- **PSNI 'call in':** Another component of the package of measures is the ability of the PSNI to 'call in' an external police force to investigate. The most prominent current legacy call ins related to several investigations led by Jon Boutcher, including Operation Kenova, examining allegations of the role of an agent of the state in the IRA. Operation Kenova had full police powers and passed prosecution files to the PPS. However, its major products would be public-facing reports of its investigative findings. This, in addition to evidence gathered through the investigative process itself, will focus on information recovery then provided to families.[135]
- **Public Inquiries:** Public inquiries into legacy matters were also part of the package of measures. Public inquiries were often judge-led with a range of powers of compulsion. It is notable that the UK never discharged a commitment to hold a public inquiry into the death of human rights lawyer Pat Finucane and introduced the Inquiries Act 2005 to grant ministers significant control over inquiries.
- **Public Prosecutions Service (PPS):** As part of the 'package of measures' there were reforms to the prosecutorial system in NI, as was also the case under the GFA. The reforms furthered independent decision making of the PPS and a more

[134] The fate of the HET is covered in the pages 5-6 of the Submission from the Committee on the Administration of Justice (CAJ) to the United Nations Human Rights Committee in response to the Concluding Observations on the 7th Periodic Report of the UK under the International Covenant on Civil and Political Rights (ICCPR), June 2017, Follow up Procedure: "accountability for conflict-related violations in Northern Ireland" (CCPR/C/GBR/CO/7, paragraph 8).
[135] Operation Kenova, ECHR Framework report v3.0, page 4, https://www.kenova.co.uk/about-kenova

transparent framework for prosecutorial decisions, including duties to give reasons for decisions not to prosecute.

- **Civil Litigation:** Also relevant and complementary to the package of measures was the ability of families to undertake civil litigation. This included litigating for the purposes of compensation but also to ensure investigative duties were discharged, a route often taken to unblock obstacles to other elements of the package of measures discharging their functions. Such civil challenges are often reliant on compliance with the ECHR. For remedy, such litigation would rely on the judiciary exercising powers independently from government. The GFA guarantees the incorporation of the ECHR in NI law with 'direct access to the courts and remedies for breach[es]'. Civil proceedings, as well as criminal trials, also provided a forum for information recovery where evidence can be presented and tested.

Taken together, the existing package of measures whilst piecemeal did have the legal capacity to deliver 'truth recovery with teeth'. This means that the mechanisms could have engaged in information recovery though the independent exercise of police-type or judicial powers (e.g., search and seizure, being able to compel access to intelligence information, the power of 'discovery' in the civil and inquest system) rather than having to rely only upon information volunteered to them.

It is notable that in his 2016 expert report into Northern Ireland Legacy, the UN Special Rapporteur, Pablo de Greiff, observed that the package of measures 'resemble more truth-seeking initiatives than justice measures.' He also commented that 'distinctions between truth and justice initiatives are more often than not overdrawn.'[136]

Statistics on police investigations and prosecutions

The PSNI Historical Enquiries Team (HET) was established in 2004 with a remit of re-examining conflict related deaths between 1969 and 1998. A two stage process of 'review' and full 'investigation' was subsequently adopted. Not one of the cases referred for full investigation by the HET was a state involvement case. In relation to disaggregation of protagonists responsible for the 2000 deaths reviewed by the HET – the PSNI set out the following statistics:

> The HET completed reviews of 1,625 cases, which related to 2,051 deaths; of these 1,038 were attributed to republicans, 536 to loyalists, 32 to the army, and 9 cases where it is not known.[137]

Ultimately the HET was stood down following a highly critical inspection by the official HM Inspector of Constabulary which found that the HET had given such preferential treatment to military cases it had not acted in a manner compliant with ECHR Article 2. The PSNI Chief Constable consequently directed that all 238 military cases that had been in the remit of the

[136] UN Doc A/HRC/34/62/Add.1 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland, (17 November 2016) para 20.

[137] Troubles legacy cases bias disputed by figures BBC News Online 2 February 2017, http://www.bbc.co.uk/news/uk-northern-ireland-38844453

HET be the subject of a fresh investigation and established a new PSNI Legacy Investigations Branch (LIB). The military cases and broader outstanding HET cases were to automatically transfer to the Historical Investigations Unit under the Stormont House Agreement. They will not transfer to the ICRIR under the present legacy Act.

In 2017, the LIB caseload reportedly involved 530 killings carried out by republicans, 271 by loyalists, 354 by the security forces, and 33 other killings (a total of 1,188). The higher number of security force cases reflected the deficiencies in previous investigations. The LIB was not actively considering all of these cases at once and into 2017 was operating four investigations teams with the majority of the cases relating to the actions of republicans.[138] Whilst some military cases had been dealt with by the LIB, the courts at first instance (in March of 2017) however held that the LIB, as part of the police, did not meet ECHR Article 2 independence requirements for such cases.[139] This position had already been taken by the Human Rights Committee of the UK Parliament. [140] The issue was subsequently dealt with by the UK Supreme Court in 2021 in the cases of McQuillan, McGuigan and McKenna 2021 [UKSC 55][141] which held that it had not been established per se that the LIB could not meet independence requirements for effective investigations, albeit it held these standards had not been met in the particular circumstances of the McQuillan challenge.

In February 2017, the office of the then Director of Public Prosecutions Barra McGrory stated that since he came to post in 2011, there had been 17 prosecutorial decisions in legacy cases, which break down as follows:

- 8 cases relate to alleged offences attributed to republicans, in 7 of the cases decisions were taken to prosecute;
- 3 cases relate to loyalists and have resulted in prosecutions;
- 3 cases relate to soldiers, two of these have resulted in decisions to prosecute and one a decision not to prosecute; and
- 3 cases relate to police officers, in two decisions were taken not to prosecute.[142]

[138] Team A examining 238 republican 'on the runs' cases; Team B: two republican cases and activities of a covert military unit (MRF, Military Action Force) following revelations from former members in a BBC documentary; Team 3 is examining the Bloody Sunday and Kingsmill massacres by the British Army and republicans respectively. Team D is dealing with seven republican attributed deaths. See Prof Kieran McEvoy, evidence to Defence Select Committee of UK Parliament, 7 March 2017 https://committees.parliament.uk/writtenevidence/78677/html/#:~:text=8%20cases%20relate%20to%20alleged,a%20decision%20not%20to%20prosecute

[139]Re Margaret McQuillan in Matter of Review by the HET into the Circumstances of the Death of Mrs Jean Smyth and Other Suspected British Army Military Reaction Force Killings. 3rd March 2017. REF 15/57619/01.

[140] Joint Committee on Human Rights (JCHR) Human Rights Judgments Seventh Report of Session 2014–15, HL Paper 130HC 1088, 11 March 2015, paragraph 3.7: *'...the Legacy Investigations Branch cannot itself satisfy the requirements of Article 2 ECHR because of its lack of independence from the police service.'*

[141] https://www.supremecourt.uk/cases/docs/uksc-2020-0019-judgment.pdf

[142] https://www.belfasttelegraph.co.uk/news/northern-ireland/no-imbalance-of-approach-in-decision-to-prosecute-troubles-related-cases/35409088.html

These figures contextualise the commentary, including from members of the UK Executive, alleging bias in the criminal justice system against the military. In relation to solider prosecutions there has also been considerable criticism of lawyers and law officers, most notably the Director of Public Prosecutions. Such discourse has included a fundamental misunderstanding of the role of lawyers, through associating them with their current or past clients and clients' causes.

Limitations and official obstruction of the 'Package of Measures'

There have been significant delays in a range of legacy related judicial proceedings in Northern Ireland. However, it is important to note that the delays in these proceedings are typically caused by state agencies who have demonstrated a deliberate pattern of obstruction and prevarication in the provision of information to victims, survivors and statutory bodies such as the Police Ombudsman and even the Courts.[143]

For example, in the Police Ombudsman report into the Loughinisland massacre (elaborated below), the then Ombudsman Dr Michael Maguire refers to police intelligence documents being marked as 'Slow Waltz', which connotes a deliberate strategy of delaying access to such materials including to other investigating officers.[144]

The 'Slow Waltz' process is not limited to intelligence files. The experience of those engaged in these judicial processes is one that is beleaguered with obfuscation and delay. High Court legacy cases are regularly challenged by Defendants such as the PSNI, MOD and NIO as a default position, followed by contested discovery applications and Public Interest Immunity applications requests for Closed Material Procedures where material is deemed sensitive.

Another example was a decision by Ministers at the time to lock away for a further 45 years public record files concerning the deaths of two school children who died because of plastic bullets fired by security forces on the grounds of 'national security'.[145]

Continued withholding of resources from the Legacy Inquests Unit

The political obstruction of legacy inquests, in the form of withholding funding and information, resulted in significant delays to that which many families have already suffered. In 2016 the Lord Chief Justice of Northern Ireland Declan Morgan stated that the failure to deal with legacy inquests has 'cast a long shadow over the entire justice system'.[146]

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[143] CAJ (2015) THE APPARATUS OF IMPUNITY? Human rights violations and the Northern Ireland conflict https://caj.org.uk/wp-content/uploads/2017/03/No.-66-The-Apparatus-of-Impunity-Human-rights-violations-and-the-Northern-Ireland-conflict-Jan-2015.pdf

[144] OPONI, *The Murders at the Heights Bar, Loughinisland,* 18 June 1994 (August 2020) 80, Available https://www.policeombudsman.org/Investigation-Reports/Historical-Reports/The-murders-at-the-Heights-Bar-in-Loughinisland-Po

[145] Seamus McKinney, 'Disgust at Discovery That Plastic Bullet Death Files are Closed for up to 84 years' *Irish News* (24 April 2018) https://www.irishnews.com/news/northernirelandnews/2018/04/24/news/plastic-bullet-filesordered-closed-for-up-to-84-years-1312047/

[146] Opening Address by the Lord Chief Justice to the Legacy Engagement Event on 12 February 2016, as cited in DH-DD(2016)528

Following proposals put forward by the Lord Chief Justice in 2016 setting out a five-year plan for dealing with outstanding legacy cases before the Coroners' Court through the establishment of a dedicated Inquest Legacy Unit, resources were prevented from being made available to implement the plan.[147]

In a February 2016 address to families, waiting on legacy inquests, the Lord Chief Justice stated:

> It is my assessment that provided the necessary resources are put in place and we obtain the full co-operation of the relevant state agencies - principally the Police Service of Northern Ireland and the Ministry of Defence - it should be possible to hear these cases within a reasonable timeframe, which I see as being about five years' [emphasis in original].[148]

In his 2016 review, Lord Justice Weir was highly critical of the UK Ministry of Defence (MoD) who had cited 'resource pressures' as a rationale for repeatedly missing deadlines for disclosing documents to inquests examining the actions of soldiers. Lord Justice Weir stated:

> The MoD is not short of money. It's busy all over the world fighting wars and it's about to buy some new submarines with nuclear warheads - so it's not short of money.... [The disclosure of official records to legacy inquests] is obviously very low on their list of priorities.[149]

He stated that such disclosure '...is not an option - this is an international obligation on the State' and took the view that the argument of 'resource pressure' raised questions over the commitment to obligations under international human rights laws stating that the practice '...doesn't suggest any great intent on the part of government to comply with their obligations.'

The Judge raised concerns in that the 'MoD have been rather inclined to think they can thumb their nose at directions from the coroner and that they were quite free to abandon the promises they made' and told legal representatives of the Ministry that 'You want to avoid any suspicions that this approach is designed to prevent the matter being aired in a public arena, that it's a deliberate attempt to delay and obfuscate.'

Lord Justice Weir was also critical of the practice within the Police of delaying disclosure stating that it was 'disgraceful' that not a single sheet of paper had been disclosed to the next-of-kin in relation to one inquest.[150]

In March 2017 the UK authorities announced that no resources would be released for the establishment of a dedicated Legacy Inquest Unit until there was overall agreement on the full range of mechanisms to deal with the past.[151] The collapse of the Executive in January 2017 related to issues concerning, *inter alia,* the establishment of such mechanisms. Therefore, the

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[147] https://www.bbc.co.uk/news/uk-northern-ireland-41165119

[148] Legacy Engagement Event – Friday 12th February 2016, Opening Address by the Lord Chief Justice, Sir Declan Morgan.

[149] MOD is not short of money for work on inquests into historic killings – Judge *Belfast Telegraph* 28 January 2016.

[150] As above.

[151] James Brokenshire: Deal needed on all legacy issues before inquest cash released (Irish News 10 March 2017) http://www.irishnews.com/news/politicalnews/2017/03/10/news/james-brokenshire-deal-needed-on-all-legacy-issues-before-inquest-cash-released-960356/

introduction of a requirement by the UK for cross-party consensus on this issue prior to the release of resources was going to delay the establishment of a Legacy Inquest Unit. It should be noted that there were no legal constraints within the constitutional settlement which would have prevented the UK government providing these monies without the approval of all parties to the NI Executive. In addition, the Secretary of State had the power to direct Northern Ireland Departments to take any action necessary to comply with international obligations where necessary. This power, under the Northern Ireland Act, was not exercised in the instance of funding legacy inquests.[152]

In January 2019, the Court of Appeal allowed an appeal taken by Raymond McCord against a case management decision not to remove a stay on the hearing of his application for judicial review against the PSNI, Department of Justice and Coroner Service seeking a declaration that the delay into an inquest into his son's death violated Article 2 ECHR.[153] Citing the Court of Appeal decision in Hugh Jordan's Application [2015] NICA 66 the Court noted that the fresh inquest should take place within a reasonable timeframe and any failure to do would constitute a fresh breach of the Convention which could result in a remedy of damages. In February 2019, there were 100 deaths before the Coroner's court to be investigated, but only those which formed part of the Ballymurphy Massacre, Kingsmill Massacre and the death of Seamus Bradley were at hearing at that time.[154]

In February 2019 the Department of Justice then stated that it would release funds to support the establishment of a Legacy Inquest Unit within the Coroners Service to address the outstanding 54 legacy inquests into 95 deaths that are currently awaiting hearing. This followed a decision of the High Court of Northern Ireland in 2018 following an application for Judicial Review taken by Bridget Hughes, the widow of Anthony Hughes killed in Loughgall, the case which was the subject of the *Kelly and Others v UK* ruling. This successful challenge held that the actions of the former First Minister Arlene Foster in preventing the release of funding for legacy inquests had been unlawful. This included a ruling that Ministerial actions had been unlawful by virtue of failure to consider the duties to comply with ECHR Article 2 and erroneously subjecting the release of monies for legacy inquests to an 'overall package' to deal with legacy issues.[155]

Obstruction of Police Ombudsman investigations: The Loughinisland Massacre

The involvement of state agents in serious human rights violations including killings has again come into focus with the arrests of journalists following revelations of informant involvement in

[152] s26 Northern Ireland Act 1998." (1)If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or public order, he may by order direct that the proposed action shall not be taken. (2)If the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations, of safeguarding the interests of defence or national security or of protecting public safety or public order, he may by order direct that the action shall be taken.

[153] https://judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20Judgment%20-%20In%20re%20Raymond%20McCord%2018.01.19.pdf

[154] Information provided by the Coroners Service for Northern Ireland on 12 February 2019

[155]Hughes (Brigid) Application [2018] NIQB 30 https://judiciaryni.uk/judicial-decisions/2018-niqb-30

the Loughinisland massacre. The attempts to challenge the Ombudsman's powers to investigate this case (by the PSNI) are detailed below.

In June 2016 the Police Ombudsman in exercising statutory powers issued a report into the 1994 Loughinisland massacre finding that collusion had been a significant feature in the sectarian murders of six civilians in a machine gun attack on the Heights Bar.[156]

In 2017 an award-winning documentary, 'No Stone Unturned,' in part relying on leaked official documents further revealed details of human rights violations through paramilitary collusion with the massacre.[157]

There were no arrests of persons suspected of involvement in the murders, but the police launched an operation involving over 100 officers which arrested the journalists who made the documentary and raided their homes and offices of four media firms seizing significant amounts of confidential journalistic material, much of which did not relate to Loughinisland but to other cases. The two journalists Trevor Birney and Barry McCaffrey were arrested in August 2018, and released on conditional police bail. The arrests related to the charge of 'theft' of an official document, as the documentary had relied on a leaked Police Ombudsman internal report. The Police Ombudsman had however not reported any theft. Judicial review proceedings were then taken as regards the legality of the search and seizure of journalistic material. The arrests have prompted significant concern from human rights and press freedom and representative bodies as well as international attention including the UN Committee Against Torture.[158]

In late May 2019 the High Court in Belfast ruled that the Police searches had been unlawful and ordered the return of all seized journalistic material. The court rebuked the police involved for their actions.[159] The police several days later announced they were dropping their investigation against Mr McCaffery and Mr Birney.[160]

The arrest of the journalists caused a public outcry and, although the court ruling has vindicated their position and that of Article 10 compliance regarding journalistic material, the police actions still leave a chill factor for journalists in relation to public interest work protecting sources and exposing human rights violations. There are concerns within the human rights and journalistic community, including CAJ, that as well as the intimidation of journalists, police actions also had the purpose or effect of 'getting at' the Police Ombudsman's office, to seek to have a basis for querying duties to disclose sensitive material to the Office. As such the police

[156] https://www.policeombudsman.org/Media-Releases/2016/The-murders-at-the-Heights-Bar-in-Loughinisland-Po
[157] http://film.britishcouncil.org/no-stone-unturned
[158] Ibid, CAT/C/GBR/CO/6, Para 40. Further details are found on a Council of Europe alert and Media Freedom report: https://mappingmediafreedom.ushahidi.io/posts/22627
https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_sojdashboard_WAR_coesojportlet_alertId=39053000
[159] https://www.theguardian.com/uk-news/2019/may/31/northern-ireland-judge-rebukes-police-for-seizing-papers-from-journalists
[160] https://www.theguardian.com/uk-news/2019/jun/04/loughinisland-journalists-police-investigation-dropped-redacted-document-no-stone-unturned

actions were as much of a concern as regards interference in the independence of the Ombudsman's office as they are regarding press freedom.

The police actions also called into question the integrity of the use of the 'call in' process presented by the UK as part of its Package of Measures. The 'call in' process has been used by the Police Service of Northern Ireland (PSNI), for cases where the PSNI would have a conflict of interest preventing an Article 2 compliant investigation.[161] In this instance however the PSNI retained significant involvement in relation to the case against the two journalists despite the operation formally being one that had called in another police service (Durham Police).

Attempts to Curb Statutory Powers of the Police Ombudsman

In 2017 former members of the RUC, including a former head of Special Branch took forward a judicial review arguing that the Ombudsman had exceeded his statutory powers by making findings in his public statement on the Loughinisland massacre. On the 21 December 2018 the High Court in Northern Ireland upheld the challenge at first instance issuing a damning judgment stating that the Ombudsman had exceeded his statutory powers by reasons of the content of his statement. Such a ruling would have rendered the Police Ombudsman's office unable to discharge the Article 2 ECHR functions the UK had assigned to it as part of the Package of Measures. In essence it would have precluded the Ombudsman on a technical basis from making findings in relation to paramilitary collusion or broader police wrongdoing. However, the integrity of the ruling was then seriously questioned when it was revealed in the media in January 2018 that the judge had previously represented as a lawyer the same applicants in an unsuccessful yet similar challenge to a previous Ombudsman report (into the 2001 Omagh bombing which killed 31 persons). This led to families applying to the court for the judge to recuse himself from concluding the judgment. The judge ultimately agreed to step aside and the court was reconstituted.[162] Judgment was formally delivered on 29 November 2018 reversing the earlier position and dismissing the application.[163] The powers of the Police Ombudsman's office to issue public statements were therefore maintained, however the Ombudsman suspended the release of Public Statements and reports whilst the proceedings were ongoing.

On 18 June 2020, the 26th anniversary of the massacre, the Court of Appeal of Northern Ireland formally issued its judgement dismissing the appeal. This found that while the Ombudsman did exceed his powers in 3 paragraphs it was appropriate for the 'Police Ombudsman to 'acknowledge that the matters uncovered by him were very largely what the families' claimed constituted collusive behaviour.'[164]

[161] For example see the terms of reference of Operation Kenova https://www.opkenova.co.uk/

[162] Concerns in relation to British Government compliance with article 2 of ECHR in respect of legacy issues in Ireland. Niall Murphy Solicitor KRW Law LLP, October 2018 http://krw-law.ie/wp-content/uploads/2018/10/Submission-to-Commissioner-for-Human-Rights-Dunja-Mijatovic-2nd-OCTOBER-2018.pdf

[163] https://judiciaryni.uk/judicial-decisions/summary-judgment-court-delivers-judgment-loughinisland-report

[164] This paragraph's information from CAJ Rule 9 to CoE of July 2020.

More recently there have been further such challenges to the powers of the Ombudsman. However the earlier ruling however cleared the way for the release of much delayed reports.

There was a further development on the on 14 February 2019 in one group of cases where the Ombudsman issued a press statement advising that:

> His investigators have identified significant, sensitive information, some of which relates to covert policing, which is held by police but was not made available to his staff investigating events during "the Troubles."[165]

This discovery was made during its investigation of matters connected to the 1992 shooting at a bookmakers' shop on the Ormeau Road in Belfast in which five people were killed. We understand that the material discovered was in 30 lever arch folders of sensitive material which relates to covert policing. The Ombudsman stated that:

> My staff became aware that police were preparing to disclose a range of material as part of impending civil proceedings. Following a request from this Office, police released this material to us which helped identify significant evidence relevant to a number of our investigations.
>
> 'Following on from this, police have now also identified a computer system which they say had not been properly searched when responding to previous requests for information.
>
> 'In that instance, it would seem information which police told us did not exist has now been found**.**
>
> 'Reports outlining the findings of these various investigations, which the Police Ombudsman had hoped to begin publishing in the coming weeks, will now be delayed.[166]

Prior to Dr Maguire taking up post the Secretary of State appointed the Police Ombudsman (the second Ombudsman Al Hutchinson, in 2007) with were significant irregularities in the process. Mr Hutchinson had queried the role of legacy cases and there was a subsequent crisis over the handling of such cases. The resignation of the Chief Executive and critical reports first from CAJ and subsequently from the Criminal Justice Inspection, which among other matters found that reports into historic cases were altered or rewritten to exclude criticism of the RUC with no explanation, led to the suspension of the Ombudsman's Office's historic caseload, and ultimately the resignation of the Ombudsman.[167]

[165] https://www.policeombudsman.org/Media-Releases/Police-did-not-disclose-sensitive-%E2%80%98troubles%E2%80%99-relat

[166] https://www.policeombudsman.org/Media-Releases/Police-did-not-disclose-sensitive-%E2%80%98troubles%E2%80%99-relat

[167] See CAJ 'The Apparatus of Impunity' January 2015, chapter 6.

3.2 Contemporary delivery success of 'Package of Measures'[168]

Synopsis:

- *Notwithstanding the gaps and all the attempts to limit the functioning of the package of measures over the last five years in particular such mechanisms have really begun to deliver significant product for families in the form of information recovery and historical clarification. This has included often for the first-time victims in state-involvement cases identifying significant patterns of human rights violations relating to state killings, torture, and collusion.*
- *Notably it is at this juncture that the Legacy Act closes down the entire system – including inquests and civil litigation which would have remained intact and run in parallel with the Stormont House Agreement institutions.*
- *The UK authorities in seeking to justify the Act have both repeatedly falsely claimed that the current mechanisms are not 'working for anyone' and that they are solely focused on justice outcomes rather than information recovery. This section therefore outlines truth recovery in particular from the package of measures.*

Legacy cases have long faced limitation and obstruction including the withholding of resources and disclosure from State agencies. However, in the context of long term supervision by the Council of Europe Committee of Ministers and intervention by families, their legal representatives, NGOs and others the mechanisms had overcome many such obstacles, and increasingly delivered 'truth recovery with teeth'.

This included 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, important to guarantees of non-recurrence.

This is notable in 2022 we commented on legacy inquest decisions and in the 600+ pages of information recovery contained in large scale Police Ombudsman legacy reports. The 'Operation Kenova' independent police team (under the 'Call In' mechanism of General Measures) also had amassed over 50,000 pages of evidence and developed its own reports now due for publication in autumn 2023. We also noted civil cases were also leading to reparations and information recovery. The Committee of Ministers noted the 'vital role played by the inquest system' as well as the Police Ombudsman.[169]

It is in this context that the legacy Act will shut these mechanisms down and curtail their work.

It is notable that the Secretary of State for Northern Ireland at the time of introducing the Bill, implied 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

[168] The following information taken and adapted from The CAJ Rule 9 submission of July 2022

[169] 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

'halted'.[170] 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 was also a driving force behind the Bill shutting down judicial and independent investigation processes.

Inquests as a route to information recovery and historical clarification

In 2021, the NI judiciary carried out a case management of legacy inquests, civil actions and judicial reviews in an effort to streamline these processes,[171] which follows the previous Lord Chief Justice's Five-Year Plan on legacy inquests.

In February and March 2022 the Presiding Coroner, Mr Justice Humphreys, conducted reviews in all legacy related inquests that had not been allocated a Coroner, and identified 9 inquests into 16 deaths to be progressed by the Legacy Inquest Unit in 'Year 3' of the Five Year Plan for inquests.[172] As of then, there were 22 inquests into 34 deaths pending before the Coroners' Courts.[173] This does not include applications made to the Attorney General for Northern Ireland to order fresh inquests into legacy related deaths.[174]

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.[175] It is also noted that due to the family-centred nature of the inquest proceedings, and the fact that the next of kin received substantial disclosure, lawyers for the families had the opportunity to test the veracity of evidence through examination of the witnesses. This process provided the next of kin with information, answers and results previously denied.

In a similar vein, the long-running inquest (due to report) into the IRA murder of ten Protestant civilians at Kingsmill has involved the 'largest volume of intelligence material that has been

[170] "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/

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

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

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

[174] 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).

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

disclosed in the context of any inquest that has run in this jurisdiction'.[176] In England there was also a legacy inquest into the Birmingham Pub Bombings.[177]

Despite the delays due to the pandemic, many inquests have concluded in the last three years. Many of these inquests have shown that the actions of state actors were disproportionate and unjustified. For example:

- Stephen Geddis (aged 10), shot dead by British soldier on 30 August 1975, Coroner held (verdict 06.09.22) that the victim posed no threat, and the firing was not justified.
- Thomas Mills, shot dead by British soldier in July 1972, Coroner held (verdict 13.05.22) that the soldier was not justified in opening fire and the force used was disproportionate to the threat perceived.
- Pat McElhone, shot dead by British soldier on 7th August 1974, Coroner held (verdict 21.01.21) that the shooting cannot be justified.
- Ballymurphy massacre, concerning the deaths of ten civilians shot dead by the British army in August 1971 (Francis Quinn, Fr Hugh Mullan, Noel Phillips, Joan Connolly, Daniel Teggart, Joseph Murphy, Edward Doherty, John Laverty, Joseph Corr, and John James McKerr.) Corner held (verdict 11.05.21) that the killings were unjustified.
- Kathleen Thompson, shot dead by British solider on 6th November 1971. Coroner held (29.06.22) that the shooting was 'unjustified.'
- Leo Norney (17) shot dead by British soldier on 13 September 1975. Corner held (verdict 03.07.23) that Leo was 'entirely innocent' and that he had been deliberately killed by Paratrooper McKay.

The following information was provided from NGO the Pat Finucane Centre (PFC) regarding the status of legacy inquests and included in a CAJ submission to the Council of Europe: On 28th February 2019, the Lord Chief Justice announced a five-year plan to deal expeditiously with the outstanding legacy inquest. The plan was due to commence in April 2020, and deal with 54 cases, relating to 95 deaths, over a five-year period. Adequate resourcing and a dedicated Legacy Inquest Unit was established to provide legal, administrative, and investigative support, as required, by the Presiding Coroner and Coroners dealing with particular legacy inquests.[178] The pandemic and other factors delayed the implementation of the five-year plan, however the Coroner Service has confirmed that they are currently dealing with cases listed for Year 3. A number of Year 1 and Year 2 inquests are still outstanding (for example the Springhill/ Westrock inquest concerning the deaths of five individuals by the British Army on 9th August 1972 was originally listed for Year 2 of the 5-year plan.)

[176] 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.'
[177] https://www.theguardian.com/uk-news/2019/apr/05/birmingham-pub-bombings-botched-warning-call-led-to-deaths-inquest-rules
[178] Presiding Coroner's Statement - State of Readiness Event - 7 June 2019.pdf (judiciaryni.uk)

The Springhill inquest opened in February 2023, investigating a military shooting, killing five persons, including three minors and a priest in July 1972. The Attorney General for Northern Ireland had directed a fresh inquest in 2014.[179]

The Inquest into the death of Paul Thompson in 1994 resumed in April 2023. Mr Thompson was shot dead by loyalist paramilitaries with a submachine gun linked to five attempted killings, in circumstances where there are concerns regarding police actions and the lack of an effective investigation.[180]

Civil Actions as route to reparations and information recovery

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

A question in the UK Parliament in 2022, there were 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 £ 632,000, and 14 claims discontinued or resolved by other means.[181] This does not include claims against other state agencies.

Civil actions initiated by victims and survivors had also proved an effective mechanism to obtain discovery and reparations denied to victims and survivors through other routes.

For example, in the Sean Graham bookmakers killing on the Ormeau Road in 1992, the loyalist paramilitary UDA[182] 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 was therefore a high-profile collusion case reported on by the Police Ombudsman in 2022. During 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.[183]

Similarly, in December 2021 the UK MoD and PSNI paid £1.5 million in damages in a settlement to two of the three families of those killed, and to two survivors, of the Miami Showband attack. This related to a sectarian gun and bomb attack on the popular music band the Miami Showband in 1975 killing three of its members and injuring two others. The survivors and

[179] https://www.judiciaryni.uk/publications/press-notice-springhill-inquest-17-february-2023 https://belfastmedia.com/springhill-massacre-families-to-relaunch-their-campaign-in-fight-for-truth-and-justice/. Also CAJ Rule 9 of May 2023

[180] https://caj.org.uk/latest/inquest-into-liam-paul-topper-thompsons-death-resumes/. Also CAJ Rule 9 of May 2023

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

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

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

relatives had taken a civil claim against state agencies alleging security force collusion with loyalist paramilitaries in the killings.[184]

In March 2022 the High Court in Belfast awarded reparations of £350,000 to the family of the late Liam Holden in a ruling that found he had been tortured by the British Army, including using 'waterboarding.' The narrative verdict by the Court runs to 60 pages, providing substantive information recovery.[185]

In a miscarriage of justice Mr Holden had been sentenced to death in 1973 having been wrongly convicted of the murder of a solider, Frank Bell, on the basis of a confession. The sentence was later commuted to life imprisonment, and he was released after 17 years. In 2012 the conviction was quashed by the Court of Appeal. In 2022 he launched the civil proceedings in which the Hight Court has accepted the military tortured, including through simulated drowning ('waterboarding') Mr Holden into the confession. Mr Holden subsequently passed away in 2023. The posthumous damages included compensation for "waterboarding, hooding and threats to kill, malicious prosecution and misfeasance in public office."[186]

In another case the High Court will also produce a detailed narrative verdict and awarded compensation of £90,000 GBP to a man who as a child had witnessed the sectarian killing of his grandfather Sean McParland in 1994. The killing involved an informant within the loyalist paramilitary UVF, run by the Special Branch of the then police service. Mr Justice Rooney held that the police knew that the informant had already confessed to his role in other killings but had "*not only turned a blind eye to Informant 1's serious criminality*" but also "*went further and took active measures to protect (him) from any effective investigation and from prosecution, despite the fact that (he) had admitted his involvement in previous murders and criminality*."[187]

Both these cases therefore provide levels of historical clarification and accountability in relation to practices of the use of torture by the miliary and collusive practices by the Special Branch of the police respectively.[188]

We are not aware of a single civil claim that has been determined to be invalid and ill founded.

Police Ombudsman information recovery

In January 2022, the Police Ombudsman released her Operation Greenwich[189] investigation report covering 19 murders and multiple attempted murders committed across several counties around the northwest of Northern Ireland between 1989 and 1993 by the Loyalist paramilitary group the Ulster Defence Association (UDA), a legal organisation until 1992.

The Operation Greenwich report, which includes the death of Patrick Shanaghan, provides 338 pages of legacy information recovery and raises significant concerns regarding collusive activity

[184] https://www.bbc.co.uk/news/uk-northern-ireland-59641564
[185] https://www.judiciaryni.uk/judicial-decisions/2023-nikb-39 [236]
[186] https://www.judiciaryni.uk/judicial-decisions/2023-nikb-39 [236] see also https://www.theguardian.com/uk-news/2023/mar/24/liam-holden-waterboarded-tortured-british-army-belfast-high-court-
[187] https://www.belfasttelegraph.co.uk/news/courts/belfast-man-awarded-90k-damages-over-grandfathers-killing-involving-police-informant/729726937.html
[188] Information on these two cases from CAJ Rule 9 of May 2023
[189] https://www.policeombudsman.org/Media-Releases/2022/Collusive-behaviours-but-no-prior-knowledge-of-att

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 [of] 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.[190]

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 several 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[191] officers passing information is in my view a serious matter that can be described as collusive behaviour;
- 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; and
- 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.

[190] As above paragraph 22.133.
[191] Ulster Defence Regiment – an NI recruited and specific regiment of the British Army.

In February 2022 a further Police Ombudsman investigation report Operation Achille, provided a further 344 pages of information recovery in relation to 11 killings 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.[192]

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.

There were a range of Police Ombudsman legacy investigations still to report, which were 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 in question. The Ombudsman also asserted that the 'collusive behaviours' between police and paramilitaries identified in the Operation Achille's report were 'systemic.'[193]

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.'[194]

In April 2023 the Police Ombudsman issued a further historical investigations report into the 1974 loyalist killing of an independent elected representative Patrick Kelly.[195] The investigation

[192] https://www.policeombudsman.org/Media-Releases/2022/Investigative-and-intelligence-failures-and-collus
[193] https://www.irishnews.com/news/northernirelandnews/2022/02/08/news/police-ombudsman-collusive-behaviours-identified-in-operation-achille-are-systemic--2584061/
[194] https://www.policeombudsman.org/Media-Releases/2022/Young-men-were-subjected-to-coercion-and-oppressio
[195] CAJ Rule 9 of May 2023

followed a family complaint, that suspects had not been investigated by the police as they were members of a local military regiment. This report, running into 139 pages of information recovery, found a series of failures to investigate, including: latent bias in the senior investigating officer; failures to verify alibies of military suspects; forensic failures; failures to link cases; the withholding of intelligence from the murder investigation team which linked individuals, including soldiers to the murder. The Ombudsman concluded some actions were indicative of collusive behaviour.[196]

'Call In': Operation Kenova criminal investigations

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

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) were most recently "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.[197]

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 would:

> '… 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.'[198]

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."[199] In this context the Operation Kenova reports have provided a further considerable vehicle for information recovery 'with teeth' through the planned reports.

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[196] https://www.policeombudsman.org/patrickkelly

[197] 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).

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

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

A total of 26 investigation files relating to Operation Kenova were submitted to the prosecution service from October 2019 to February 2022, but decisions as to whether to prosecute have largely not yet been taken.[200] The delay in taking such decisions was brought into sharp focus with the death of a chief Stakeknife suspect, Freddie Scappaticci, in April 2023, leading to questions as to why prosecutorial decisions had not been taken earlier.[201]

Operation Kenova released a protocol in October 2022 setting out an eight-stage process for the release of the report. The second stage of this process whereby agencies criticised in the report, are allowed to make representations ('Maxwellisation'), was however delayed. Stage 4 of the process, security checking, was underway by May 2024.[202] This process was completed in August 2023, with the report passed to the PSNI for publication thereafter and is presently awaited.[203]

First and only to date legacy conviction of soldier on 25 November 2022[204]

In sharp contrast to the witch hunt narrative there have in fact only been a handful of decisions to prosecute soldiers as a result of legacy cases, only one conviction and no jail time.

A few days after the Second Reading of the Legacy Bill the Crown Court in Northern Ireland found a former soldier guilty of the manslaughter of a civilian, Aidan McAnespie, in 1988. This is the first occasion a member of the security forces has been convicted in a legacy case relating to the Northern Ireland conflict.[205] A sentence of three years in prison was handed down but suspended and no jail time was served.[206]

The two military cases which were central to the mobilisation calling for a military amnesty from certain veterans groups and their supporters were the prosecutions of former solider Dennis Hutchings in relation to the fatal shooting in the back of a young man with learning disabilities John Pat Cunningham in 1974[207] and the prosecution of 'Solider F' in relation to the Bloody Sunday massacre. Solider Dennis Hutchings died whilst on trail. A prosecution service decision to discontinue legal proceedings against Solider F was successfully challenged in court, reconsidered and the proceedings resumed in late 2022.[208]

The Command Paper's alternative narrative on the Package of Measures (July 2021) [209]

The July 2021 Command Paper tries to paint a narrative that both the existing 'package of measures' and institutions proposed under the SHA focus on 'criminal justice outcomes' (i.e.,

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[200] https://www.kenova.co.uk/pps-update-on-consideration-of-operation-kenova-files
[201] https://www.theguardian.com/uk-news/2023/apr/14/freddie-scappaticci-army-spy-inside-ira-stakeknife
[202] https://www.kenova.co.uk/update-on-progress-of-interim-report-release; CAJ Rule 9 of May 23
[203] https://www.kenova.co.uk/update-regarding-the-publication-of-the-kenova-report
[204] The CAJ Rule 9 addendum of December 2022
[205] https://www.judiciaryni.uk/judicial-decisions/2022-nicc-29
[206] https://www.amnesty.org.uk/press-releases/northern-ireland-ex-soldier-guilty-manslaughter-aidan-mcanespie-troubles-case
[207] https://www.patfinucanecentre.org/taxonomy/term/182
[208] https://madden-finucane.com/2022/09/22/prosecution-of-soldier-f-for-murder-and-attempted-murder-on-bloody-sunday-to-resume/
[209] https://www.dealingwiththepastni.com/assets/Model-Bill-Team-Response-to-the-UK-Government-Command-Paper-on-Legacy-in-NI-Final-3.09.21-(1).pdf

prosecutions and convictions) and that the proposed new 'Information Recovery Body' IRB will amount to a departure from this approach to instead pursue 'information recovery'. The Command Paper states:

> 'Rather than pursuing a goal (convictions) that will fail almost every family, we want a process of information recovery that will deliver for every family that wants it.'[210]

It describes this process as one that 'moves away from criminal justice outcomes'.[211] Erroneously claiming that 'persisting with criminal justice outcomes' conflicts with the GFA and SHA the stated justification for proposing the IRB is to instead 'focus on the recovery and provision of information.'[212] Elsewhere in the Command Paper the pursuit of 'criminal justice outcomes' is blamed for diverting 'finite resources' away from 'positive outcomes' for the 'vast majority of families' who 'miss out on the opportunities to successfully recover information.'[213] The Secretary of State in his foreword to the proposals even goes as far as to blame the application of the rule of law for preventing information recovery, reconciliation and 'wider society moving forward'.

These claims wilfully ignore the fact that the overarching thrust of the proposed SHA mechanisms was grounded in information recovery facilitated by mechanisms 'with teeth.'

The ICIR was entirely focused on information recovery in individual cases, as was the Oral History Archive at a more thematic level, and both were to contribute to broader work on overarching themes and patterns. The HIU along with the inquest system could engage in information recovery 'with teeth' through the exercise of police or coronial powers, with the main product of the HIU being family reports.

The presentation in the Command Paper of the package of measures erroneously portrays their focus as one of 'criminal justice outcomes.' In fact, some mechanisms—inquests, public inquiries, do not relate at all to criminal justice outcomes at all. Whilst retaining the possibility of prosecutions, the main product of Police Ombudsman legacy investigations has long been public reports, contributing to truth recovery and reform as a guarantee of non-recurrence. Similarly, Sir Hugh Orde, who established the Historical Enquiries Team (HET), was similarly clear that main work of the HET was focused on providing the maximum information possible to families.[214] To frame all this work as 'prosecution focused' was highly misleading and disingenuous.

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[210] Command paper, paragraph 5.
[211] Command paper, paragraph 17.
[212] Paragraphs 10-11.
[213] Paragraph 5.
[214] The Command paper states 'The Historical Enquiries Team had an annual budget of £30million and 100 staff. After 10 years, just 3 of the 1615 cases it reviewed resulted in successful convictions for murder.' This deliberately This entirely overlooks the fact that the HET produced hundreds and hundreds of family reports, which were always to be its main product in each of its cases. As Sir Hugh Orde has argued:
'The fact that evidential opportunities lost at the time would be hard to recover did not render the initiative worthless. We had to shift the focus to ensure that, mindful of our primary role as investigators, the driving

The Command Paper also critiques the work of Operation Kenova, noting that it has not yet led to any prosecutions. Whilst in fact Kenova has passed prosecution files to the PPS, this again overlooks and disregards the significant level of information recovery provided to families to date through the investigative process and the public-facing reports that Kenova (and its other operations) are to produce into over 200 deaths.

In addition, the paper states that the PSNI Legacy Investigation Branch is currently considering almost 1,200 cases, which would take 'over 20 years using current resources.' However, these figures do not represent the small number of cases currently live before the LIB. Rather the figure relates to the outstanding number of cases not yet completed by the HET, which were to be picked up by the SHA HIU and not the LIB. Had the UK set up the HIU after the SHA, the HIU caseload would already by now have been substantively progressed.

Moreover, as noted above, whilst the IRB would have 'information recovery' in its name it would have fewer powers than any of the existing or proposed comparable mechanisms and is therefore was far less likely to lead to information recovery in practice.

Finally as set out elsewhere in this paper, it is also worth noting that, whilst the government's Command Paper argues its motivation for the changed approach is 'information recovery', on other occasions Ministers have quite openly stated that the motivation for the changed approach is to prevent investigations and prosecutions of soldiers.

3.3 Impact of the Legacy Act on the 'Package of Measures'

In our submission to the Council of Europe in July 2023, at a time the relevant sections of the Bill had been finalised through Lords amendments set out, in summary, the impact of the Bill as:

- To debar the **Police Ombudsman** from investigating legacy complaints (we understand from the Ombudsman's office there are around 450 outstanding such complaints). The SHA 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. The accelerated passage of the Bill assists in preventing, to paraphrase the Ombudsman, the 'completion of the picture' regarding police collusion with loyalist paramilitaries.
- To prevent new **Legacy Inquests** along with closing down many outstanding inquests already in the NI judiciary's five year planned 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.

force behind this initiative would be to deliver a meaningful outcome for the families… The phrase, 'the principle of maximum permissible disclosure' meant exactly what it said; we would tell the family everything we found, however difficult or challenging that may be, subject only to legal restrictions, for example Article 2 issues – in other words information that could put another life at risk would not and could not be disclosed.' Sir Hugh Orde, War is Easy, Peace is the Difficult Prize, The Annual Lord Longford Lecture 2 December 2009, Available at https://www.longfordtrust.org/longford-lecture/past-lectures/lectures-archive/sir-hugh-orde-war-is-easy-peace-is-thedifficult-prize/

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.

- To 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, but under the Legacy bill, these cases (which include many against the military which have not had previous Article 2 compliant investigations) will not be transferred. The Bill bans 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.[215]
- The Bill bars all Troubles-related civil action from the date it was introduced into the UK Parliament, 17 May 2022. 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 in the past also recovered information, including highlighting previous 'sham' investigations. The Bill precludes both reparations and information recovery, including on past unlawful investigations, for those victims and survivors who did not bring civil action before its introduction.

This was further elaborated as follows:

Part 3 of the Bill 'creates prohibitions and restrictions' on civil and inquest proceedings as well as police investigations. Under the original Bill 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 were already opened would have been permitted to continue until 1 May 2023 and inquests not at 'advanced hearing' by that date will be closed. The Bill also shuts down 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.

Under the amended Act as amended in the Lords, those inquests that have not *been completed* by 1st May 2024 will not now proceed. This includes those that have not commenced but there is also uncertainty concerning inquests that have opened and are due to be heard between September 2023 and when the Legacy Bill provisions take effect on 01 May 2024. For example, the Springhill/ Westrock inquest concerning the deaths of 5 individuals (3 of which were children) opened in February 2023, and heard evidence from a number of civilian witnesses. Evidence from military and expert witnesses is still to be heard. Families of the bereaved are concerned that there is insufficient time for the outstanding witnesses to be identified and give evidence. It is simply unconscionable that families currently in Years 3-5 of the LCJ Five Year Plan

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

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.

The inquest into the murder of Sean Brown in 1997 by loyalists is also due to recommence on 8th January 2024 and run for four weeks. To date there have been in excess of 35 preliminary hearings regarding this case. The inquest commenced in March 2023, however it was postponed in June 2023 because materials from the security forces still had not been disclosed.[216] Legal representatives for the PSNI have indicated to the Coroner that the new timetable for this inquest 'cannot be met' and therefore there is a legitimate concern that this inquest will also not conclude by the 01 May 2024.[217] The PFC and Brown family believe the State agencies may deliberately delay in handing over materials to prevent the inquest from concluding.

The Attorney General has also granted new inquests into conflict-related deaths since the commencement of the 5 year-plan. These include the 1972 IRA murder of Corporal James Elliott (inquest granted February 2023), and the inquest into the fatal shooting of Thomas Burns in 1972 by the British Army (inquest granted 30th March 2023). Under the provisions of the Legacy Bill the inquests into the deaths of James Elliott, Thomas Burns and any other newly granted inquest will not proceed.

In relation to legacy investigations by the Police Ombudsman the Bill has already had a negative impact with the uncertainty regarding job security within Historical Investigation Directorate having an adverse impact on the recruitment of staff. The Ombudsman is currently dealing with around 442 complaints relating to events which the Ombudsman would be prohibited from investigating by 1 May 2024 under the provision of the Bill:

- Of the total 167 of these complaints are allocated for investigation but many are unlikely to be completed before the 1 May 2024.
- Of these complaints 69 are anticipated for completion before this date.
- The remaining 275 (of the 442) complaints etc have been subject of limited research and assessment to inform prioritisation and scheduling of investigations.[218]

Those complaints currently anticipated to be completed before the cut-off date could of course be delayed. One particular risk is that the very agencies and persons subject to investigation and who may be criticised in reports may seek to delay their publication until the deadline passes.

An independent police team led by a former Chief Constable Jon Boucher has been undertaking several investigations under the procedure under the Package of Measures whereby the Police Service of Northern Ireland can 'call in' another UK police force to undertake an investigation. Such an investigation can use full police powers. Three investigations and one review have been

[216] Troubles: Sean Brown inquest delays criticised by coroner - BBC News
[217] Sean Brown inquest: State agencies accused of 'deliberately delaying' information release over death | Belfast News Letter
[218] Reply to CAJ from OPONI 27 July 2023.

conducted by this team which has a dedicated website named after its initial investigation Operation Kenova.[219]

As referenced above in October 2022 Operation Kenova published a *Protocol on Publication of Public Reports* ('the Protocol') from its investigations. This sets out an eight-stage process that will be followed for the publication of all its public reports.[220]

We that of the four operations being conducted the status of the Reports is as follows:

- *Operation Kenova* (investigating the involvement of a state agent codenamed 'Stakeknife' within the IRA). An Interim Report was originally scheduled for publication at the beginning of 2023.[221] In April 2023 it was announced the Stage 2 of the Protocol – a process whereby representations can be made by agencies or persons criticised in the report ('Maxwellisation') – had been delayed but that Stage 4 (security checking) would commence in May 2023.[222] This had been completed in Autumn 2023 and the report was passed to the PSNI for publications.
- *Operation Turma* (investigating the killing of three RUC officers by an IRA landmine at Kinnego Embankment in County Armagh on 27 October 1982.) We understand the investigation is completed and a full file has been submitted to the Public Prosecution Service (PPS), with a PPS decision and report publication pending.
- *Operation Mizzenmast* (an investigation into the death of Jean-Smyth Campbell in 1972) we understand the investigation has been completed and the process for publishing the report under the above Protocol is now commencing.
- *Barnard Review* (not an investigation but a review to produce an analytical report on collusion in the Glenanne Gang series of killings). We understand this report is scheduled for completion in 2024.

[219] https://www.opkenova.co.uk/
[220] https://www.kenova.co.uk/A%20Kenova%20Reports%20Protocol%20-%20for%20Publication%20with%20Logo%20(002).pdf
[221] https://www.kenova.co.uk/kenova-report-set-for-new-year-after-release-protocol-finalised
[222] https://www.kenova.co.uk/update-on-progress-of-interim-report-release

4. Further evidence of ministerial objectives behind the Legacy Act

Synopsis:

- *In the run up to the change in policy there was both considerable misinformation from ministers relating to NI legacy cases, attacks on the rule of law and legal profession, and calls to close down legacy investigations into the security forces.*
- *This continued as a genesis for the present bill and during its passage with Ministers at times openly admitting the role was to close down investigations into the military and celebrating that the Act would do this.*
- *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 legacy conflict.*
- *This section therefore covers a number of statements and speeches by ministers and associated media coverage that underpins the evolution of legacy policy into the Act. This includes a lengthy interview given by veterans Minister Johnny Mercer regarding how the act came about.*

4.1 The 'Pernicious Counter Narrative' speech and 'vexatious' prosecution claims (2016-2019)[223]

In February 2016, the Secretary of State for Northern Ireland Theresa Villiers MP made a speech on the way forward for dealing with the past in Northern Ireland, which essentially denied state involvement in the Loughinisland massacre and implied allegations that either victims' families or human rights defenders in raising issues of human rights violations were responsible for a 'pernicious counter narrative' with the purpose or effect of either diverting attention from armed groups or even justifying the actions of paramilitary groups.[224] CAJ and three other human rights NGOs wrote to the Secretary of State in relation to concerns:

> In your [the Secretary of State] speech you make reference to bravery awards to the security forces and then raise concerns that, in contrast "....*today we face a pernicious counter narrative...It is a version of the Troubles that seeks to displace responsibility from the people who perpetrated acts of terrorism and place the State at the heart of nearly every atrocity and murder that took place - be it through allegations of collusion, misuse of agents and informers or other forms of unlawful activity*." This statement not only implies that allegations of such human rights violations are vexatious but also that they are being made, not in

[223] The following narrative of interventions in 2016-2017 is contained in Submission from the Committee on the Administration of Justice (CAJ) to the United Nations Human Rights Committee in response to the Concluding Observations on the 7th Periodic Report of the UK under the International Covenant on Civil and Political Rights (ICCPR), June 2017, Follow up Procedure: "accountability for conflict-related violations in Northern Ireland" (CCPR/C/GBR/CO/7, paragraph 8). (pp7-13).

[224] Villiers: A way forward for legacy of the past in Northern Ireland, Speech by Secretary of State, 11 February 2016.

furtherance of human rights goals like realising victims' rights, the right to truth and non-recurrence, but with the intention of displacing responsibility from paramilitary organisations.

In your speech you also state rejection of "*equivalence between the security forces and those who carried out acts of terrorism*" and then appear to link this to a "*real risk that those who seek to justify the terrorist violence of the past risk giving a spurious legitimacy to the terrorist violence of the present*." This implies that uncovering and commenting on security force involvement in actions as serious as extra-judicial killings and torture – which were also carried out by non-state actors - is undertaken to justify "terrorist violence" past and present.[225]

In our correspondence we drew attention to international standards regarding the non-stigmatisation of human rights defenders. The Secretary of State responded to our correspondence, did not indicate to whom she was attributing the allegation of a 'pernicious counter narrative', but did state that she considered any narrative which suggested that misconduct in the security forces was rife or endemic was "a deliberate distortion and not justified by the facts."[226] We saw this statement as evidence of UK government alarm at the prospect of reputational damage from fully independent legacy investigations, particularly in relation to patterns of human rights violations linked to police and security force informants. It is this concern which appears central to the advent of the Legacy Bill.

The Secretary of States' remarks were subsequently quoted in a comment piece in one of the main Belfast newspapers – *the Newsletter*- on the 21 November 2016. This article by an academic states that rather than a line being drawn on the past "*Instead [the republican political party] Sinn Féin, umbilically linked to the [Irish Republican Army] IRA's campaign of violence, and a range of sympathetic NGOs and lawyers, has waged a discursive war to justify the IRA's campaign*". The author then refers to 'resistance' to this narrative from the former Secretary of State through her concept of the 'pernicious counter-narrative.'[227]

Party conference speech by UK Prime Minister Theresa May (October 2016)

In her first speech to her annual party conference as the UK Prime Minister, Theresa May MP, stated her commitment to the 'finest Armed Forces known to man' and followed this by stating:

> 'But we will never again – in any future conflict – let those activist, left-wing human rights lawyers harangue and harass the bravest of the brave – the men and women of Britain's Armed Forces.'[228]

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[225] CAJ correspondence 20 June 2016, also on behalf of Relatives for Justice, the Pat Finucane Centre and Rights Watch UK, to Secretary of State, Theresa Villiers MP.

[226] Secretary of State correspondence, response to CAJ and others, 14 July 2016.

[227] In Submission from the Committee on the Administration of Justice (CAJ) to the United Nations Human Rights Committee in response to the Concluding Observations on the 7th Periodic Report of the UK under the International Covenant on Civil and Political Rights (ICCPR), June 2017, Follow up Procedure: "accountability for conflict-related violations in Northern Ireland" (CCPR/C/GBR/CO/7, paragraph 8). (pp7-13)

[228] http://press.conservatives.com/post/151378268295/prime-minister-the-good-that-government-can-do

Whilst this assertion has been taken to be linked to claims against the UK military in Iraq, the phrase has, predictably, subsequently been linked to Northern Ireland cases.

The media narrative

The Sun, 8 December 2016:

The Sun is the widest circulation newspaper in the UK in its print format. On the 8 December 2016, *The Sun* ran a front page headline "Bloody Outrage", with the subheadings – in relation to Northern Ireland -"New Probe into all 302 Army killings" and "Tank Chase Lawyers agony for 1,000 squaddies (soldiers)".[229] The *Sun* article claimed that all killings by British Troops in Northern Ireland would be freshly investigated in a 'legal inquiry' costing taxpayers 'tens of millions of pounds' citing a 'decision' it stated has come just weeks after the UK Prime Minister Theresa May 'finally acted to limit lawyer-driven claims on Iraqi veterans'. The paper quotes a Conservative MP Johnny Mercer who it describes as a 'former army officer' who has 'battled against tank-chasing lawyers' describing the investigations as a 'brand new witch-hunt'. The paper then 'reveals' that 328 deaths are being reinvestigated by the Police Service of Northern Ireland (PSNI) Legacy Investigations Branch (LIB) which it describes as 'newly created'.

This article was released at the time Council of Europe Committee of Ministers were deliberating on the UK cases. The PSNI LIB was not 'newly created' but had been established almost two years earlier in January 2015 following the standing down of the HET. The article continued stating that in addition to these criminal probes a number of inquests into 57 killings by the British Army had been reopened. It states that 'Republican-linked law firms' had helped 'force' the opening of inquests. A spokesperson for the Secretary of State for Northern Ireland is quoted in the article as stating that the UK government believes in the rule of law, but then qualifies this belief with a 'concern' regarding investigations focusing on police officers and soldiers.

The Daily Mail, 9 December 2016:

The *Daily Mail* is the newspaper with the largest combined print and online UK readership.[230] The day after the Sun's headline Friday 9 September the *Daily Mail* ran with a front page headline "*So why are our soldiers facing a new witch hunt*?" which was directly juxtaposed with the quote from the Prime Minister that "*We will never again let human rights lawyers harass the bravest of the brave*". The article also focused on 'fresh' PSNI LIB investigations and presented them as a new development.[231]

The Sun, 10 December 2016:

The following day on the 10 December 2016, *The Sun*, on pages 12-13 published a further article entitled the "Our Lions the Rich and the War Probe" (a play on words of a CS Lewis children's novel). This article specifically focused on criticising lawyers with carriage of conflict

[229] https://www.thesun.co.uk/news/2353150/decision-to-investigate-brave-british-troops-over-killings-in-northern-irelands-30-years-of-the-troubles-branded-witch-hunt/

[230] According to the Press Gazette in 2015, the Mails and online readership has a total of 23.5 million readers a month.

[231] http://www.dailymail.co.uk/news/article-4015524/Why-Army-facing-new-witch-hunt-IRA-killers.html

related cases and on this occasion named three Belfast law firms with clients in state-involvement cases. The article:

- Was sub-headlined “Firms’ profit from Heroes”; “Lawyers scored 12m in legal aid” and “Veterans: end witch-hunt now.”
- Names three Belfast law firms and publishes names and photos of two of their partners with the general location and reported value of their family homes;
- An adjacent picture box is entitled “Solicitors’ IRA clients” and pictures nine persons who have been, or whose families have been, represented by the named law firms.

The Sun facilitated an online comments section which included a comment stating lawyers ‘were standing up for terrorists’ and also the following:

> ‘Soldiers should have immunity from this kind of thing. These parasite lawyers need shooting along with the scum they're representing.’[232]

On the 12 December 2016 CAJ wrote to the UN Special Rapporteurs on the independence of lawyers and judges and human rights defenders to raise concerns for the safety of human rights lawyers working on Northern Ireland conflict cases in light of newspaper coverage.

Subsequent statements in the UK Parliament

The media articles were followed by statements in the UK Parliament (which are protected from claims for defamation) from senior politicians, including members of the government, alleging that the criminal justice system was biased.

On the 13 December 2016 in a debate on legacy cases in Northern Ireland former Foreign Office Minister and Conservative MP, Sir Henry Bellingham, in the course of a Westminster Hall debate, in addition to suggesting that investigations into human rights violations would ‘imperil’ the whole peace process, and speaking about a live case currently before the courts, was also critical of the Director of Public Prosecutions (DPP), Barra McGrory QC. Mr Bellingham alleged the DPP was making political rather than evidence based decisions. The reasoning proffered to support this contention was the DPP being a former defence solicitor who had previously represented (among many others) republicans:

> ‘What has changed? There is no new evidence, but what has changed is that the DPP in Northern Ireland is now Barra McGrory, QC—the same person who represented Martin McGuinness in the Saville [Bloody Sunday] inquiry. This is the person who is prepared to move away from credible evidence to political decision making, which I find very worrying. It has to be stopped.’[233]

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[232] In Submission from the Committee on the Administration of Justice (CAJ) to the United Nations Human Rights Committee in response to the Concluding Observations on the 7th Periodic Report of the UK under the International Covenant on Civil and Political Rights (ICCPR), June 2017, Follow up Procedure: “accountability for conflict-related violations in Northern Ireland” (CCPR/C/GBR/CO/7, paragraph 8).

[233] Hansard, 13 December 2016, Volume 618, Legacy Issues: Northern Irelandhttps://hansard.parliament.uk/commons/2016-12-13/debates/359B1D65-1837-4701-BBE1-78FE2D9A6CE9/LegacyIssuesNorthernIreland

The Minister of State Kris Hopkins MP responding in the debate, rather than defending the integrity of law officers instead made his own allegations of bias against the justice system complaining that "*the almost exclusive focus on the actions of the state is disproportionate and must be challenged and redressed if we are to deal with the past in a way that is fair and balanced and allows victims and survivors to see better outcomes than the current piecemeal approach*."[234]

These allegations against the DPP were made precisely at a time when the second decision to prosecute two soldiers for murder, was under active consideration. In a further debate in the UK Parliament on the 17 January 2017, which related to new elections in Northern Ireland, a former Defence Minister Conservative MP Gerald Howarth stated:

> '...may I make a fervent plea that he should protect the interests of former British soldiers currently being charged by the Sinn Féin-supporting Director of Public Prosecutions for Northern Ireland with murder for events that took place more than 40 years ago?'[235]

The Secretary of State James Brokenshire MP responded, by praising the work of the armed forces, and raising his own concerns about "imbalance within the [justice] system" and not defending the DPP. The Secretary of State subsequently wrote to the *Daily Telegraph* newspaper stating legacy investigations were reportedly "not working" because they were "targeting soldiers not terrorists" and arguing there was an 'imbalance' and disproportionate focus on the military.[236]

A former Northern Ireland Justice Minister, David Ford MLA, raised concerns around the Secretary of State's comments stating:

> 'Politicians have a duty to support the impartial operation of the institutions of the Justice system. The comments from James Brokenshire on prosecutions come perilously close to interfering in the rule of law.'[237]

On the 22 February 2017 the UK Prime Minister, Theresa May, stated in the UK Parliament that she found it "*absolutely appalling when people try to make a business out of dragging our brave troops through the courts*" and reiterated the allegation that the present system was disproportionately focused against the security forces.[238]

As alluded in an earlier section of this report in April 2017 the Defence Committee of the UK Parliament published an inquiry report calling for an amnesty (framed as a 'statute of limitations') covering all conflict-related incidents until 1998 involving members of the armed

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[234] As above.
[235] https://hansard.parliament.uk/commons/2017-01-17/debates/58D7C09F-47A1-49C7-A347-A38703C7C6FF/NorthernIrelandAssemblyElection
[236] British soldiers are being failed by Troubles inquiry, Northern Ireland Secretary concedes *The Telegraph* 28 January 2017.
[237] https://allianceparty.org/article/2017/0010948/ford-criticises-brokenshire-comments-on-prosecutions
[238] Official Report (Hansard) PMQ 22 February 2017 https://hansard.parliament.uk/commons/2017-02-22/debates/A31B6DEF-BB99-46F6-A49F-37FFF90D70C5/FormerMilitaryPersonnelNorthernIreland On the 23 February 2017 a further debate took place in the UK Parliament the following day.

forces. The Committee also sought a truth-recovery mechanism. It also urged government to consider extending such an amnesty to the police and other security personnel and, in implicit recognition that this may be discriminatory, stated that it would be a matter for a future government to determine whether such an amnesty should cover all conflict-related incidents.[239]

In May 2017 the Director of Public Prosecutions for Northern Ireland announced he would step down from the role.[240]

In June 2017 US-based *Human Rights First* issued a report documenting and raising their concerns regarding the vilification of human rights lawyers in Northern Ireland. This includes material from interviews with directly affected practitioners. The report – alluding to the contribution of the Clinton Administration to the Good Friday Agreement and peace process - concludes:

> Now an element of that success is in danger of unravelling. Renewed hostility toward human rights lawyers—those representing the families of people allegedly killed by the British military— recalls the Troubles and augurs new danger.
>
> History tells us that rhetorical attacks against lawyers by the press and public officials can lead to violence, which, in turn, inhibits the pursuit of justice and undermines the rule of law. The hostility toward human rights lawyers strikes at the heart of the Good Friday Agreement, which embedded respect for human rights into the politics of Northern Ireland. It is especially alarming given the United Kingdom's broader backsliding on its human rights commitments.[241]

The report calls the UK to publicly reaffirm the UN Basic Principles on the Role of Lawyers, to urgently calm the rhetoric around the work of lawyers working on legacy cases in Northern Ireland and outline how it will otherwise protect the lawyers from vilification and violence. It also calls on members of the UK Legislature to refrain from inflammatory rhetoric against Northern Ireland lawyers and the Director of Public Prosecutions.[242]

The misinformation continued and attacks of the rule of law from senior figures continued.

This includes twice in 2018 the UK Prime Minister telling the UK Parliament that police legacy investigations were only focusing on the security forces, despite this being flatly contradicted by police figures.[243]

On appointment as the head of the Chief of the Defence Staff, General Sir Nick Carter, in particular reference to legacy investigations in Northern Ireland, stated that "vexatious claims"

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[239] House of Commons Select Committee 'Investigations into fatalities in Northern Ireland involving British military personnel'HC1064 April 2017.

[240] http://www.bbc.co.uk/news/uk-northern-ireland-39940849

[241] A Troubling Turn: The Vilification of Human Rights Lawyers in Northern Ireland (Human Rights *First*, June 2017) available at: http://www.humanrightsfirst.org/sites/default/files/A-Troubling-Turn.pdf

[242] As above page 12.

[243] This first occurred in May 2018 and again in June 2018 see 'PM: Northern Ireland system investigating past 'unfair' BBC News 9 May 2018 https://www.bbc.co.uk/news/uk-northern-ireland-44054424; and 'Theresa May repeats claim paramilitaries are not being investigated for Troubles killings' *Irish News* 6 June 2018.

into soldiers "will not happen on my watch. Absolutely not." The head of the military went on to say "I would absolutely stamp on any of that sort of activity." Clearly there is no lawful basis in which the head of the UK military should or could intervene to obstruct or 'stamp out' legacy investigations in Northern Ireland. CAJ wrote to the Chief of the Defence Staff to raise concerns that the statement was either an "unconstitutional threat to the rule of law or essentially meaningless but certainly inflammatory rhetoric." We sought assurances that the head of the military was not arrogating to himself the power to take any action in respect of any independent legal proceedings.[244] The response ultimately received from the Ministry of Defence stated that it was right for allegations of wrongdoing to be dealt with under the rule of law, noting 'increasing criticism' of legacy cases in Northern Ireland and alluding to the SHA consultation.[245]

In November 2018 the Secretary of State for Northern Ireland Karen Bradley MP, in appearing before a Committee at the UK Parliament, and being questioned in relation to the Statute of Limitations made the following statements:

> '[A statute of limitations] would also not stop the coronial inquests and… those inquests that are going on at the moment are much of the problem…
>
> 'A statute of limitations would say a prosecution didn't happen but wouldn't stop the investigation it wouldn't stop... people having to go and face charges sitting police cells and being interviewed, now I want to get to a position where we stop all of that...
>
> 'I am working hard on the [SHA] consultation responses so that we can find away where we can deal with this matter, so that we can all be happy that our service veterans and our former police officers do not face harassment in the courts.'[246]

Clearly it is inappropriate for a serving member of the UK Executive to refer to due process in legacy inquests as 'much of the problem' and judicial processes involving the military as 'harassment in the courts' as well as implying that all investigations, interviews and charges of soldiers should be 'stopped.' Such assertions contradict the UK's official position on the SHA and it is not clear if the Secretary of State simply strayed off script or revealed an intention not to proceed with the SHA.

The language of 'vexatious claims' and a witch-hunt narrative were also prominent in the Queen's Speech in December 2019, which alleges that former members of the security forces are the victims of 'unfair and vexatious claims' and:

[244] CAJ correspondence to General Sir Nick Carter, Chief of the Defence Staff, 2 August 2018.
[245] MoD Head of Inquests, Judicial Reviews and Public Inquiries correspondence to CAJ, 2 November 2018
[246] See https://twitter.com/CAJNi/status/1065262694687756290 and https://www.parliamentlive.tv/Event/Index/226f5010-7320-43d2-9497-f3a798b68a45

> 'the Government is strongly opposed to the threat of vexatious litigation in the form of repeated investigations and potential prosecutions arising from historical military operations many years after the events in question.'[247]

In effect, the Queen's Speech appears to transpose, erroneously, the idea of 'vexatious' litigation that exists within civil law to the realm of (potentially) criminal investigations into allegations of past crimes and human rights abuses.

Despite its political prominence, there is no precise legal meaning to the term 'vexatious litigation'. A vexatious proceeding has been described in *AG v Barker* as one that 'has little or no basis in law (or at least no discernible basis)' wherein: 'its effect is to subject the defendant to inconvenience, harassment and expense out all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court.'[248]

In a similar vein, there is no legal definition of a 'vexatious prosecution'. There is an analogous tort of 'malicious prosecution' which has been defined as one (a) wherein the proceedings were found in the defendant's favour, (b) where there was no 'reasonable and probable cause to bring the prosecution' and (c) where the police or prosecutor acted 'maliciously.'[249]

A reasonable and probable cause has been defined as an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead to any ordinarily prudent and cautious man to the conclusion that the person charged was probably guilty of the crime imputed.[250]

Acting maliciously in such a case is an extremely high threshold, requiring that the police or prosecutor's motives were something other than bringing an offender to justice (e.g. revenge) or that the police or prosecutor had fabricated evidence.[251]

Where investigations and prosecutions are conducted for good faith reasons, but are unsuccessful in securing a conviction, this is not evidence that the investigation and trial were vexatious.

Bearing in mind that legacy investigations in Northern Ireland are of the most serious offences (including murder), and that previous investigations have been widely accepted as substandard in many important cases (see further below), the idea that conflict-related investigations or prosecutions could be legally described as 'vexatious' or 'malicious' is not intellectually credible.

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[247] Queen's Speech in December 2019; Queen's Speech Background Briefing Notes 2019, p. 5.; MBT: Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland 2020, p13.

[248] 55 [2000] 1 FLR 759

[249] D. Young et al (2014) Abuse of Process in Criminal Proceedings (4th edition).

[250] Hawkins J in Hicks v Faulkner, 1878 8 QBD 167, 171 approved and adopted by the House of Lords in Herniman v Smith 1938) AC 305 316 per Lord Atkin.

[251] D. Young et al op cit.

Moreover, such a view appears to suggest that the PSNI (previously HET) and the Public Prosecution Service have been engaged in unprofessional behaviour, amounting to either vexatious or malicious investigations or prosecutions.

Given the gap between the high threshold outlined in law and the reality of how investigations have unfolded, the term 'vexatious' is a term of political rather than legal import.

The political origins of the term can be traced in several Defence Select Committee reports.[252] These reports have been highly critical of the legal basis upon which civil actions have been taken by the families of British soldiers killed in Iraq[253]as well as the ways in which investigations into alleged abuses by British Army personnel have been handled in that theatre.[254]

These civil actions and investigations – and the Defence Select Committee responses to them - are complex and beyond the scope of this paper. However, one central strand which is of direct relevance is the persistent political criticisms of findings by the courts that the European Convention on Human Rights may apply in certain circumstances to the actions of British military abroad. That political frustration in some quarters at the applicability of the ECHR to military conflict overseas, (sometimes confusing the ECHR with the European Union), has in turn been extended to the application of the ECHR to the Northern Ireland conflict. However, the application of the ECHR within the United Kingdom as compared to overseas is hardly a matter of political controversy.

4.2 Contradictory official narratives regarding the purpose of the Bill[255]

In May 2022 after the introduction of the Bill into the UK Parliament, the UK authorities sent an official communication to the Council of Europe, this claimed the purpose of the bill was 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.'[256]

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[252] See Defence Committee, UK Armed Forces Personnel and the Legal Framework for Future Operations, Twelfth Report of Session 2013–14, HC 931; Defence Committee, Who Guards the Guardians? MoD Support for Former and Serving Personnel, Sixth Report of Session 2016–17, HC 109; Defence Sub-Committee, 'Drawing a line: Protecting veterans by a Statute of Limitations', 16 July 2019, https://publications.parliament.uk/pa/cm201719/cmselect/cmdfence/1224/1224.pdf, pp. 6-8.

[253] In 2013, the Supreme Court held in three cases concerning the deaths and serious injuries of servicemen service in Iraq that the legal obligations owed by the state to British service personnel could fall within the jurisdiction of the ECHR. See Smith and others v the Ministry of Defence, Ellis v the MoD and Allbutt and others v the MoD [2013] UKSC 41

[254] C. Ferstman, T. Obel Hansen and N. Arajärvi, The UK Military in Iraq: Efforts and Prospect for Accountability for International Crimes Allegations? Essex and Ulster Universities, 1 October 2018, https:// www.ulster.ac.uk/ data/assets/ pdf_file/0018/317502/THE-UK-MILITARY-IN-IRAQ-1Oct2018.pdf.

[255] The following narrative capturing ministerial objectives behind the bill specifically is taken from the CAJ Rule 9 submission to the Committee of Ministers Julu 2022.

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

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'.[257]

The Secretary of State omits to mention that the primary purpose and driver behind the legislation openly articulated by Ministers elsewhere, was to end investigations and related proceedings into military veterans of the Northern Ireland conflict. Indeed, as set out in the previous section in detail Ministers have gone further than this in extolling that the legacy policy legislation will deal with concerns that essentially the current independent judicial and investigative processes are damaging the official narrative about the conflict.

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.[258]

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*."[259]

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.[260]

A similar line was taken by a further NIO Minister in a publication in the Parliamentary House Magazine.[261]

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[257] As above, cover letter

[258] 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

[259] 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/

[260] As above.

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

Statements by Minister for Veterans Affairs Johnny Mercer MP

According to a lengthy media interview with the Minister for Veterans Affairs Johnny Mercer MP the whole genesis of the current bill centred on ending proceedings against members of the military.[262] Mr Mercer resigned as veterans minister largely as the Bill had not been delivered at an earlier stage and was subsequently reappointed.

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.[263]

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 were however reflected in the subsequent Act. In introducing the current Bill the Secretary of State Brandon Lewis credited Mr Mercer and other Conservative MPs who had campaigned for immunities for the military for it.[264]

On the 22 June, Mr. Mercer responded to a question from a backbench Conservative MP on how Government would protect former soldiers who had served in Northern Ireland from what was termed 'vexatious litigation'. The Minister, rather than refuting the suggestion due process was not being followed by investigators, prosecutors and the courts, responded by making direct reference to 'the vexatious nature of *investigations* and litigation' against military veterans (emphasis added). The Minister stated that 'we are nearly at the summit of the mountain' [of protecting veterans from 'vexatious litigation'] due to the passage of the Bill which would 'become law by the summer recess.'[265]

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

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

[264] 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

[265]https://hansard.parliament.uk/Commons/2023-06-22/debates/AB6FE18A-F087-4C06-AF4C-EED27E39393F/TopicalQuestions "Mr Philip Hollobone (Kettering) (Con) What steps is the Cabinet Office taking to honour the Conservative party's manifesto commitment to protect Northern Ireland veterans from vexatious litigation? Johnny Mercer "*I can tell my hon. Friend and the House that we are nearly at the summit of that*

The same Minister, when the Bill returned for consideration of amendments to the lower house then expressly named the prosecution of former soldier as an example of a 'vexatious prosecution'. The soldier had stood trial in 2021 for the shooting in the back of an unarmed civilian with learning disabilities, John Pat Cunningham, in 1974. His legal representatives had lodged legal challenges against the prosecution, however the courts had ruled proceedings, had followed due process.[266]

A non-government MP, the DUP's Ian Paisley JR in the same debate, claiming there was to be 'another trial' against a former RUC [police] officer for a fatal shooting, used parliamentary privilege to refer to a lawyer acting on behalf of the family of the deceased as a "shameful snake-oil salesman of a legal practitioner" engaged in vindictive actions.[267] Whilst there was no intervention from ministers another MP, Colum Eastwood, did interject alluding to the dangerous consequences of past criticism in the UK Parliament of solicitors acting in NI-conflict related cases. In response the regulatory professional body for solicitors in Northern Ireland issued the following statement: *'The Law Society reiterates its call for attacks on lawyers made in relation to this Bill to cease immediately. Solicitors provide vital support to victims and survivors of the Troubles to access truth and justice and should not come under attack for doing their jobs.'*[268]

In the same debate a backbench MP from the ruling Conservative party raised concerns that the ICRIR in the Bill may now have powers to investigate military veterans. Whilst the intervention was ambiguous and open to interpretation the MP appeared to seek assurances that it would not. Specifically, he asked the Secretary of State for assurances that the Bill would not be '*institutionalising the mechanism for a republican lawyer fest, which would be totally contrary to the whole point of bringing in the Bill in the first place?'* The Secretary of State responded by stating that his 'honest answer' was 'yes.' The Minister did not challenge the assertion that official investigations are driven by a 'republican lawyer fest.'[269]

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mountain. The Bill is continuing to go through the Lords. It will come back to this House and become law by the summer recess. We will have delivered on a manifesto commitment to protect those who served us in Northern Ireland, of whom we are deeply proud, from the vexatious nature of investigations and litigation, while providing a better opportunity for all victims of that conflict to find out what happened and to focus on reconciliation and the future." The follwing commentary taken from CAJ Rule 9 submission of July 2023.

[266] See: https://www.bbc.co.uk/news/uk-northern-ireland-58960262

[267] https://hansard.parliament.uk/commons/2023-07-18/debates/EADA122A-B956-4296-A739-B66818A2A4B6/NorthernIrelandTroubles(LegacyAndReconciliation)Bill#contribution-C784E979-744B-45A9-A340-5ADAFFC6374D

[268] https://www.lawsoc-ni.org/statement-on-attacks-on-lawyers-troubles-and-reconciliation-bill

[269]Mark Francois MP "*The Secretary of State said that it has taken a year for the Bill to go through the House of Lords—I and others campaigned for four years for the Bill even to be introduced in the first place. I fear that some of the Government's own amendments introduced in the other place have had the effect of swinging the pendulum too far—I admit it is a delicate balance—against our veterans who served in Operation Banner in Northern Ireland. Specifically, the Bill now gives the independent commission extremely wide and latitudinal powers to decide whether a veteran should still be investigated, even despite the Bill's so-called double-jeopardy provisions. The decision still ultimately lies with the commission. It also has great latitude in deciding whether a veteran has complied with an investigation, which would then allow them immunity. They would not get it if the commission ruled they had not complied. Can the Secretary of State absolutely assure me in his heart of hearts that we are not institutionalising the mechanism for a republican lawyer fest, which would be totally contrary to the whole point of*

The same backbench MP also sought an assurance that the Bill would *not* lead to all military killings in the early part of the conflict being reinvestigated to an Article 2 ECHR standard. The Minister gave this assurance.[270] This issue relates to military killings prior to 1973 which were not investigated by the police at the time, but rather were dealt with internally by the Royal Military Police (RMP), an approach the domestic courts have long ruled was not ECHR-compliant.[271] Given the lack of a previous ECHR-compliant investigation such cases were expressly to be among those to be subject to an ECHR-compliant investigation under the mechanisms to be established by the Stormont House Agreement.[272] They are dispensed with by the present Act and do not automatically form part of the caseload of the ICRIR as they would have done under the Stormont House Agreement.

In the House of Lords) the Minister claimed the legacy inquest system had been 'overloaded.' The Minister blamed coronial judges progressing inquests too 'expeditiously' since the Bill's introduction for this (rather than the pressure created by the arbitrary deadline for shut down of inquests within the Bill). The Secretary of State repeated this position when the Bill returned to the lower house.[273]

The fact that Judges have apparently progressed more cases than the Minister would have wished for was cited as justification for a UK Government amendment to the Bill designed to ensure more inquests were closed down. The amendment moves the cut-off date for inquests to 1 May 2024, *but removes the exemption for inquests that had already reached the stage of a substantive hearing*. The Minister stated the purpose of the amendment was for only inquests that would be complete within the next year to now proceed.[274]

Mr Mercer celebrated the passage of the Act describing it as a promise to veterans.[275]

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bringing in the Bill in the first place?" Secretary of State "*I am a great believer in short and honest answers to such questions, and the answer is yes…"* https://hansard.parliament.uk/commons/2023-07-18/debates/EADA122A-B956-4296-A739-B66818A2A4B6/NorthernIrelandTroubles(LegacyAndReconciliation)Bill#contribution-9E91BA90-BCBB-4516-A657-F7792C8AA495

[270] https://hansard.parliament.uk/commons/2023-07-18/debates/EADA122A-B956-4296-A739-B66818A2A4B6/NorthernIrelandTroubles(LegacyAndReconciliation)Bill#contribution-215860E8-5013-4BB5-9763-50E23C591411

[271]https://www.judiciaryni.uk/sites/judiciary/files/decisions/In%20the%20matter%20of%20an%20application%20by%20Mary%20Louise%20Thompson%20for%20Judicial%20Review.pdf

[272] Stormont House Agreement, paragraphs 30 & 34.

[273] https://hansard.parliament.uk/commons/2023-07-18/debates/EADA122A-B956-4296-A739-B66818A2A4B6/NorthernIrelandTroubles(LegacyAndReconciliation)Bill#contribution-7635BC80-FFCD-422D-816F-EC5AA7F7D764

[274] Lord Caine "Our amendment provides until 1 May 2024 for inquests to conclude. Since the Bill's introduction, expeditious case management in order to reach an "advanced stage" has resulted in the overloading of a system that was already struggling under incredible pressure, causing delay and frustration. This amendment will ensure that resources will now be focused on completing those inquests that have a realistic prospect of conclusion in the next year." https://hansard.parliament.uk/lords/2023-06-21/debates/7F755B57-E4F7-4925-B8B0-7B5DCF2B4909/NorthernIrelandTroubles(LegacyAndReconciliation)Bill#contribution-24F31876-E4BE-4040-9349-4F5AE8AAFEDC

[275] https://www.belfasttelegraph.co.uk/news/northern-ireland/veterans-minister-johnny-mercer-speaks-of-pride-at-delivering-troubles-legacy-bill/a2047547975.html

5. Legacy Bill from introduction to passage

5.1 Passage of the Bill

Synopsis:

- *There were a range of procedural irregularities in the manner of taking forward the Bill – the UK government bypassed constitutional convention regarding legislative consent from devolved parliaments and breached equality and consultation duties.*
- *The Bill introduced to Parliament differed from the 2021 Command Paper in three main ways: (1) a move away from a blanket amnesty to a conditional immunities scheme, (2) to give the ICRIR police powers, and (3) to allow claims and inquests that have substantially commenced prior to the Bill to continue (although the latter was rolled back by amendments).*
- *The most credible explanation for these changes from the Command Paper is that the UK government did so in an attempt to make the Bill appear less obviously unlawful, and particularly less obviously in contradiction to the ECHR—e.g., the blanket amnesty became a conditional immunities scheme with a conspicuously low threshold.*
- *There were no government amendments at all in the House of Commons. One opposition amendment in the commons prevailed – to exclude sexual offences from the scope of the immunities scheme (but not from the ban on investigations of sexual offences which were conflict related).*
- *The UK government repeatedly promised 'game changing amendment' in the House of Lords; the numerous amendments were however withheld until the last minute on two occasions and were not game changing – some made the bill worse – for example closing down. In the Lords government also refused non-government amendments which would have sought to strengthen ECHR compliance of the bill in key areas. The government was defeated twice in the Lords, most notably on the immunities scheme—before the Commons overturned the same and re-inserted the immunities scheme into the Bill.*
- *The NIO was twice investigated by the Equality Commission for Northern Ireland and found to have breached its Equality Scheme over the policy development process.*

Procedural irregularities and the Legacy Bill[276]

Following the Written Ministerial Statement of March 2020, the UK developed its legislation in secret over a year. It then produced the Command Paper in July 2021.

On the 17th May 2022 the UK introduced the Northern Ireland Troubles (Legacy and Reconciliation) 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 Council of Europe Committee of Ministers.[277]

[276] Adapted from the CAJ Rule 9 Submission to the Committee of Ministers (July 2023)
[277] For further detail see section below on Parliamentary Progress of the Bill.

The Second Reading debate took place on the 24th May 2022 at which the UK Government announced the Bill would bypass the usual committee stage scrutiny of the Bill. Indeed, despite previous indication the Government unexpectedly announced the Committee stage of the Bill would in fact take place on just two days on the 12 and 14 December 2022.

The Bill completed passage in the Commons by the 4 July 2023. Government could not control the timetable in this way in the House of Lords and the Bill did not fully complete passage until September 2023.[278]

Failures to consult and engage:

The Committee of Ministers Decision of June 2022, 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.'*[279]

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. The Bill was even withheld from the Northern Ireland Human Rights Commission (NIHRC) a core safeguard institution established because 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.[280]

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.[281]

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.'[282]

Failure to comply with statutory Equality Duties:

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, and if

[278] https://bills.parliament.uk/bills/3160/stages
[279] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a6ce9b paragraph 10.
[280] Section 69(3) Northern Ireland Act 1998 (the main GFA implementation legislation). https://www.legislation.gov.uk/ukpga/1998/47/section/69
[281] https://nihrc.org/news/detail/ni-human-rights-commission-responds-to-proposed-legislation-on-dealing-with-the-past
[282] 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/

undertaken correctly, would have obliged consideration of 'alternative policies' to the current Bill.[283]

In a debate in the UK Parliament on the 20 July 2020 in an incidental Ministerial response to a question in a debate on civil claims against the UK military for actions abroad a Minister of State for Defence stated that the UK was actively preparing new NI legacy legislation.[284]

The equality duty was introduced under the implementation legislation of the Good Friday Agreement (GFA). Public authorities are to 'impact assess' new or proposed policies 'at the earliest stage' of policy development in relation to equality impacts on protected grounds. There are binding duties to undertake and release the 'equality screening' document on request.

In an unusual move the Northern Ireland Office (NIO) refused to release the equality screening document for the new legacy bill. Two human rights NGOs – CAJ and the Pat Finucane Centre lodged complaints with the Equality Commission for NI to seek enforcement. The NIO unusually declined to submit any formal response to the complaint further to a request from the Equality Commission that it do so.[285]

Further to the 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.[286]

The Investigation Report also revealed that the NIO had withheld documentation from Equality Commission investigators despite their exercise of formal powers of investigation.[287]

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).

The investigation states NIO officials had argued the policy was in a state of 'flux' following the March 2020 statement, and that the reluctance to release the documentation was that it would

[283] Section 75 and Schedule 9 of the Northern Ireland Act 1998, see: https://www.equalityni.org/S75duties. CAJ December 2022 Addendum Rule 9 submission

[284] https://hansard.parliament.uk/Lords/2020-07-20/debates/3746196E-EFCF-4639-91BC-2D997F50E14A/BritishOverseasTroopsCivilLiabilityClaims "Lord Dannatt (CB) My Lords, when does the Minister believe that Her Majesty's Government will extend legislation in the overseas operations Bill to cover operations in Northern Ireland? Baroness Goldie [V] Minister of State for Defence …, I assure him that, yes, a Northern Ireland Bill is coming forth to deal with similar issues; the Northern Ireland Office is currently in the process of preparing it. We expect more information in early course."

[285] Correspondence to CAJ/PFC from the Equality Commission 28 October 2020. Information in this paragraph taken from CAJ CM submission October 2022.

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

[287] 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]."

reflect a previous policy position. It is not clear if this is a reference to an understanding the commitment to legislate for the SHA would be honoured at that time. The NIO maintained however in April 2021 that equality testing documentation on the legacy policy was *still* not ready to be released. One explanation is that the proposals for a broad unconditional amnesty and shutting down of all investigations (as provided for in the Command Paper) were part of the policy proposals much earlier than has been officially acknowledged, and at a time the UK was still indicating to the Council of Europe it would introduce SHA implementation legislation.

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 then released an Equality Impact Assessment (EQIA) for consultation *after* a decision had been taken to introduce the Bill to the UK Parliament.

This then 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.[288] 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.

For a second time the Equality Commission held the NIO had not complied with the statutory duties stating:

> The Commission's investigation found that the NIO had failed to comply with paragraph 4.2 of its approved equality scheme. This was because the Northern Ireland Troubles (Legacy and Reconciliation) Bill, having been introduced into Parliament at the same time as the Equality Impact Assessment was published for consultation, contains the proposed policies assessed. The NIO cannot have taken any consultation responses to its equality assessment into account for its decisions on the policies proposed in the Bill.[289]

The NIO had published a draft EQIA was produced at the same time the legislation was introduced; and consulted on over the summer of 2022, the NIO response to criticism of same was that the Bill could still be amended in response to the EQIA consultation and final EQIA report that is produced following the consultation. It is recorded in the Investigation Report that the NIO told the Equality Commission "*we took the decision to run the consultation alongside the early stages of the parliamentary passage, with both processes beginning on 17 May. We have worked with parliamentary Business Managers to ensure that the Bill remains in amending stages following the closure of the consultation period. This means that we can subsequently address and reflect responses to the consultation via amendments to the Bill should this be required.*"

However, the NIO then in practice simply did not produce a final EQIA report nor a response to consultation document.

The UK in developing its legacy proposals from March 2020 has therefore bypassed core equality safeguards designed to ensure transparency, structured public engagement and

[288] Correspondence to CAJ and PFC from ECNI (29 June 2022) and NIO (8 June 2022).
[289] ECNI correspondence to CAJ 11 October 2023.

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

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.

Much of the content of the Act falls within the competence of justice powers transferred to Northern Ireland.

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 not the case with the Legacy Bill, indeed the bill runs *contrary* to the UK's treaty-based obligations, including the ECHR.[290]

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.[291]

On this occasion Ministers 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.[292]

The NI Assembly had unanimously backed a motion of opposition to the Legacy Bill.[293] Before the removal of Ministers in October 2022, the Justice and Communities Ministers laid Memorandums of Understanding opposing the legacy bill and objecting to legislative consent.[294]

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[290] 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.

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

[292] 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/

[293] CAJ Rule 9 Communication July 2022, paragraphs 28-34.

[294] Northern Ireland Troubles (Legacy and Reconciliation) Bill –Memorandum Laid Before the Assembly Under Standing Order 42A (4)(b) Minister of Justice, 26 October 2022 and Minister for Communities, 27 October 2023.

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.[295] The NI Justice Minister has stated that the bill is an "egregious interference with the Northern Ireland justice system" and called for its withdrawal.[296]

This 'reaching in' by the UK to transferred powers is one of two ways in which the Act breaches the GFA. The second 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 Act directly limits the ability of people in Northern Ireland to challenge 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.

The bill also covered significant areas of justice competence that have been transferred to the Scottish Parliament. Again whilst the UK Parliament retains powers to legislate on such matters, by constitutional convention it is not to normally do so unless consent is granted by the Scottish Parliament.[297]

Scottish Government Ministers and the relevant committee of the Scottish Parliament in a Report of the 10 January 2023, noting the human rights concerns, have declined to give consent to the Bill.[298]

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[295] 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*.'

[296] 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/

[297] For further background information see: CAJ Rule 9 Communication July 2022, paragraphs 28-34. https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2022)830E%22]}

[298] Legislative Consent Memorandum: Northern Ireland Troubles (Legacy and Reconciliation) Bill; https://www.parliament.scot/-/media/files/legislation/bills/lcms/northern-ireland-troubles-legacy-and-reconciliation-bill/legislative-consent-memorandum.pdf Report on the Legislative Consent Memorandum for the Northern Ireland Troubles (Legacy and Reconciliation) Bill (UK Parliament legislation) https://digitalpublications.parliament.scot/Committees/Report/%20CJ/2023/1/10/e34e9a44-7b80-4466-a26f-ed1582969257#a80abf9c-8256-4849-a0bf-f90f8c71025d.dita

However, the UK Government pressed on regardless and legislated against the will of the Scottish Parliament.[299]

In the case of both jurisdictions this is a breach of constitutional convention; in the case of Northern Ireland, it is also a breach of the provisions of the Good Friday Agreement.

Lack of meaningful engagement with key GFA Stakeholders

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*."[300]

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.[301]

The Northern Ireland Assembly had previously unanimously passed a motion opposing the UK legacy policy set out in the Command Paper.[302] The NI Assembly did not debate the Bill as the reestablishment of the Assembly following the May 2022 elections was 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.

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

[299] 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

[300] 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

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

[302] 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.

> 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.[303]

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 two Governments and parties to the NI Executive.[304] These sessions, one of which CAJ 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 was 'box ticking' rather than meaningful insofar as the intentions for specific provisions in the Bill remained concealed.

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." [305] The victims group also raised concerns that the Secretary of State was 'dangerously deluded' if he believes the WMS proposals will aid reconciliation.[306]

The pattern of no meaningful consultation with groups representing victims and survivors and other civil society actors 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 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"

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[303] NIAC October 2020 report, paragraphs 24 ,4 & 6.
https://publications.parliament.uk/pa/cm5801/cmselect/cmniaf/329/32902.htm
[304] 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/
[305] http://wavetraumacentre.org.uk/news/wave-legacy-letter-to-mps/
[306] 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

with officials 'unable' to give very much information.[307] Moreover, WAVE have raised concerns that "*referrals from Troubles' victims in need of mental health support have doubled in the past year, due to the UK government's legacy bill*."[308]

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*."[309]

Lack of Parliamentary consultation on Bill

UK Parliament Joint Committee on Human Rights[310]

On the 26th October 2022 the Joint Committee on Human Rights of both houses of the UK Parliament published a report into the Bill raising concerns that the legislation "risks widespread breaches of human rights law".[311]

The Report[312] concurs with the concerns of other stakeholders regarding the lack of ECHR compatibility of the Bill. The Committee puts forward amendments which would "fundamentally alter the entire approach of the Bill" and urges Government to "reconsider its whole approach" and instead put forward legislation which ensures:

> '(i) investigations are independent, effective, timely, involve next of kin, and are subject to public scrutiny; (ii) perpetrators of serious human rights violations are held to account; and (iii) that all possible avenues for the pursuit of justice and the provision of an effective remedy are available to victims and their families.'[313]

[307] 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/

[308] 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

[309] 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/

[310] The following is taken from CAJ Rule 9 CM of December 2022.

[311] https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/173874/northern-ireland-troubles-bill-risks-widespread-breaches-of-human-rights-law/

[312] https://committees.parliament.uk/publications/30491/documents/175903/default/

[313] Conclusions and recommendatio Delegated Powers and Regulatory Reform Committee July 2022ns paragraph 1.

Delegated Powers and Regulatory Reform Committee July 2022

A Parliamentary committee scrutinising technical aspects of the Bill has also released a Report highly critical of its provisions. This relates specifically to regulation of the powers it will vest in Ministers in relation to aspects of the proposed ICRIR.[314]

The Committee was particularly critical of the broadly drawn power in clause 21 of the Bill which would allow the Secretary of State to issue guidance in relation to a broad number of aspects relating to the determination of applications for immunity under the Bill. This includes Guidance on how to consider a person's account is 'true to the best of their knowledge', whether something is 'criminal conduct' and guidance on whether a person should be granted 'specific' or 'general' immunity.

The Committee was critical that this Ministerial Guidance 'covers significant matters' but is not regulated by any parliamentary procedure at all (that would require its approval/publication etc.) The Committee describes Government's explanation for this (that details of the Guidance will only happen after the bill is law) as 'baffling' and urges reconsideration.[315]

The Committee was also critical of Ministerial powers to define sexual offences, and the arbitrary power for Ministers to abolish the ICRIR at any point, urging that this latter power be removed from the Bill entirely.[316]

Call from the NI Victim Commissioner to withdraw the Bill, and UK response[317]

The NI Victims Commissioner Ian Jeffers has also called on the UK government to withdraw the legacy bill, raising concerns the bill 'will not deliver truth recovery' and will 'remove the opportunity for justice.'[318]

On the 3 January 2023, despite calls from the UN and Council of Europe Human Rights machinery and the NI Victims Commissioner (and previous calls from the NHRI, Irish Government, NI Political Parties and civil society groups), UK Ministers rebuffed the calls and have continued to press the bill, pointing to a Parliamentary majority.[319]

Commitment from the UK Opposition to repeal the Bill

On Friday 14 January 2022, the leader of the UK official opposition Labour Party Keir Starmer MP, responded during a public session in Queen's University Belfast to a question from Professor Kieran McEvoy with a public commitment that should he become Prime Minister, he would repeal the Bill.[320]

[314] https://publications.parliament.uk/pa/ld5803/ldselect/lddelreg/55/5503.htm
[315] As above. Paragraphs 9-11
[316] As above, paragraphs 12-15.
[317] The following is taken from CAJ Rule 9 Jan 2023.
[318] https://www.bbc.co.uk/news/uk-northern-ireland-64063077
[319] As above.
[320] https://www.youtube.com/watch?v=SKZUoXoUMNA&feature=youtu.be

5.2 Differences between the Legacy Bill and Command Paper

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.

The UK claimed in a brief submission to the Committee of Ministers that the Bill "takes into account feedback gained through engagement with key stakeholders" on the Command Paper.[321] 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."[322]

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 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.[323]

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 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.

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.

[321] DH-DD(2022)579, Communication from the UK, 30 May 2022, page 4.
[322] As above.
[323] 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

The changes to the immunity provisions were 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.[324]

- **Police Powers**

The possibility of some ICRIR officers being able to use police powers also appeared to have been 'bolted-on' to the Bill for the UK 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 gave assurances to veterans that implied the ICRIR will not use police powers such as arrest and questioning against them.

- **Impact on Existing General Measures**

The Bill will still reach into the Northern Ireland justice system and close the possibility of opening any new legacy inquests and would also still prevent the initiation of inquests currently awaiting hearing that have not reached a 'substantive' stage (this was subsequently regressed further). It also retrospectively, to the date of the introduction of the Bill, prevents all new civil claims and closes down all Police Ombudsman and criminal investigations.

Our contention that the changes 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:

[324] 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 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

> '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.'[325]

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."'[326]

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.

The Minister for Justice in Northern Ireland Naomi Long MLA 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.[327]

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.[328]

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

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

[327] 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/

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

5.3 Amendments to the Bill

In September 2022 the Committee of Ministers urged the UK authorities, if the Bill was progressed, to amend the Bill in order to comply with the ECHR including in the following areas:

- ensuring that the Secretary of State for Northern Ireland's role in the establishment and oversight of the ICRIR is more clearly circumscribed in law in a manner that ensures that the ICRIR is independent and seen to be independent;
- ensuring that the disclosure provisions unambiguously require full disclosure to be given to the ICRIR;
- ensuring that the Bill adequately provides for the participation of victims and families, transparency and public scrutiny; and
- reconsider the conditional immunity scheme in light of concerns expressed around its compatibility with the European Convention.

The UK authorities told the CM in September 2022 they were open to 'constructive engagement with stakeholders' on the Bill. However no formal pause or consultation process was opened. The same pattern of Ministers and officials holding meetings about the Bill continued. However, as illustrated by the very limited amendments put forward by Ministers, whilst concerns about the Bill are articulated at such meetings, they continue to be in practice ignored by the UK authorities. The Committee of Ministers Decision had strongly reiterated calls on the UK for meaningful effective engagement with stakeholders *before* any progression of the Bill. This clearly did not occur and there was no meaningful engagement on the Bill. [329]

UK Ministers had set out the proposed areas of amendment to the Bill at the Second Reading debate on the 23 November 2022. The text of the amendments was not provided. Subsequently the Committee of Ministers in the Decision of December 2022 stated these areas of amendment did not allay the concerns that had been set out in detail in the September Decision.[330]

The text of the amendments was finally published on the evening of the 18 January 2023. The UN High Commissioner for Human Rights Volker Türk criticised the late production of the amendments by the UK authorities stating:

> The actual text of the proposed amendments has been made public only one week before the House of Lords committee stage. This gives the public and relevant stakeholders, including victims and survivors, insufficient time to scrutinize the amendments and participate meaningfully in this hugely significant legislative process.[331]

The UK published a press statement concurrent with the tabling of the Government amendments.[332] This statement is misleading in general terms and regarding the scope of

[329] CAJ Rule 9 CM of December 2022
[330] Taken from January 2023 CAJ Rule 9 submission.
[331] https://www.ohchr.org/en/press-releases/2023/01/uk-rights-victims-and-survivors-should-be-centre-legislative-efforts-address
[332] https://www.gov.uk/government/news/government-tables-amendments-to-ni-troubles-legacy-legislation

specific amendments. In general terms the UK statement claimed the amendments would "address some of the principal concerns raised since the Bill's introduction, including by victims and survivors."

In fact, it is notable that the UK authorities did not propose any amendments that would address any of the issues raised by the CM, the Commissioner for Human Rights, the Northern Ireland Human Rights Commission, the Joint Committee of Human Rights of the UK Parliament, the UN Special Procedures mandates holders, the Irish Government, victims' groups, academics and NGOs.

It is also illustrative how Ministers responded to non-governmental amendments tabled by legislators during the House of Lords Committee stage which would have addressed some of the concerns set out by the CM in its Decisions.[333]

The amendments proposed at the House of Lords Committee Stage (by opposition ministers and by UK authorities) are outlined below.

Independence of ICRIR

The CM urged that the UK amend the Bill to ensure the "*Secretary of State for Northern Ireland's role in the establishment and oversight of the ICRIR is more clearly circumscribed in law in a manner that ensures that the ICRIR is independent and seen to be independent*."

The areas of concern in relation to the ICRIR not meeting ECHR procedural requirements relating to independence included: the level of the Secretary of State's control over the resources of the ICRIR; control over the caseload of the ICRIR; powers to redact all reports emerging from the ICRIR; powers to terminate the work of ICRIR at any point; the issuing of Guidance that will structure and constrain the work of the ICRIR.

Ministers did not propose any amendments to address any of these areas of concern.

A series of amendments were tabled by Baroness Nuala O'Loan, a former NI Police Ombudsman, to probe the investigative function of the proposed independent Commission for Reconciliation and Information Recovery (ICRIR).[334]

The amendments citing *inter alia*, the concerns of the Committee of Ministers, would change the term 'review' in the legislation to the term 'investigation', to ensure the function of the ICRIR was to carry out investigations and not 'reviews.' A further amendment would require ICRIR 'investigations' when a person is seeking immunity; [335] a further amendment tabled by Lord Peter Hain would require that ICRIR investigations are carried out to criminal justice standards and are compliant with the investigative duties under the ECHR.[336]

[333] At Committee Stage in the House of Lords it is custom and practice that amendments are not voted upon. Rather Ministers will make a statement as to whether they are minded to accept or will reject non-government amendments if brought at a later stage.
[334] HL Hansard Volume 827: 24 January 2023 Column 152-3
[335] HL Hansard Volume 827: 24 January 2023 Column 152-3
[336] HL Hansard Volume 827: 24 January 2023 Column 155-6 Amendment 72

The Minister Lord Jonathan Caine in response made clear the UK government would be rejecting all of these amendments.[337]

Another area of concern related to the Secretary of State directly appointing all of the office holders within the ICRIR. In the second day Committee Stage session opposition legislator Lord Des Browe tabled an amendment to address the lack of independence in the appointments to the ICRIR. A concern raised in the CM Decision.[338] Lord Browne's amendments would change the appointing authority for all ICRIR Commissioners so that the appointments were not made by Ministers (the Secretary of State) and would be instead made by the Northern Ireland Judicial Appointments Commission.[339] This Commission is an independent public body established because of the NI Criminal Justice Review that flowed from the Good Friday Agreement. The Commission makes independent appointments to judicial posts in Northern Ireland.[340]

Despite the Bill providing for the ICRIR Chief Commissioner to be a person who holds, or has held, high judicial office the Minister Lord Jonathan Caine in response made clear the UK government would be rejecting these amendments.[341]

Ministers eventually proposed another amendment in this area, it however did not change the appointments being made by the Secretary of State. Rather it was limited to the Secretary of State, 'consulting' with other unnamed persons before appointing the Chief (but not other) Commissioners.[342]

Disclosure provisions

The CM urged the UK to ensure "that the disclosure provisions [in the Bill] unambiguously require full disclosure to be given to the ICRIR."

The UK authorities did not propose any amendments to address this issue.[343]

Baroness O'Loan tabled an amendment to limit the qualification to ICRIR disclosure powers (that the ICRIR must 'reasonably' require the information requested – which on could present a significant qualification in powers).[344] This amendment would have had the potential to address one of the express areas of concern set out by the CM that the UK ensure that "the disclosure provisions unambiguously require full disclosure to be given to the ICRIR".

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[337] HL Hansard Volume 827: 24 January 2023 Column 168-9

[338] The information on Lord Browne's amendments taken from addendum Rule 9 submission in February 2023.

[339] HL Hansard Volume 827: 31 January 2023 Column 572 Amendment 12

[340] https://www.nijac.gov.uk/about-nijac

[341] HL Hansard Volume 827: 31 January 2023 Column 584

[342] "We will strengthen the commission's independence by making clear that the Secretary of State should consult named individuals before appointing the chief commissioner."

[343] The Government amendments did include a provision to increase the fine in the relation to an individual who refuses to comply with a notice to cooperate with the ICRIR (from £1,000 GBP to £5,000 GBP) (clause 14) However, this is entirely separate to the duties on public authorities to disclosure information (clause 5) which remain unamended and without any sanction for non-compliance.https://bills.parliament.uk/bills/3160/stages/17158/amendments/94293

[344] HL Hansard Volume 827: 31 January 2023 Column 633-4 Amendment 37

The Minister Lord Jonathan Caine in response made clear the UK government would not be accepting these amendments.[345]

Participation of Victims and Families

The CM urged the UK to ensure 'that the Bill adequately provides for the participation of victims and families, transparency and public scrutiny.' The UK authorities did not propose any amendments to address this issue at this stage.

Conditional Immunity Scheme

The CM urged the UK to reconsider the conditional immunity scheme given the concerns of ECHR incompatibility.

Baroness Nuala O'Loan and others tabled an amendment that would remove the conditional immunities scheme from the Bill.[346] This would address the concerns of the CM regarding the immunities scheme. A further amendment tabled would remove the Secretary of State's powers to provide internal 'Guidance' on how the immunities scheme should operate following the passage of the Bill.[347] A further probing amendment from Lord Browne required the ICRIR to first consider whether granting an immunity from prosecution would be compatible with ECHR rights.[348]

The Minister Lord Jonathan Caine in response made clear the UK government would not be accepting these amendments and defended the conditional immunities scheme.[349]

The UK authorities did not propose any amendments to reconsider the conditional immunity scheme. The UK authorities also did not propose any amendments to address the conspicuously low threshold that will allow an applicant to be granted immunity, without even offering any new information at all.

In relation to former members of the security forces it is foreseeable that veterans will be granted immunity from prosecution (and any prospect of an ECHR compliant investigation[350]) by simply providing copies of original statements given at the time of conflict-related incidents and declining no further information. This is despite the misgivings about the reliability and accuracy of such statements.[351] Provision of such statements would however meet the currently low threshold for immunity envisaged in the current Bill. Whilst this option would not facilitate information recovery and not be an option open to non-state actors, it is consistent with the immunities scheme having been designed entirely around facilitating impunity for state actors

[345] HL Hansard Volume 827: 31 January 2023 Column 637
[346] HL Hansard Volume 827: 31 January 2023 Column 596-7
[347] Amendment 131
[348] HL Hansard Volume 827: 31 January 2023 Column 601-2
[349] HL Hansard Volume 827: 31 January 2023 Column 617-8
[350] Whilst the UK has asserted that the ICRIR will be able to conduct ECHR compliant investigations using police powers, however in addition to broader misgivings of the ICRIR meeting ECHR standards for independent and effective investigations, as set out below it does not appear such police powers could be used against persons with immunity.
[351] Statements taken from soldiers by the internal Royal Military Police following military shootings in the early part of the conflict, where no police investigations at all took place, in particular have been found incompatible with the procedural requirements of Article 2 ECHR.

and the undertakings given by Ministers to military veterans that they will no longer face investigation following the passage of the Bill.

The sole amendments proposed by the UK authorities relate to the proposed creation of an offence, and the possibility of revocation of immunity, for persons who willingly mislead the ICRIR. This relates to a concern regarding the potential for individuals to deliberately give false and misleading information to the ICRIR and benefit from immunity regardless. The amendment only dealt with such a circumstance, and the very low threshold of an applicant providing even information that is already in the public domain, or past statements, remains.

Civil claims and legacy inquests

The CM had urged the UK to "reconsider provisions of the Bill" that curtailed inquests."

The UK authorities did not propose any amendments to address this. This includes not even reconsidering the termination of the many legacy inquests and civil claims that were already opened before the courts.

One amendment did exclude family proceedings from the scope of civil proceedings that touch on the conflict that will be prohibited under the new Bill.[352] It appears the original provision had been drafted so broadly it had, presumably inadvertently, captured family proceedings.

Criminal investigations and police powers of ICRIR[353]

The UK government did amend the Bill to 'make clear' the ICRIR can carry out criminal investigations 'when it judges them to be appropriate,' [354]

However, Ministers in the UK Parliament and elsewhere had also given express reassurances to military veterans that if the Bill is passed they will both not be subject to any further 'investigations' and that police powers will not be used against them.[355]

Whilst the UK authorities talked up the addition of police powers to the ICRIR, it is not clear how such powers could be used against persons with immunity. Persons can usually only be arrested, questioned etc based on reasonable suspicion for offences they can be prosecuted for.

The amendment is also discretionary on the ICRIR as to whether a criminal investigation will be conducted regardless of whether evidential leads have been identified that could lead to the identification and punishment of a perpetrator in accordance with the *Brecknell* threshold.

In relation specifically to 'criminal enforcement action,' clause 35 of the Bill (as introduced to the House of Lords)[356] expressly provides that 'criminal enforcement action (defined as arresting

[352] https://bills.parliament.uk/bills/3160/stages/17158/amendments/94324
[353] This section partly taken from: January 2023 CAJ Rule 9 submission.
[354] https://bills.parliament.uk/bills/3160/stages/17158/amendments/94323 "Clause 13, page 11, line 18 at end insert—"(4A) In particular, the Commissioner for Investigations is to decide whether a criminal investigation is to form part of a review."" "Member's explanatory statement: This makes clear that the Commissioner for Investigations should consider whether there should be a criminal investigation as part of an ICRIR review."
[355] CAJ Rule 9 Communication July 2022, paragraphs 161-164.
[356] https://publications.parliament.uk/pa/bills/lbill/58-03/037/5803037_en_4.html#pt3-pb1-l1g35

or detaining a person for the offence, prosecution and criminal proceedings)[357] cannot be exercised in relation to a person who has immunity for an offence.

Elsewhere in the Bill the ICRIR was empowered to use a certain type of police powers available to current NI legacy investigations – namely covert investigatory powers. The Government amendments however striped these powers from the ICRIR.[358]

As set out elsewhere the UK authorities have taken a position that as a matter of domestic law there are no duties to conduct ECHR compliant investigations before 1990, a period which covers most of the Northern Ireland conflict.

Amendments to the GFA Early Release Scheme[359]

Another amendment disapplies the early release scheme derived from the Good Friday Agreement (whereby in practice persons convicted of conflict-related offences serve a maximum of two years). [360] The Early Release Scheme was a key outworking of the GFA.

The amendment proposed that convicted persons would instead serve a full sentence if they 'choose not to' tell the ICRIR 'what they know.' An increased fine for 'non-compliance' with the ICRIR was also proposed.[361]

As set out in the official explanatory notes provided by the Minister, the amendment in fact abolished entirely the GFA-derived Early Release Scheme for new applicants as soon as the ICRIR immunities scheme becomes operational.[362] The explanatory notes also imply the rationale for this is that persons not wishing to do jail time should now apply to the immunities scheme instead, which will provide for zero jail time.[363] There remains no requirement for any form of full disclosure to the ICRIR to avail of immunity scheme. Rather the threshold remains conspicuously low, subjective and does not require applicants to provide any new information at all to the ICRIR, applicants do not have to tell the ICRIR "what they know" to avail of the amnesty.

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[357] Clause 38(2) Bill as introduced House of Lords.

[358] https://bills.parliament.uk/bills/3160/stages/17158/amendments/94287 Page 89, line 16, leave out paragraph 4" Member's explanatory statement "This removes the amendment of the Regulation of Investigatory Powers Act 2000 (which would have made the ICRIR subject to the jurisdiction of the Investigatory Powers Tribunal, something no longer needed as the ICRIR will no longer have investigatory powers by virtue of amendment in the Minister's name to leave out paragraph 6(3) of Schedule 12)."

[359] https://bills.parliament.uk/bills/3160/stages/17158/amendments/94291 ; https://bills.parliament.uk/bills/3160/stages/17158/amendments/94290; and https://bills.parliament.uk/bills/3160/stages/17158/amendments/94289. This section partly taken from: January 2023 CAJ Rule 9 submission.

[360] Under the Northern Ireland (Sentences) Act 1998

[361] https://www.gov.uk/government/news/government-tables-amendments-to-ni-troubles-legacy-legislation

[362] New applicants in this context means, according to the amendments, persons either convicted on a date after the immunities scheme comes into force (with an exception for those whose prosecutions were already commenced and ongoing by that date.)

[363] The Explanatory Notes state the effect of the amendments will be as follows: "This will prevent a prisoner from being released under the Northern Ireland (Sentences) Act 1998 if the prisoner is convicted after the ICRIR's power to grant immunity from prosecution becomes exercisable (and so could have avoided conviction by obtaining immunity)."

It is not clear what a person telling the ICRIR "everything they know" means, whether it relates to a particular matter they are subsequently convicted of or all their knowledge about any conflict related matter. There is a significant risk such processes could become selective and arbitrary, bypassing the safeguards provided for in the exercise of police powers. It is also not clear how the ICRIR will be able to determine whether an individual has told them "everything they know." It is not clear how such a matter would or could become clear in a criminal trial on a specific offence. It is not clear if the UK authorities have thought through this amendment.

Ministerial correspondence to members of the House of Lords on the publication of the amendments openly frames the purpose of this particular amendment as designed to 'incentivise' individuals to 'engage' with the ICRIR, in reference to an application for immunity.[364] The aim of the amendment is therefore to encourage and compel applications for the *de facto* amnesty provided by the conditional immunities scheme by abolishing the Early Release Scheme.

This creates a further entrenchment and exacerbation of the level of impunity the current Bill will provide for. The Early Release Scheme allowed for reduced jail time only. An Article 2 ECHR compliant investigation could still take place, along with a prosecution and trial. Indeed, the Early Release Scheme requires such an investigation, prosecution and trial to take place to secure a conviction in order to come into play. The Article 2 compliant investigation using full police powers against a suspect, and indeed a narrative verdict of a trial, can also play a significant role in information recovery and historical clarification. Under the model envisaged by the Stormont House Agreement, and current investigative processes such as that of the Police Ombudsman, this is accompanied by a comprehensive family report or public statement respectively, gathered through an Article 2 compliant investigation.

By contrast, with the conditional immunities scheme under the Bill, no Article 2 compliant investigation will take place, nor will there be a prosecution, trial or narrative verdict, or an obligation to produce a comprehensive family report.

Whilst the UK authorities continue to claim the ICRIR 'reviews' will be capable of Article 2 compliant investigations using full police powers, this is clearly not the case, in particular, for persons who avail of the immunities scheme. Police powers will not be exercisable against persons who cannot be subject to criminal proceedings for an offence as they have immunity for it. Indeed, the bill itself expressly restricts any criminal enforcement action against persons with immunity.

The amendments in question in providing a 'stick' to incentivise applications to the immunity scheme and increase its uptake have the concerning purpose and effect of permanently putting suspects beyond the reach of any Article 2 compliant investigation.

Other 'window dressing' Amendments

An example of 'window dressing' was found in an amendment relating to the appointment of Commissioners. There has long been discussion that legacy bodies in NI should have an international element, either through being established as international bodies; through figures

[364] Correspondence from Minister Lord Caine to All Peers, 17 January 2023.

of international standing chairing them (both were planned in relation to the SHA) or through involving international figures in the appointments process to strengthen independence. In seeming response to these issues, one Government amendment provides that if possible one of the five ICRIR commissioners should have some 'international experience' (defined as experience outside the UK).[365] This is clearly not the same as any of the above suggestions. A further amendment on appointments does not change the vesting of the sole power of appointment in the Secretary of State, but rather states that the Secretary of State may 'consult' any other person of his or her choice before making the appointment. The amendment also allows the Secretary of State to appoint a retired judge to run the ICRIR rather than a serving judge.[366]

In relation to amendments that further entrench the harms of the Bill, an example is provided by Government further seeking to restrict the Police Ombudsman for Northern Ireland in engaging in any inquiry at all that touches on conflict-related human rights violations by police. At present the bill would prohibit the Ombudsman from dealing with any complaints from families regarding grave and exceptional police misconduct (which has to date been interpreted as relating to police conduct in relation to a death). The Amendment would take this much further to ban the Ombudsman from engaging in *any* form of formal investigation that touches on the actions of the Police during the conflict.[367] This is relevant to powers for example of thematic inquiry.

5.4 Report Stage, House of Lords[368]

In advance of Report Stage on the 10 May 2023, the Secretary of State for Northern Ireland announced in the UK Parliament that the UK Government would be tabling 'game changing' amendments to the Legacy Bill 'over the next couple of weeks.'[369] This statement was made in response to the spokesperson for the UK opposition calling for a 'total rethink on legacy' in light of the broad opposition to the Bill.[370]

The commitment to 'game changing' amendments was met with scepticism. Such significant amendments to the Bill had been repeatedly promised by Ministers at earlier stages of the Bill and not delivered.

The Government amendments for Report Stage were not in fact tabled or otherwise put into the public domain 'over the next couple of weeks.' They were drafted and circulated internally during this timeframe. The UK did not however make public the amendments until late on the evening on the 8 June 2023 the day *after* the Committee of Ministers Meeting in Strasbourg which would have considered them for ECHR compliance.[371]

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[365] https://bills.parliament.uk/bills/3160/stages/17158/amendments/94305
[366] https://bills.parliament.uk/bills/3160/stages/17158/amendments/94304
[367] https://bills.parliament.uk/bills/3160/stages/17158/amendments/94312 there is now some transitional provision regarding the Ombudsman: https://bills.parliament.uk/bills/3160/stages/17158/amendments/94313
[368] This section taken from The July 2023 CAJ Rule 9 submission.
[369] HC Official Report, 10 May 2023, Volume 732, column 322.
[370] As above.
[371] https://www.gov.uk/government/news/government-introduces-amendments-to-ni-troubles-legacy-legislation The evening timing may have been designed to limit the opportunity for journalists to source alternative

The Council of Europe Commissioner for Human Rights, Dunja Mijatović, issued a statement in advance of the Report Stage debate raising concerns the amendments did not address the fundamental problems with the Bill. The Commissioner recalling the serious concerns expressed by the CM, PACE, UN High Commissioner and UN Special Rapporteurs, stated:

> 'Despite this, the UK government has decided to go ahead with the Bill in a way that does not recognise Northern Ireland's violent past or honours the suffering of victims. While the government has recently published amendments, these leave the fundamental problems with the Bill intact, such as the conditional immunity scheme that would result in impunity for serious human rights violations, the unilateral shutting down of avenues to justice for victims, and questions about the ability of the Independent Commission for Information Recovery to deliver outcomes that would meet human rights standards.
>
> 'In addition, several judgments related to the legacy of the Troubles have been waiting to be executed for twenty years or more. The government's latest amendments were published the day after the Committee of Ministers concluded its most recent meeting on the supervision of execution of judgments of the Court. As a result, it could not consider the impact of these amendments for the implementation process, and with its next examination to take place in September, it may not have this opportunity again before the Bill is adopted. However, it is my view that adopting the Bill would make the prospect of meeting the requirements of the Court's case law more remote than ever.'[372]

The Report Stage in the upper chamber took place on the 21st and 26th June 2023.[373]

The Government amendments made no attempt to address the specific areas of ECHR incompatibility expressly identified by the Council of Europe Committee of Ministers (CM) Decisions, listed in the previous section.

Some of these concerns were not addressed at all by the Government amendments. Others were engaged with but not in a manner that would allay the concerns raised. Other amendments exacerbated concerns about ECHR compatibility. This is further detailed below.

References to clauses in the Bill below refer to the Bill as brought to the upper chamber (Lords) from the lower chamber (Commons), prior to the amendments being adopted.[374] No Government amendments were subject to successful challenge.

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viewpoints although some outlets were able to do so e.g. see Amendments to NI Legacy Bill criticised as 'smoke and mirrors' by campaigners – The Irish Times

[372] https://www.coe.int/en/web/commissioner/-/united-kingdom-adopting-northern-ireland-legacy-bill-will-undermine-justice-for-victims-truth-seeking-and-reconciliation

[373] This section taken from The July 2023 CAJ Rule 9 submission.

[374] Bill as brought to HL from HC accessible here. The bill was not amended at HL Committee Stage.

Closing down the 'Package of Measures'

As noted above the Bill shuts down the existing 'package of measures' of legacy mechanisms including inquests, civil claims, Police Ombudsman investigations, PSNI legacy investigations and 'called in' investigations, at the time such mechanisms are increasingly delivering for families.[375] Government amendments were presented as extending to the 1 May 2024 the timeframe to which inquests, PSNI and Police Ombudsman could run. In practice, however, as set out below, the impact of the amendments curtailed more inquests, places additional prohibitions on the Police Ombudsman and potentially further curtails other criminal investigations.

The Bill will 'replace' these mechanisms with the option of a 'review' by the ICRIR. However, the ICRIR is a much more limited mechanism. The Northern Ireland Human Rights Commission has taken the position that ICRIR 'reviews' do not meet ECHR procedural requirements.[376] The Commissioner for Human Rights Dunja Mijatović has also specified the independence and effectiveness of ICRIR reviews as one of the issues of compliance with the ECHR, with the Bill.[377]

The table below highlights the impact of the Bill before and after the amendments in relation to closing down the existing package of measures. This relates to Troubles-related offences. The timeframe is set out in the commencement clause of the Bill, clause 57(2).

Mechanism	**Bill Prior to Amendment at Lords Report Stage**[378]	**Bill Following Amendment**
No criminal investigation may be continued or begun.	Two months after Bill completes passage.	On the 1 May 2024
No public/family report of a previous criminal investigation can be produced	The report from a previous investigation could still be produced even if a criminal investigation could not continue (with a cut-off date).[379]	The exemption allowing a report from a criminal investigation to be produced after it has had to cease was removed.

[375] See CAJ Rule 9 submission to Committee of Ministers (July 22) paragraphs 60-95; which details as providing substantive information recovery and historical clarification "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." (para 63)see also CAJ Rule 9 submission to the Committee of Ministers, May 2023, paragraphs 25-42.

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

[377] UK Country Visit report December 2022, page 8.

[378] See Clause 57(2) Commencement and Pt III of the Bill as brought to the HL:
https://publications.parliament.uk/pa/bills/lbill/58-03/037/5803037_en_6.html#pt5-l1g57
https://publications.parliament.uk/pa/bills/lbill/58-03/037/5803037_en_4.html#pt3

[379] The provision sets a cut-off date of 1 May 2023 or the date or the date of the establishment of the ICRIR, whichever is earlier, the former date however had already passed by this stage (clauses 34(3)&(6)).

Current civil actions	Two months from Bill completing passage any civil action brought on or after 17 May 2022 may not be continued.	No change.
New civil actions	No further civil actions can be brought two months after the Bill completes passage (but see above).	No change.
Powers to open new legacy inquests.	A prohibition on new legacy inquests would come into force two months after the Bill completes passage.	A prohibition on new legacy inquests will come into force on the 1 May 2024 (however any such inquest open would also have to have to be completed by that same date).
Existing inquests already in system.	Inquests that have already substantively commenced[380] by the 1 May 2023 can continue, others which have not reached that stage cannot.	All inquests must be complete by 1 May 2024 (only a verdict etc can still be issued after that date). The exception that allows inquests substantively commenced but not completed has been removed.
Police Ombudsman investigations	Police Ombudsman legacy *complaints* investigations must cease and new complaints cannot be brought two months after Bill completes passage. Certain other Ombudsman investigations into legacy issues that are not complaint-based may continue.	Police Ombudsman legacy complaints investigations must cease by 1 May 2024. The amendment also extended this prohibition to any other Ombudsman investigation dealing with legacy matters. (There is an exemption for criminal investigations where a prosecution has already begun before 1 May 2024.)

[380] The drafting disapplied the prohibition on continuing inquests to those inquests "at an advanced stage", which in practice had meant those substantively commenced.

The impact of the Report Stage amendments can therefore be summarised as follows:

- **Legacy criminal investigations**

These investigations can continue until 1 May 2024, but the express exemption providing for investigations to issue reports after that date has been removed. The completion of a report from such an investigation can take many months following the conclusion of the investigation. (For example, Operation Kenova issued an eight-stage protocol on the publication of its interim report in October 2022, with a view to publication in the new year. Following delays the report is expected in autumn 2023). The amendment that removes the express provision providing for continued publication of reports from already completed investigations appears to serve no purpose other than potentially thwarting access to investigation reports that may provide significant information recovery to families. As noted, this amendment also provides an obvious incentive for the very persons and agencies who have been the subject of investigation and are criticised in reports to seek to delay their publication until the deadline.

- **Inquests**

The amendments removed the exemption in the Bill that permitted certain inquests which have already substantively commenced by 1 May 2023 to continue. Rather, there will now be an absolute cut off point for any inquests of 1 May 2024, even if the inquest is at an advanced stage. Only inquests which have entirely completed their proceedings before 1 May 2024 will now be permitted to issue their findings. This change is self-evidently designed to close down even more inquests than the previous formulation.

- **Ombudsman Investigations**

The amendments significantly extended the prohibition on the Police Ombudsman investigating conflict-related human rights violations by the police. The Bill was limited to curtailing complaint-based investigations, and the amendments extended this to cover the Ombudsman's broader powers of investigation in legacy cases. Criminal investigations by the Ombudsman may also have fallen under the provision previously in the Bill designed to allow reports from investigations completed before the deadline being subsequently published that has now been removed. There appears no reason for this other than to thwart the publication of Ombudsman reports on completed investigations.

- **Civil Cases**

The amendments did not address the cut off point for civil cases.[381] The Bill closes down and prohibit all civil claims for conflict-related abuses that commenced after May 2022. Notably such civil cases recently are delivering for victims of human rights violations both in relation to information recovery via legal discovery powers as well as reparations for victims. Recently one case relating to a miscarriage of justice found that the victim had been tortured by the army, including 'waterboarding'; a second case provided reparations and truth-recovery for informant-

[381] One technical amendment to Clause 8 clarified that family proceedings are not to be considered within the scope of the bar on civil proceedings.

based collusion.[382] Such cases are now being shut down and it is reasonable to conclude the motivation for doing so is to prevent the courts from further highlighting human rights violations.

Amendments related to ICRIR and ECHR compatibility

Government amendments to clause 13: [383]

- Placed a duty on the ICRIR Commissioner for Investigations to 'comply with the obligations imposed by the Human Rights Act 1998' and
- Made it clear the Commissioner must consider whether reviews will include a criminal investigation (which could use police powers).

The reference to the HRA should be viewed in the context that Government had argued obligations under the HRA do not arise as a matter of domestic law in most Troubles-related cases having argued for temporal restrictions on the scope of the HRA on pre-1990 cases (ten years before the commencement of the HRA). It should also be noted that compliance with the

[382] In March 2023 the High Court in Belfast awarded reparations of £350,000 GBP to the family of the late Liam Holden in a ruling that found he had been tortured by the British Army, including through the use of 'waterboarding'. The narrative verdict by the Court runs to 60 pages, providing substantive information recovery. In a miscarriage of justice Mr Holden had been sentenced to death in 1973 having been wrongly convicted of the murder of a solider, Frank Bell, on the basis of a confession. The sentence was later commuted to life imprisonment, and he was released after 17 years. In 2012 the conviction was quashed by the Court of Appeal. In 2022 he launched the civil proceedings in which the Hight Court has accepted the military tortured, including through simulated drowning ('waterboarding') Mr Holden into the confession. Mr Holden subsequently passed away in 2023. The posthumous damages included compensation for "waterboarding, hooding and threats to kill, malicious prosecution and misfeasance in public office." See ruling here and media report here. In a second case the High Court awarded compensation of £90,000 GBP to a man who as a child had witnessed the sectarian killing of his grandfather Sean McParland in 1994. The killing involved an informant within the loyalist paramilitary UVF, run by RUC Special Branch. Mr Justice Rooney held that the police knew that the informant had already confessed to his role in other killings but had "*not only turned a blind eye to Informant 1's serious criminality*" … but also "*went further and took active measures to protect (him) from any effective investigation and from prosecution, despite the fact that (he) had admitted his involvement in previous murders and criminality*." See report here.

[383] Clause 13 LORD CAINE Page 11, line 1, at end insert— "(A1) The Commissioner for Investigations must comply with the obligations imposed by the Human Rights Act 1998 when exercising functions under this section." *Member's explanatory statement: This amendment expressly confirms that the Commissioner for Investigations (when exercising operational control over the conduct of reviews) must comply with obligations imposed by the Human Rights Act 1998.*

Page 11, line 18, at end insert— "(4A) In particular, the Commissioner for Investigations is to decide whether a criminal investigation is to form part of a review." *Member's explanatory statement*
This makes clear that the Commissioner for Investigations should consider whether there should be a criminal investigation as part of an ICRIR review.

Page 11, line 48, at end insert—"(7A) Subsection (A1) does not limit the duty of the Commissioner for Investigations to comply with the obligations imposed by the Human Rights Act 1998 when exercising other functions." *Member's explanatory statement This makes clear that the duty of the Commissioner for Investigations to comply with the Human Rights Act 1998 is not limited by the express provision in the new subsection (A1).*

HRA would already be an obligation of the ICRIR, unless compelled to act in conflict with ECHR rights by primary legislation (as is the case with the Legacy Bill).[384]

In tabling the amendment government argued that the ICRIR would have to comply with obligations under the HRA whilst simultaneously holding the position that there are no such obligations in most Troubles-related cases.

Ministers claimed that ICRIR 'reviews' can constitute Article 2 ECHR compliant investigations due to the ICRIR being able to exercise police powers.[385] However, the use of police powers (rightly) requires the meeting of certain thresholds of being able to investigate a suspect with regard to an offence for which they can potentially be charged and prosecuted. As alluded to above It therefore appears clear that such powers may not be used against a person who holds *immunity* for an offence through the ICRIR. This issue was raised with the Minister during Parliamentary debate, but no response was given.[386]

In addition, Ministers have given assurances to military veterans that imply the Bill means they will no longer be subject to investigations using police powers such as arrest and questioning. These statements have not been retracted.[387]

The immunities scheme in this context has the purpose or effect of operating as a 'get out of investigation' free card, as the ICRIR is not able to exercise police powers where needed and hence conduct effective investigations when a suspect holds an immunity.

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[384] By virtue of section 6 of the HRA which requires public authorities to act compatibility with the ECHR, save when required to act differently by primary legislation.

[385] See for example paragraph 30 of the ECHR Memorandum on the Bill.

[386] 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?* Hansard House of Lords 11 May 2023 vol 829 clm 1964 The Minister gave no answer to these questions in his response. Hansard House of Lords 11 May 2023 vol 829 clm 1971

[387] In introducing the Bill in May 2022 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." 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 See also Conservative Home piece stating: "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/

Government amendments at Report Stage exacerbated this problem by incentivising applications to the immunities scheme hence placing more suspects beyond the reach of effective investigations. This is notable in the taking forward of the Committee Stage amendments which abolished the 'Early Release Scheme' for conflict related offences.[388]

The Early Release Scheme was an outworking of the 1998 Good Friday Agreement (GFA) whereby persons with serious conflict-related convictions for offences committed before the GFA serve only a maximum of two years in prison before release on licence, rather than a full sentence – including life sentences.[389]

Ministerial correspondence to members of the House of Lords framed the purpose of these particular amendments as designed to 'incentivise' individuals to 'engage' with the ICRIR, in reference to an application for immunity.[390]

A further area raised by the CM related specific concerns regarding the powers of disclosure of the ICRIR. The CM urged the UK to ensure "that the disclosure provisions [in the Bill] unambiguously require full disclosure to be given to the ICRIR." Government amendments did not address this issue.[391] An opposition amendment to address the matter and strengthen the disclosure powers in a manner which would have addressed CM concerns was also rejected by Government.[392]

Amendments on the Immunities Scheme

UN and Council of Europe Experts singled out the immunities scheme as incompatible with ECHR and other international obligations.

Again, the Bill expressly provides that the ICRIR 'must' grant an immunity from prosecution for a conflict-related offence when certain criteria are met. This would include acts such torture-regardless of ECHR compatibility or compliance with UN treaties.

As noted, there is a low threshold with the relevant criteria providing that an applicant only has to give an account they themselves believe to be true and they do not have to give any new information at all.[393] For example, a former solider could read out their original statement given

[388] See amendments to Schedule 11 – the effect of which (Members Explanatory Statement) is to "prevent a prisoner from being released under the Northern Ireland (Sentences) Act 1998 if the prisoner is convicted after the ICRIR's power to grant immunity from prosecution becomes exercisable (and so is a case where the prisoner could have avoided conviction by obtaining immunity)."

[389] Under the Northern Ireland (Sentences) Act 1998

[390] Correspondence from Minister Lord Caine to All Peers, 17 January 2023 (re committee stage).

[391] One proposed amendment to clause 5 did augment the list of public authorities who are to assist the ICRIR with disclosure to include bodies in Great Britan the existing clause having been restricted to NI. This does not address the ambiguity over the disclosure provisions.

[392] https://bills.parliament.uk/bills/3160/stages/17158/amendments/94211

[393] 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. Criterion B is of course central to the extent to which the immunity scheme will be able to contribute to information recovery. Clause 18(4) of the Bill sets out that the applicant's account could consist entirely of information which they have previously provided to the ICRIR or any other process.

to the Royal Military Police (RMP) and meet the criteria, despite the RMP process not being ECHR compliant and the information already potentially being in the public domain.

UN special procedures mandate holders assessed the Immunity Scheme as "tantamount to a de-facto amnesty scheme" due to the "low threshold required for granting immunity and the lack of review mechanisms."[394] The CM called for the scheme to be entirely reconsidered.

Immunity is to be granted even if no family is to benefit from information recovery.[395]

The Bill provides that the immunity must be granted for serious conflict-related offence.[396] Less serious conflict-related offences are subject to an unconditional amnesty. Government amendments did not reconsider the immunities scheme at all nor make any changes to this conspicuously low threshold for immunity set out on the face of the legislation. The scheme had only ancillary changes.

One government amendment, to clause 21, requires the ICRIR to take 'reasonable steps to obtain any information which the Commissioner for Investigations knows or believes is relevant to the question of the truth of' an account given relating to an application for immunity.[397]

This amendment did not alter the very low subjective bar for immunity whereby an applicant only has to believe their account is true and does not have to give any new information at all to meet the criteria. The amendment also did not alter the manner in which the immunities scheme will place persons beyond the reach of police powers and hence an effective investigation by the ICRIR.

It also raises questions as to how an ICRIR Commissioner would 'know or believe' information was relevant before seeing it. The provision of 'reasonable steps' is not cross-referenced to any relevant powers. The closing down of other mechanisms currently conducting ECHR-compliant investigations limits the information available to the ICRIR. It is also unclear as to what standard the truth must be verified.

A further government amendment provides for the revocation of immunity when there is a fresh conviction for either a false statement to the ICRIR or if "a person is convicted of a terrorist

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[394] *UK: Flawed Northern Ireland 'Troubles' Bill flagrantly contravenes rights obligations, say UN experts*

[395] Immunity will be granted: 1 Even where the disclosed material does not relate to a case that the ICRIR is reviewing; 2 That even where the ICRIR is reviewing a case relating to the disclosed material, it will be at the discretion of the ICRIR whether they link the immunity request to that review; 3: In the absence of a case being linked to a review, no information gained in the immunity process will be disclosed to families; 4: It is not clear whether any disclosed information will be published in any format.

[396] The only exception to this, as a result of an opposition amendment in the House of Commons, are sexual offences. However, it is worth noting, if an applicant applied for immunity for a range of offences, including sexual violence, immunity could be granted to them for all other eligible crimes. Furthermore, whilst immunity may not be granted for sexual offences the bar on criminal investigations of the same sexual offence by the PSNI or other existing mechanisms will remain in place.

[397] Clause 21 LORD CAINE Page 20, line 3, at end insert— "(1A) The ICRIR must take reasonable steps to obtain any information which the Commissioner for Investigations knows or believes is relevant to the question of the truth of P's account." *Member's explanatory statement This amendment would require the ICRIR to take reasonable steps to obtain information in connection with determining the truth of P's account (see Clause 18(3)).*

offence or an offence with a terrorist conviction". The amendment was proposed as a new clause (after clause 23).

Whilst this amendment does not address the fundamental problems with the immunities scheme per se, it also does not address the issue that regardless of a revocation of immunity for a Troubles related offence a person, following the commencement of Part III of the Bill, cannot be investigated by any competent ECHR Article 2 compliant body for the same offence.

By way of illustration, consider the hypothetical case of an applicant who has been responsible for participation in a paramilitary 'kneecapping' in 1992. In 2026 they are then granted, on application, immunity for this offence. Three years later, in 2029 they are then convicted of a new offence under Schedule 1A of the Counter Terrorism Act 2008 and their immunity is consequently revoked. However, the Police Service of Northern Ireland (PSNI) would be prohibited from investigating the original offence, and hence no criminal enforcement action can be taken. The ICRIR is the only body which could have 'reviewed' the case. However, the ICRIR has by that time ceased operations, did not 'review' the incident whilst operational, and in any case could not have conducted an Article 2 compliant criminal investigation, not least as the person had immunity at the time. In short, the applicant still has a *de facto* amnesty in such circumstances for an offence that conflicts with Article 3 of the ECHR.

An amendment to clause 21(6) transferred the power to issue Guidance as to whether the immunities criteria are met from the Secretary of State to the Chief Commissioner of the ICRIR. Whilst in principle it is preferable for Guidance to be vested in the ICRIR itself rather than the Secretary of State, again this provision does not address the very low bar for immunity which is set out on the face of the legislation.

Powers to determine the Rules of Procedure for making and dealing with requests for grants of immunity, under clause 20(4), continue to be vested in the Secretary of State and were not affected by the amendments.

Amendments relating to the independence of the ICRIR

The CM specifically sought measures to ensure "*that the Secretary of State for Northern Ireland's role in the establishment and oversight of the ICRIR is more clearly circumscribed in law in a manner that ensures that the ICRIR is independent and seen to be independent*;"

The Government amendments did not address this issue save for the one amendment, referenced above, that transferred powers on Guidance on immunities criteria to the ICRIR from the Secretary of State.

Other powers in the Bill are not transferred away from the Secretary of State. These include powers to make all the ICRIR appointments, set the budget, close the ICRIR down at any point, extensively shape its caseload, redact the content of ICRIR reports with a broadly drafted 'national security' veto, and to solely provide all oversight of the ICRIR.

There are some limited provisions on appointments. One amendment to schedule 1 provides that the Secretary of State can consult other persons over when making appointment of the ICRIR Chief Commissioner. However, it is entirely at the Secretary of State's discretion who such

persons are, and furthermore, as set out below, appears somewhat academic in this instance when the recruitment had already taken place prior to the Bill becoming law.

A further Government amendment empowered the Secretary of State to limit the term time of commissioners. This would appear to potentially increase the leverage the Secretary of State may have over Commissioners.

Amendments relating to victims' participation and memorialisation

The CM has recommended 'ensuring that the Bill adequately provides for the participation of victims and families, transparency and public scrutiny.' There was very limited provision in Government amendments to address this.

One new clause, after clause 22, provides for 'Personal statements by persons affected by deaths.' The explanatory note states '*This amendment requires the Chief Commissioner to give individuals affected by a death or other harmful conduct the opportunity to provide personal statements to the ICRIR about the effects of the Troubles-related conduct.'*

However, the proposed amendments also provides a national security veto over the contents of such personal statements.[398] Such a duty could be deployed to remove concerns by victims of potential involvement of state informants and agents in a death or other human rights violations.

There were also Government amendments to part 4 of the Bill which dealt with memorialising the Troubles. These amendments further enhanced the role and powers of the Secretary of State over the memorialisation process. They also frame a particular perspective for the 'Troubles-related work Programme' with an out-dated conceptualisation of reconciliation that limits state responsibility by framing the conflict in terms of two sectarian communities.[399]

Government defeats on opposition amendments

Government suffered two narrow defeats in votes on opposition amendments at Report Stage. Another vote on an opposition amendment which would have removed the bar on legacy inquests from the Bill, was narrowly defeated.[400] One opposition amendment in the earlier Commons stages prevailed—to exclude sexual offences from the scope of the immunities scheme (but not from the ban on investigations of sexual offences which were conflict related).

The first amendment required that ICRIR reviews to be ECHR compatible, be carried out to criminal justice standards (modelled on the aforementioned Operation Kenova); gather as much

[398] A duty would be placed on the ICRIR to redact or not publish a personal statement if information within would conflict with sections 4(1) or s26(2). These, among other matters, relate back to national security duties.
[399] The proposed amendments to clause 45 would allow the Secretary of State discretion to pick which organisations and Northern Ireland Departments are consulted in relation to the memorialisation strategy (removing a requirement to consult with the First and deputy First Minster). In similar terms an amendment to clause 50 will provide that the Secretary of State is empowered to pick who will be consulted on appointments of 'designated persons' to take forward work under this part of the Bill. An amendment to clause 48 on the Troubles-related work programme would require the work to be carried out to ensure non-recurrence. However, this is not in relation to patterns of violations (as the concept is interpreted in international law), but rather is limited to 'political and sectarian hostility between people in Northern Ireland.'
[400] https://votes.parliament.uk/votes/lords/division/2954

information as possible; and explore all evidential opportunities.[401] The second opposition amendment removed the immunities scheme from the Bill and at first prevailed.[402]

But when the Bill returned to the lower house (18 July) Government resisted both amendments and won votes on them, reinstating the immunities scheme to the Bill and removing the amendment which would have sought to require, *inter alia*, ICRIR reviews to be ECHR compatible.[403]

The UK Government had intended on ensuring the Bill would complete passage by before the summer recess but ran out of parliamentary time with the Secretary of State blaming the opposition for the delay.[404]

5.5 Third Reading in the House of Lords – 4 July 2023[405]

Before the Bill returned to the lower house (Commons) there was a final substantive stage in the upper house Lords. This could not deal with matters already voted on in Report stage but did lead to other Government amendments on a single issue.

In this instance Government tabled amendments to reverse the outcome of a 2020 ruling of the UK Supreme Court relating to the validity of 'Interim Custody Orders' made as part of the policy of internment (imprisonment without trial) which operated from 1971-1975 in Northern Ireland.

That policy of imprisonment without trial indisputably fuelled the Northern Ireland conflict. The policy engaged Article 5 ECHR and relied on a derogation from the ECHR. Baroness Nuala O'Loan speaking during the debate summarised the impact of internment as follows:

> 'Internment without trial was introduced on 9 August 1971 and continued until 5 December 1975. About 340 people were detained initially, often just scooped up by the Army because of their age and where they lived. About 100 were released within 48 hours; 17 people died in the rioting which followed and an estimated 7,000 Catholics had to flee their homes when they were attacked by loyalists. Initially, internment was carried out under regulations made under the special powers Act. All those detained were from the Catholic community. The interpretation of the Detention of Terrorists (Northern Ireland) Order 1972—introduced that November—by the Supreme Court is the subject of today's

[401] https://votes.parliament.uk/votes/lords/division/2951 Baroness Ritchie of Downpatrick moved amendment 31, in clause 13, page 11, line 13, at end to insert—
"(3A) The Commissioner for Investigations must ensure that each review—
(a) is carried out to criminal justice standards as modelled on Operation Kenova,
(b) complies fully with obligations under the European Convention on Human Rights,
(c) gathers as much information as possible in relation to the death or harmful conduct, and
(d) explores all evidential opportunities.
(3B) "Operation Kenova" means the independent investigation established under the overall command of former Chief Constable Jon Boutcher in 2016, known as Operation Kenova."
[402] https://votes.parliament.uk/votes/lords/division/2952
[403] https://bills.parliament.uk/bills/3160/stages/17849
[404] https://twitter.com/chhcalling/status/1681659565211893762
[405] This section taken from The July 2023 CAJ Rule 9 submission.

> government amendment. Overall, 1,981 people were detained without trial, 1,874 from the Catholic/ nationalist /republican community and 107 from the Protestant/unionist/loyalist community. That began in 1973. It is generally accepted that internment without trial was a major recruiting agent for the IRA, and the Government said decades ago that they would never introduce it again.'[406]

The internment policy also engaged Article 14 with Article 5 ECHR insofar as persons detained were predominantly from the (Irish nationalist)/Catholic community. This was at a time when there were both Irish Republican armed groups and (pro British) loyalist paramilitaries active. Remarkably the British Army had at the time (in 1972) adopted a separate 'Arrest Policy for Protestants'.[407] In 2022 a group of Protestant men were given leave in civil proceedings alleging they had been 'imprisoned without trial to balance the number of Catholics being detained under the policy.'[408]

The purpose of the Government amendments was to prevent persons seeking compensation for their detention under 'Interim Custody Orders.'

The UK Supreme Court in *R v Adams [2020] UKSC 19,* in summary, ruled that the Interim Custody Orders were not valid as they had not been individually considered by the Secretary of State as the legislation required. The applicant was Gerry Adams, the former President of Sinn Féin. The effect of the ruling would apply to a much broader cohort of former detainees.

Whilst there is a much broader prohibition on civil litigation related to the Northern Ireland conflict within the Bill, there is a retrospective exception for cases which commenced before the Bill was introduced. The amendment on Interim Custody Order by contrast does not contain this exemption and aims to prevent civil proceedings and compensation for unlawful imprisonment regardless of when the proceedings were taken. The amendments were incorporated into the Bill.

[406] https://hansard.parliament.uk/lords/2023-07-04/debates/350E1B11-8033-4F79-9654-EC69F062845A/NorthernIrelandTroubles(LegacyAndReconciliation)Bill#contribution-61D0021F-BD14-419E-9C58-CBBCCB6925B2

[407] https://www.patfinucanecentre.org/declassified-documents/arrest-policy-protestants

[408] https://www.newsletter.co.uk/news/crime/group-of-elderly-loyalists-secure-legal-hearing-into-internment-claims-3607674

6. Reaction from UN and Council of Europe to the Legacy Bill

Summary:

- *There was consistent UN and CoE concern regarding the Command Paper, the Bill and the final Act with amendments still not addressing concerns.*
- *UN concerns from UN Special Rapporteurs (UNSRs) up to the High Commissioner are recorded below along with concerns from CoE bodies including the decisions and resolutions of the Committee of Ministers.*

6.1 2016-2017 UN interventions[409]

Earlier UN interventions include the ICCPR UN Human Rights Committee's concluding observations of 2016; the dedicated report on NI legacy of 2016 by UNSR Pablo de Grieff; and Universal Period Review resolutions in 2017.

The ICCPR Concluding Observation no. 8 in full:

> 'Accountability for conflict-related violations in Northern Ireland: While welcoming the adoption of the Stormont House Agreement, the Committee remains concerned (see CCPR/C/GBR/CO/6, para. 9) about the quality and pace of the process of promoting accountability in relation to 'the Troubles' in Northern Ireland and about the absence of a comprehensive framework for dealing with conflict-related serious human rights violations. The Committee also notes with concern (a) the multiple independence and effectiveness shortcomings alleged in relation to the Police Ombudsman's ability to investigate historical cases of police misconduct; (b) that the Legacy Investigation Branch established within the Police Service of Northern Ireland to carry out the work of the closed Historical Enquiries Team may lack sufficient independence and adequate resources; (c) delays in the functioning of the Coroner's inquest system in legacy cases; (d) the retention in the Inquiries Act 2005 of a broad mandate for government ministers to suppress the publication of inquiry reports and the lack of safeguards against abuse of those executive powers; and (e) that the review relating to the murder of Patrick Finucane (i.e. the de Silva Review) does not appear to satisfy the effective investigation standards under the Covenant. The Committee, while welcoming the proposed establishment of an Historical Investigations Unit to deal with outstanding cases related to the conflict in Northern Ireland, is concerned that the quality of investigations to be conducted may be affected by the passage of time, given that the unit would become fully operational only in 2017 (arts. 2 and 6).
>
> 'The State party should:

[409] The following information is taken from: Submission from the Committee on the Administration of Justice (CAJ) to the United Nations Human Rights Committee in response to the Concluding Observations on the 7th Periodic Report of the UK under the International Covenant on Civil and Political Rights (ICCPR), June 2017, Follow up Procedure: "accountability for conflict-related violations in Northern Ireland" (CCPR/C/GBR/CO/7, paragraph 8).

‘(a) Ensure, as a matter of particular urgency, that independent, impartial, prompt and effective investigations, including those proposed under the Stormont House Agreement, are conducted to ensure a full, transparent and credible account of the circumstances surrounding events in Northern Ireland with a view to identifying, prosecuting and punishing perpetrators of human rights violations, in particular the right to life, and providing appropriate remedies for victims;

‘(b) Ensure, given the passage of time, the establishment and full operation of the Historical Investigations Unit as soon as possible; guarantee its independence, by statute; secure adequate and sufficient funding to enable the effective investigation of all outstanding cases; and ensure its access to all documentation and material relevant to its investigations;

‘(c) Ensure that the Legacy Investigation Branch and the Coroner’s Court in Northern Ireland are adequately resourced and are well positioned to review outstanding legacy cases effectively;

‘(d) Reconsider its position on the broad mandate of the executive to suppress the publication of inquiry reports under the Inquiries Act 2005;

‘(e) Consider launching an official inquiry into the murder of Patrick Finucane.’[410]

The November 2016 report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Grieff, on his mission to the UK focused specifically on the legacy of the Northern Ireland conflict.[411] This is the most comprehensive international report produced on the legacy of the conflict.

The 2017 Universal Periodic Review of the UK by the Human Rights Council led to the following recommendations:

‘6.156. Increase the necessary resources to the service of the Coroner to allow him to carry out impartial, swift and effective investigations on all the deaths linked to the conflict in Northern Ireland (Switzerland);

‘6.157. Continue negotiations on transitional justice issues and implement transitional justice elements of the Stormont House Agreement (Australia).[412]

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https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsg%2FOK3H8qae8NhIDi53MecJ8Es8JxwwaL1HQ8hgVMkgor%2Ba2BnDTW%2FHC6BIyM8TPJNF%2F6qe%2Bcdb0NBnXp%2BA57rBA17cvjmBwuivD2gq5FYEj

411 UN DOC A/HRC/34/62/Add.1, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland, 17 November 2016.

412 UN Doc A/HRC/WG.6/27/L.7, 8 May 2017 (Draft report of UPR Working Group on UK)

6.2 2018-2019 interventions

June 2028: Committee of Ministers: SHA and inquest funding[413]

The Committee of Ministers during its 1318th DH meeting:

- Reiterated the 'urgent need' to take forward outstanding investigations in the individual cases 'without further delay,' including in the Finucane case once domestic litigation is concluded;
- 'Recalled their serious concerns about the lack of progress in the establishment of the Historical Investigations Unit and other legacy institutions and underlined that, regardless of the complexity of the broader political picture, it is imperative that a way forward be found to enable effective investigations to be conducted, particularly in light of the length of time that has already passed since these judgments became final and the failure of previous initiatives to achieve effective, expeditious investigations as required by the judgments in this group' and welcomed publication on 11 May 2018 of the SHA consultation and draft legislation;
- Recalled in 2013 the Court indicating the UK 'must take as a matter of some priority all necessary and appropriate measures to ensure that, in cases where inquests concerning killings by the security forces in Northern Ireland are pending, the procedural requirements of Article 2 are complied with expeditiously;'
- 'Expressing concern that delays in inquest proceedings continue, noted therefore with interest the judgment of the High Court of Northern Ireland of 8 March 2018 which both underlined the obligation to ensure that the Coroners Service could effectively comply with Article 2, irrespective of whether an overall package was agreed to deal with all legacy issues, and directed a reconsideration of the question of the provision of additional funding for legacy inquests which should not be postponed until broader political agreement is resolved;'
- Noted with satisfaction the UK's indication that legacy inquest funding would be revisited and strongly encouraging the UK to properly resource without any further delay legacy inquests in accordance with the NI Lord Chief Justice's proposals.

March 2019: Committee of Ministers Concerns on SHA Delays and Proposed Amnesty[414]

The Committee of Ministers during its 1340th meeting:[415]

'As regards *individual measures*

- 'Recalled serious regret that the investigations and related litigation in the cases of McKerr, Shanaghan, Jordan, Kelly and Others and McCaughey and Others have still not been completed;

[413] Information taken from February 2019 CAJ Rule 9 submission.
[414] Taken from CAJ's July 2019 Rule 9 Submission.
[415] CM/Del/Dec(2019)1340/H46-30

- ‘Recalled the decision of 2015 to resume consideration of reopening the Finucane case once the domestic litigation had concluded and UK had provided its response.

‘As regards *general measures*

- ‘Reiterated serious concerns about the delay in the establishment of the Historical Investigations Unit and other legacy institutions under the SHA;
- ‘Noted that the public consultation on the SHA had concluded in October 2018, and the UK commitment to introduce legislation into the UK Parliament in the ‘near future’;
- ‘Strongly encouraged the UK to act on the SHA commitment, to provide a timetable for next steps, and ensure SHA legislation guarantees HIU independence in law and practice to enable effective and accessible Article 2 compliant investigations;
- ‘Noted the announcement on 14 February 2019 of the discovery of significant police documentation relevant to Police Ombudsman legacy investigations, including Shanaghan, and welcomed the announcement of an independent review of PSNI disclosure to the Ombudsman by the Criminal Justice Inspector;
- ‘Recalled the NI High Court ruling of 8 March 2018 on legacy inquest funding, and noted with satisfaction the NI Department of Justice announcement of funding for the Lord Chief Justice’s Legacy Inquest Unit proposals, and looked forward to further updates on implementation.’

On the 21 June 2019 (in relation to Finucane) and on 9 July 2019 on broader measures the UK issued Communications in response to the above decisions.[416]

September 2019: Committee of Ministers concerns on SHA delay[417]

The Committee of Ministers during its 1355th meeting:[418]

‘As regards *individual measures*

- ‘Recalled profound regret that the investigations and related litigation in the cases of McKerr, Shanaghan, Jordan, Kelly and Others and McCaughey and Others had still not been completed;
- ‘Recalled the decision (2015) to resume consideration of reopening the **Finucane** case once the domestic litigation had concluded; noted the UK Supreme Court ruling of 27 February 2019 finding an Article 2 compliant investigation had not taken place and called on the UK to submit concrete information by 1 December 2019 as to how the UK will conduct an Article 2 compliant investigation, and to consider the request for reopening consideration at the March 2020 meeting.

‘As regards *general measures*

[416] DH-DD(2019)712, 25 June 2019; DH-DD(2019)772, 9 July 2019.
[417] Taken from The January 2020 Rule 9 submission.
[418] CM/Del/Dec(2019)1340/H46-30

- '**Historical Investigations Unit (HIU)**: reiterated 'serious concerns' about the delay in the establishment of the HIU and other legacy institutions from the 2014 Stormont House Agreement (SHA) underlining it is imperative that the authorities ensure ECHR-compliant investigations can be conducted given the passage of time;
- **'HIU/ SHA legislation**: Noted the publication of a summary of responses to the [2018 SHA] consultation, and a commitment from the UK to implement the SHA, noting that this must be consistent with international legal obligations. Regretting however there was no clear timetable for implementation, and calling for the legislation to be introduced in a manner which will secure ECHR Article 2 compliance;
- **'Legacy Inquests funding**: strongly encouraged the authorities to ensure that the funding announced by the NI Department of Justice in February 2019 was rapidly released to ensure the establishment of the Legacy Inquests Unit, to ensure legacy inquests can be concluded without further delay;
- **'Legacy inquests disclosure**: sought further information on measures taken to ensure in particular the Police and Ministry of Defence comply with their legal obligations to disclose information to the coroners service;
- **'Police Ombudsman**: recalled the ongoing role of the Ombudsman pending the establishment of the HIU and encouraged 'all necessary measures' including providing resources to ensure the Ombudsman can undertake ECHR-compliant legacy investigations, and sought details on the review by the Criminal Justice Inspection into delayed police disclosure to the Ombudsman, affecting cases including Shanaghan.'

December 2019: UN Committee Against Torture

The UN Committee Against Torture recently stated that it:

> 'Remains concerned by recent statements by high-level officials that they are contemplating measures to shield former public officials from liability.'

And recommends that the UK:

> *'…*refrains from enacting amnesties or statutes of limitations for torture or ill-treatment, which the Committee has found to be inconsistent with the States parties' obligations under the Convention'. [419]

6.3 2020 interventions

March 2020: Committee of Ministers concerns on UK compliance with ECHR Art. 2[420]

Committee of Ministers during its 1369th meeting:

- Regretted the UK had not submitted concrete information sought by the CM by 1 December 2019 as to how the UK intended to conduct an Article 2 compliant investigation into Finucane in light of the findings of UK Supreme Court. The CM set a

[419] Ibid, Para 40 and Para 41(f)
[420] Taken from April 2020 Rule 9 submission.

further deadline of 31 March 2020 and deferred the planned March 2020 examination of the cases until the June 2020 meeting.[421]

September 2020: Committee of Ministers concerns on UK compliance with ECHR Article 2[422]

The Committee of Ministers during its 1377th meeting:

- In relation to reopening supervision of ***Finucane*****:** expressed 'deep concern' that no decision had been made by the UK on how it would conduct and ECHR Article 2 compliant investigation into the death of human rights lawyer Pat Finucane, in accordance with the requirements of a ruling of the UK Supreme Court in February 2019.
- In relation to ***General Measures*****:** noted that information submitted by the UK still indicated it would honour its commitment to legislate for the SHA. Yet also expressed concern at the March 2020 Written Ministerial Statement (setting out an alternative approach). Pointing to a 'lack of detail' on the approach, how it would work in practice and be compliant with ECHR Article 2, and further concern that initiating new plans would risk further delay. Sought 'full details' of this new approach to 'enable a comprehensive assessment' in time for the next examination, including the proposed legislative timetable. Strongly urging the UK to act within the 'shortest possible timeframe.'
- 'Decided to resume examination of these cases at 1390th meeting (December 2020) (DH) and, in the absence of the submission of concrete information on all of the above issues by 22 October 2020, instructed the Secretariat to prepare a draft interim resolution for consideration at that meeting.'

The UK submitted no concrete information to this end by this deadline.

December 2020: Committee of Ministers Interim Resolution[423]

The Committee issued an Interim Resolution in December 2020 that:[424]

- 'Noted the information provided very shortly before the meeting setting out the response of the United Kingdom Government to the Supreme Court judgment of 27 February 2019 related to the investigation in the *Finucane* case; instructed the Secretariat to provide an assessment of this information for the Committee's next examination, with a view to considering whether to reopen the individual measures;
- 'Recalled with profound regret that the inquests and investigations in the cases of *McKerr, Shanaghan,* and *Kelly and Others* have still not been completed, underlining the need to make progress with the required general measures on which their progress depends, without further delay;

[421] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016809cc97c
[422] Taken from CAJ July 2020 Rule 9 submission.
[423] Taken from CAJ February 2021 Rule 9 submission.
[424] CM/ResDH(2020)367 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a097b6

- ‘Noted with interest the detailed plan for the conclusion of all legacy inquests within five years which has been adversely impacted by the COVID-19 pandemic; strongly encouraged the authorities to pursue all of their efforts to put in place a recovery plan as soon as is possible so that legacy inquests can continue in a timely manner;
- ‘Noted the information submitted about protection of the OPONI’s budget; reiterating the vital role played by the OPONI in investigating historical cases and giving answers to families, strongly encouraged the authorities to continue to take all necessary measures to ensure that it has the capacity to conduct its work in an effective and timely manner;
- ‘Expressed profound concern nevertheless that the authorities have not provided any details in response to the Committee’s request for information on the approach to legacy investigations set out by the government in the Written Ministerial Statement of 18 March 2020, in particular how the current proposals would work in practice and in compliance with the obligation under Article 2 of the Convention and the proposed legislative timetable for those proposals;
- ‘Called upon the authorities to follow up on their previous commitments to publish and introduce legislation in the United Kingdom Parliament to implement the Stormont House Agreement to address legacy issues, as set out in the New Decade, New Approach publication of January 2020;
- ‘Decided to resume examination of these cases, and all relevant developments, at the 1398th meeting (March 2021) (DH) and invited the authorities to submit detailed information on all of the above issues by 25 January 2021.’

6.4 2021 interventions

March 2021: Committee of Ministers urge UK to implement the SHA[425]

The Committee of Ministers in their March 2021 meeting:

- Reiterated profound concern regarding delays in McKerr, Shanaghan and Kelly and other cases ‘due to systemic delays in inquest proceedings and [Police Ombudsman] (OPONI) investigations’;
- Decided to reopen consideration of individual measures in Finucane*;*
- Closed without prejudice to general measures, examination of McShane, Collette and Michael Hemsworth and Hugh Jordan cases;
- Noted the UK had appeared to now confirm intention to introduce legislation in light of the SHA and reiterated profound concern at the delay;
- Underlined the importance that proposed legislation would enable effective ECHR-compliant investigations into all outstanding cases and sought full details to enable a comprehensive assessment to be made;

[425] Taken from a CAJ October 2021 submission to the CM. March 2021 meeting: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22004-2202%22]}

- Noted with interest that legacy inquests were resuming, encouraging a stepping up in efforts to progress them; and invited the UK to provide concrete information regarding steps to ensure statutory bodies are complying with disclosure obligations;
- In light of the 'ongoing chronic delays' in the legacy work of the Police Ombudsman many sought information on the response to the five-year review of powers; assessment of the revised MOU on Police-Ombudsman discoloured and the bid for additional staff;
- With regard to 'called in' police investigations from Great Britain sought further details on steps to ensure independence.

The Committee stated that:

> 'it is imperative that the authorities now take all measures to expedite the finalisation of the legislation to establish the HIU [SHA Historical Investigations Unit] and make sure that, it will enable, in whatever format, in the shortest possible timeframe, effective investigations into all outstanding cases in compliance with their obligations under Article 2 of the Convention.'

September 2021: CoE Commissioner for Human Rights raises concerns

The UK government first proposed in its 2021 Command Paper to end all ECHR-compliant investigations and introduce the Legacy Bill with its sweeping amnesty and far more limited investigatory body. 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'.[426] 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.[427]

December 2021: Committee of Ministers[428]

The Committee of Ministers in their December 2021 meeting:

> 'expressed profound regret about the authorities' failure to take any concrete steps to enable effective investigations into the outstanding cases and thus noted with concern what would appear to be a change of approach from the Stormont House Agreement in the authorities' latest proposals, in particular with regard to their proposal to introduce a statute of limitations bringing an immediate end to criminal investigations and prosecutions, as well as investigations by the police and Office of the Police Ombudsman of Northern Ireland (OPONI), inquests and

[426] 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

[427] 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. This information taken from July 2022 Rule 9 Submission.

[428] Taken from CAJ February 2022 Rule 9 submission.

civil proceedings but also noted that the authorities' position is not final and that they are engaging with stakeholders;

'recalled that initiating new plans at this stage would appear to risk further delay when the need to avoid any setbacks is paramount and considering it vital that any proposals garner trust and confidence from the public, strongly encouraged the authorities to engage with all stakeholders in finalising any intended legislative proposals and to settle their position as soon as possible.'[429]

6.5 2022 interventions

September 2022: Committee of Ministers urge amendments to Legacy Bill[430]

At the time of the September meeting the Bill had cleared the lower house (Houses of Parliament) and passed to the House of Lords.[431] The CM Decision of September 2022:

- Recalled previous concerns regarding the UK departure from the (UK-Ireland) Stormont House Agreement to the present Bill, reemphasising that any legislation must be in full compliance with investigative duties under the ECHR.
- Noted serious concern about the lack of formal public consultation on the Bill; as well as concerns about ECHR compatibility; and the 'minimal support' and public confidence in the Bill. The Decision however noted the UK now had stated an openness to 'constructive engagement' with stakeholders on the Bill, and strongly reiterated calls for the UK authorities to take all necessary measures and devote sufficient time before they pursue progression and adoption of the Bill. Reference was made to meaningful and effective engagement to address concerns.
- Urged the UK authorities, if the Bill was progressed, to amend the Bill to comply with the ECHR including in the following areas:
    - ensuring that the Secretary of State for Northern Ireland's role in the establishment and oversight of the ICRIR is more clearly circumscribed in law in a manner that ensures that the ICRIR is independent and seen to be independent;
    - ensuring that the disclosure provisions unambiguously require full disclosure to be given to the ICRIR;
    - ensuring that the Bill adequately provides for the participation of victims and families, transparency and public scrutiny;
    - reconsider the conditional immunity scheme in light of concerns expressed around its compatibility with the European Convention.

The CM also urged the UK authorities to reconsider provisions of the Bill that would prevent new legacy inquests from continuing.

[429] https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a4acb2
[430] Taken from December 2022 CM submission
[431] https://bills.parliament.uk/bills/3160/stages

The CM Decision sought updated information from the UK by 24 October 2022 on 'all developments in the legislative process and the measures undertaken to work with victims, their families and all other stakeholders.'

On this date the UK authorities forward a one page holding letter.[432] This made a general reference to continued Ministerial and official engagement with stakeholders.

December 2022: Committee of Ministers continued concerns on Bill[433]

The CM Decision of December 2022:

- Recalled previous concern at the UK's fundamental change of approach from the Stormont House Agreement 2014 and expressed growing concern that the Bill had continued to be progressed without being formally paused, and that the proposed amendments would not sufficiently allay the concerns of the CM set out in the September 2022 Decision.
- Strongly reiterated calls on the UK, if it persisted with the Bill, to amend the Bill to ensure ECHR compatibility, including in several specific areas reiterated in the Decision. The CM also strongly reiterated their calls to reconsider the 'conditional immunity scheme' and the proposal to terminate pending inquests.
- Sought from the UK detailed updated information by 15 January. At the time of writing this has not been published. The UK amendments were published on the 18 January.

December 2022: Council of Europe Commissioner calls on UK to withdraw Legacy Bill

On the 9 December 2022 the Council of Europe Commissioner for Human Rights, Dunja Mijatović, released the report from her visit to the UK in June 2022.[434]

In this Report the Commissioner called upon the UK authorities to consider withdrawing the legacy Bill and urged a return to the previously agreed approach (the Stormont House Agreement).[435]

The Commissioner observed the widespread opposition to the Bill and raised concerns 'about the UK government's lack of genuine consultation with key actors ahead of the publication of the Bill' and as regards:

> '…a number of serious issues of compliance with the ECHR, including in relation to the independence and effectiveness of the mechanism for the review of Troubles-related incidents by the Independent Commission for Reconciliation and

[432] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a8b6c4
[433] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a93a84. Information taken from CAJ Rule 9 submission January 2023.
[434] https://www.coe.int/en/web/commissioner/-/united-kingdom-commissioner-warns-against-regression-on-human-rights-calls-for-concrete-steps-to-protect-children-s-rights-and-to-tackle-human-rights-issues-in-northern-ireland
[435] As above, page 8.

> Information Retrieval (ICRIR), the closure of many important existing avenues for victims to seek truth and justice, and the conditional immunity scheme.'[436]

Whilst alluding to the intention to amend the Bill, the Commissioner also noted her concerns related to 'fundamental elements of the Bill', and that 'reconsidering the Bill in its entirety' would be preferable.[437]

December 2022: UN Special Procedures mandate holders call on UK to withdraw Bill

On the 15 December 2022, UN Special Procedures Mandate holders Mr. Fabián Salvioli, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and Mr. Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions, issued a further statement calling on the UK to withdraw the legacy Bill.[438] The experts warned that the Bill:

> …fails to comply with the State's obligation to investigate serious human rights violations committed during the 'Northern Ireland Troubles' and denies truth and remedy for victims.

They held that:

> The Bill will substantially hamper victims' access to remedy before criminal and civil courts for the serious human rights violations and abuses suffered. It would further preclude information recovery and reparations for those victims who have for decades struggled to get justice and redress for the harm endured.

They assessed the Immunity Scheme as the Bill as 'tantamount to a de-facto amnesty scheme' due to the 'low threshold required for granting immunity and the lack of review mechanisms.'

The Special Rapporteurs urged the UK to withdraw the bill and warned that:

> 'If approved, the Bill would thwart victims' right to truth and justice, undermine the country's rule of law, and place the United Kingdom in flagrant contravention of its international human rights obligations.'

The statement also records regret that the UK authorities had failed to respond to a previous communication on the Bill in July 2022.[439] The UK opposition tabled a question in the UK Parliament querying why a response has not been issued.[440]

In January 2023 in response to questions in the UK Parliament from the opposition as to why there had been no response to the UN the Secretary of State for Northern Ireland stated

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[436] As above, page 8.
[437] As above, paragraph 133.
[438] *UK: Flawed Northern Ireland 'Troubles' Bill flagrantly contravenes rights obligations, say UN experts* https://www.ohchr.org/en/press-releases/2022/12/uk-flawed-northern-ireland-troubles-bill-flagrantly-contravenes-rights
[439] As above.
[440] https://questions-statements.parliament.uk/written-questions/detail/2023-01-19/127845

attributed a delay to an 'administrative error' and that a formal UK response would be 'issued shortly' along with an apology for the delay.[441]

Reportedly however in July 2023 the UK authorities had still not responded to the UN, the OHCHR confirming it had '*not received any response officially or has been otherwise contacted by the UK Government to discuss the concerns*.'[442] The UK authorities would not respond to media questions as to why no response had been sent. The UK opposition NI spokesperson Peter Kyle MP said in response: '*It is disturbing if the government has evaded the UN's questions, particularly given the global concerns about the legacy bill*.'[443]

6.6 2023 interventions

January 2023: Intervention by UN High Commissioner for Human Rights Volker Türk

On the 19 January 2023 the UN High Commissioner for Human Rights Volker Türk issued a statement calling on the UK to reconsider its approach to the legacy Bill, raising concerns that the Bill would obstruct the rights of victims to effective remedies and will be incompatible with the UK's international human rights obligations.[444]

Committee of Ministers March 2023[445]

The CM Decision in March recalled the concern previously expressed at the UK's departure from the (UK-Ireland) Stormont House Agreement of 2014.

Responding to the UK amendments the CM Decision:

> 'expressed serious concern that those amendments do not sufficiently allay the concerns about the Bill set out in the decisions adopted at the 1443rd meeting (DH) (September 2022) and 1451st meeting (DH) (December 2022) and emphasised again that it is crucial that the legislation, if progressed and ultimately adopted, is in full compliance with the European Convention and will enable effective investigations into all outstanding cases.'

Consequently, the CM:

> 'decided to resume examination of the group of cases at their 1468th meeting (June 2023) (DH) to closely follow all developments and, in the absence of tangible progress in the legislative process to sufficiently allay the concerns about the Bill's compatibility with the Convention by 3 May 2023, to instruct the

[441] https://questions-statements.parliament.uk/written-questions/detail/2023-01-19/127845

[442] https://www.irishnews.com/news/northernirelandnews/2023/07/19/news/uk_government_failed_to_respond_to_un_accusation_legacy_bill_flagrantly_contravenes_human_rights_conventions-3451553/

[443] https://www.irishnews.com/news/northernirelandnews/2023/07/19/news/uk_government_failed_to_respond_to_un_accusation_legacy_bill_flagrantly_contravenes_human_rights_conventions-3451553/

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

[445] 1459 DH decision in Mckerr group. Information taken from CAJ May 2023 Rule 9 submission.

> Secretariat to prepare a draft interim resolution for consideration at that meeting.'

The UK issued a response on the CM on the 4 May 2023. This set out that a third day of Committee stage had taken place on the 29 March, but due to the overrun of a previous debate, this did not complete and has been rescheduled for the 11th May. The UK claimed it could demonstrate 'tangible progress' with the Bill before the Report Stage and therefore suggested to defer CM consideration of an Interim Resolution until the September meeting.[446]

June 2023: Council of Europe Commissioner on amendments to Bill[447]

The Council of Europe Commissioner for Human Rights, Dunja Mijatović, issued a statement in advance of the Report Stage debate raising concerns the amendments did not address the fundamental problems with the Bill. The Commissioner recalling the serious concerns expressed by the CM, PACE, UN High Commissioner and UN Special Rapporteurs, stated:

> Despite this, the UK government has decided to go ahead with the Bill in a way that does not recognise Northern Ireland's violent past or honours the suffering of victims. While the government has recently published amendments, these leave the fundamental problems with the Bill intact, such as the conditional immunity scheme that would result in impunity for serious human rights violations, the unilateral shutting down of avenues to justice for victims, and questions about the ability of the Independent Commission for Information Recovery to deliver outcomes that would meet human rights standards.
>
> In addition, several judgments related to the legacy of the Troubles have been waiting to be executed for twenty years or more. The government's latest amendments were published the day after the Committee of Ministers concluded its most recent meeting on the supervision of execution of judgments of the Court. As a result, it could not consider the impact of these amendments for the implementation process, and with its next examination to take place in September, it may not have this opportunity again before the Bill is adopted. However, it is my view that adopting the Bill would make the prospect of meeting the requirements of the Court's case law more remote than ever.[448]

The Committee of Ministers issued Interim Resolution CM/ResDH(2023)148 June 2023

Recalling the decisions adopted at its last examinations of the cases at the 1443rd meeting (September 2022) (DH), the 1451st meeting (December 2022) (DH) and the 1459th meeting (March 2023) (DH);

Underlining that, as for all Contracting Parties, the United Kingdom has an obligation under Article 46 of the Convention to abide by judgments of the Court;

[446] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680ab245c
[447] Information recorded in CAJ July 2023 Rule 9 submission.
[448] https://www.coe.int/en/web/commissioner/-/united-kingdom-adopting-northern-ireland-legacy-bill-will-undermine-justice-for-victims-truth-seeking-and-reconciliation

Recalling the concern previously expressed as to what is a fundamental change of approach from the Stormont House Agreement, December 2014;

Recalling its serious concern that the amendments so far proposed by the government to the Northern Ireland Troubles (Legacy & Reconciliation) Bill do not sufficiently allay the concerns about the Bill set out in its most recent decisions mentioned above;

Emphasising again that it is crucial that the legislation, if progressed and ultimately adopted, is in full compliance with the European Convention and will enable effective investigations into all outstanding cases;

Recalling furthermore the concerns of the United Kingdom Parliament's Joint Committee on Human Rights set out in its legislative scrutiny report on the Bill:

> NOTED WITH SERIOUS CONCERN the absence of tangible progress to sufficiently allay the concerns about the Bill's compatibility with the European Convention, the conditional immunity scheme or the proposal to terminate pending inquests that have not reached substantive hearings by 1 May 2023; while noting also the authorities' position that delayed legislative passage has prevented such progress from being made in time for the present meeting;
>
> STRONGLY REITERATED its calls upon the authorities to sufficiently amend the Bill to allay the concerns about compatibility with the European Convention, including by addressing the following key issues:
>
> - ensuring that the Secretary of State for Northern Ireland's role in the establishment and oversight of the Independent Commission for Reconciliation and Information Recovery (ICRIR) is more clearly circumscribed in law in a manner that ensures that the ICRIR is independent and seen to be independent;
> - ensuring that the disclosure provisions unambiguously require full disclosure to be given to the ICRIR; and
> - ensuring that the Bill adequately provides for the participation of victims and families, transparency and public scrutiny;
>
> UNDERLINED AGAIN the importance for the success of any new investigative body, particularly if aimed at achieving truth and reconciliation, of gaining the confidence of victims, families of victims and potential witnesses;
>
> STRONGLY REITERATED its calls upon the authorities to reconsider the conditional immunity scheme in light of concerns expressed around its compatibility with the European Convention;
>
> FURTHER STRONGLY REITERATED its serious concern about the proposal to terminate pending inquests that have not reached substantive hearings and call on the authorities to reconsider this proposal and allow the limited number of pending legacy inquests to conclude, to avoid further delay for families.

June 2023 Irish Government response

The Irish Minister for Foreign Affairs, Tánaiste Micheál Martin, in welcoming the CM Interim Resolution drew attention, in the context of the NI peace agreements having hitherto been bilateral, to the UK continuing to take a unilateral approach to the legacy Bill:

> 'Recent celebrations of the 25th anniversary of the Good Friday Agreement have reminded us how a partnership approach between the two Governments, and the support of Northern Ireland's political parties, has always been central to the Agreement's success.
>
> 'It is a matter of regret to my government that the Legacy Bill continues its legislative progress without the support of political parties in Northern Ireland, and without support from families, victims' groups or civil society.
>
> 'I believe that, by providing for amnesties for crimes amounting to gross human rights violations, the Bill, if enacted, would undermine rather than assist reconciliation.'[449]

On the 26 Jun 2023 the Committee of the Irish Parliament which scrutinises implementation of the peace agreements issued a statement calling on the UK to withdraw the Bill. The Committee emphasised that the 'Bill is a unilateral move away from the 2014 Stormont House Agreement in which parties in Northern Ireland, together with the British and Irish governments, decided on mechanisms to better assist these families, and to pursue justice. That agreement was endorsed again by both governments, in the 2015 Fresh Start and the 2020 New Decade, New Approach deals.' Should the UK enact the Bill the Committee will request that the 'Irish Government to consider interstate litigation in the European Court of Human Rights. This course of action would demonstrate tangible support and solidarity with victims' campaigners by sparing them the costly and arduous task of bringing individual cases to challenge the Bill.'[450]

September 2023: Committee of Ministers[451]

The Committee of Ministers during their 1475th meeting:

As regards individual measures:

- 'reiterated their profound concern that over four years have passed since the Supreme Court judgment finding that there has still not been an Article 2-compliant inquiry into Mr Finucane's death in 1989 and that there is still no clear indication of how the Secretary of State proposes to proceed; exhorted the authorities again to provide their full and clear response to the Supreme Court judgment, including a decision on the measures they intend to take as soon as possible;

[449] https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2023/june/tanaiste-micheal-martin-welcomes-council-of-europe-decision-on-northern-ireland-legacy-issues.php
[450] https://www.oireachtas.ie/en/press-centre/press-releases/20230626-good-friday-committee-calls-on-the-uk-government-to-withdraw-the-northern-ireland-troubles-legacy-and-reconciliation-bill/
[451] The September 2023 CM resolution is here:
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680ac9e8e

- ‘reiterated also their profound regret that the inquests in the cases of *McKerr* and *Kelly and Others* have still not been completed, nor been listed for hearing; called upon the authorities to take all measures to expedite proceedings so that they can be concluded before 1 May 2024 when they will have to be terminated and transferred to the Independent Commission for Reconciliation and Information Recovery (ICRIR), risking further delays;
- ‘decided, without prejudice to the Committee’s evaluation of the general measures, to close the examination of the *Shanaghan* and *McCaughey and Others* cases by adopting Final Resolution CM/ResDH(2023)272.’

As regards general measures:

- ‘recalling their concerns about the Northern Ireland Troubles (Legacy & Reconciliation) Bill’s compatibility with the European Convention and their repeated calls upon the authorities to sufficiently amend the Bill, if progressed and ultimately adopted, to allay those concerns…
- ‘deeply regretted furthermore that, while the cut-off date has been extended to May 2024, the proposal to terminate pending inquests remains in the Bill; expressing profound concern that, if effective handover measures are not put in place, this may lead to further delay and distress for individuals, including some of the individual applicants in this group of cases, urged the authorities to consider taking additional practical measures to ensure that as many inquests as possible can conclude before 1 May 2024 and that all of the preparatory work done on these pending cases is not lost in any transfer to the ICRIR;
- ‘underlining again the importance for the success of any new investigative body, particularly if aimed at achieving truth and reconciliation, of gaining the confidence of victims, families of victims and potential witnesses, acknowledged the steps taken by the authorities in an attempt to engage with victims and stakeholders over the past twelve months; noted with deep regret nevertheless that despite those efforts, support for the ICRIR remains minimal; strongly encouraged the authorities to take all necessary additional measures to garner public trust and the confidence of victims, their families and all stakeholders;
- ‘reiterated their serious concern about the proposed conditional immunity scheme which risks breaching obligations under Article 2 of the European Convention to prosecute and punish serious grave breaches of human rights, and seriously undermining the ICRIR’s capacity to carry out effective investigations within the meaning of Article 2 of the Convention; deeply regretted therefore the authorities’ decision not to support the House of Lords’ amendment to remove the scheme from the Bill and its subsequent rejection; strongly urged the authorities to consider repealing the immunity provisions.’

7. The ICRIR and ECHR Obligations

Summary:

- *The UK has successfully argued in domestic litigation that it has no ECHR obligations under the Human Rights Act 1998 for cases relating to 10 years before its commencement in October 2000, (hence October 1990). This argument seeks to place legacy cases pre-1990 outside the reach of ECHR obligations to conduct independent, effective investigations.*

7.1 The ICRIR and procedural duties of Articles 2 & 3 ECHR[452]

The Committee of Ministers asked several questions as to how it will be 'ensured that the reviews undertaken by the ICRIR are adequate and effective investigations.' The NI Human Rights Commission has raised concerns 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.[453]

In a 2022 submission to the Committee of Ministers, the UK argued the ICRIR will be capable of conducting effective investigations compliant with ECHR Article 2 & 3.[454]

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.[455] Clearly the ECHR obligation requires complying with all the law rather than 'most' of it.

The UK then added on the possibility of the ICRIR exercising police powers to be able to argue that the ICRIR is 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.[456]

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

[452] This information taken from a CAJ Rule 9 submission to the CM in July 2022.
[453] https://committees.parliament.uk/writtenevidence/109473/html/ paragraph 2.1.
[454] 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]}
[455] 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
[456] See ECHR Memorandum, paragraphs 16-21.

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.[457]

As alluded to earlier Government amendments placed a duty on the ICRIR Commissioner for Investigations to "comply with the obligations imposed by the Human Rights Act 1998" [458]

The reference to the HRA should be viewed in the context that Government has argued obligations under the HRA do not arise as a matter of domestic law in most Troubles-related cases having argued for temporal restrictions on the scope of the HRA on pre-1990 cases (ten years before the commencement of the HRA). It should also be noted that compliance with the HRA would already be an obligation of the ICRIR, unless compelled to act in conflict with ECHR rights by primary legislation (as would be the case with the current Bill).[459]

In tabling the amendment government argued that the ICRIR would have to comply with obligations under the HRA whilst simultaneously holding the position that there are no such obligations in most Troubles-related cases.

A further amendment tabled by Lord Peter Hain would require that ICRIR investigations are carried out to criminal justice standards and are compliant with the investigative duties under the ECHR.[460] The Minister Lord Jonathan Caine in response made clear the UK government would be rejecting this amendment and others.[461]

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[457] 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/

[458] Clause 13 LORD CAINE Page 11, line 1, at end insert— "(A1) The Commissioner for Investigations must comply with the obligations imposed by the Human Rights Act 1998 when exercising functions under this section." *Member's explanatory statement: This amendment expressly confirms that the Commissioner for Investigations (when exercising operational control over the conduct of reviews) must comply with obligations imposed by the Human Rights Act 1998.*
Page 11, line 18, at end insert— "(4A) In particular, the Commissioner for Investigations is to decide whether a criminal investigation is to form part of a review." *Member's explanatory statement*
This makes clear that the Commissioner for Investigations should consider whether there should be a criminal investigation as part of an ICRIR review.
Page 11, line 48, at end insert—"(7A) Subsection (A1) does not limit the duty of the Commissioner for Investigations to comply with the obligations imposed by the Human Rights Act 1998 when exercising other functions." *Member's explanatory statement This makes clear that the duty of the Commissioner for Investigations to comply with the Human Rights Act 1998 is not limited by the express provision in the new subsection (A1).*

[459] By virtue of section 6 of the HRA which requires public authorities to act compatibility with the ECHR, save when required to act differently by primary legislation.

[460] HL Hansard Volume 827: 24 January 2023 Column 155-6 Amendment 72

[461] HL Hansard Volume 827: 24 January 2023 Column 168-9. This information taken from Feb 2023 CAJ Rule 9 Addendum.

7.2 Temporary nature of the ICRIR[462]

The Committee of Ministers has asked: '*How will effective investigations into Troubles related deaths be ensured after the five year limitation period on the making of requests for reviews and the winding up of the ICRIR, including for example if new evidence comes to light?'*

Once the ICRIR closes, the ban on police and other bodies investigating conflict-related cases will remain. The Act closes 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. The Bill provided that no requests for an 'ICRIR' review can be made after five years of its operations.[463] This was not amended.

As further detailed in the section on independence, the ICRIR is 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 is 'satisfied' that the 'need' for the ICRIR has ceased.[464]

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.

7.3 ICRIR and Independence[465]

A fundamental principle of the obligations upon states to investigate deaths or serious injuries (Articles 2 and 3 of the ECHR respectively) is that such investigations must be independent from government. CAJ's 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.

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.

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

[462] This information taken from the CAJ Rule 9 submission to the CM of July 2022.
[463] Clauses (9)8 and 10(3) (as introduced HC)
[464] Clause 32(1) of the Bill as introduced.
[465] The following is taken from the CAJ Rule 9 of July 2022.

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.

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.

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.[466]

The Independent Commission for Information Retrieval 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.[467]

In stark contrast the Act belies 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 Act stipulates that the appointment of Chief Commissioner, and all other Commissioners, of the 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 information that could heavily shape the case load of the ICRIR despite clear conflicts of interest. 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

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

Bill suggests a mindset that is oblivious to the need to command public confidence in Northern Ireland on such a sensitive matter.

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. The SOSNI will also directly control the resources provided to the ICRIR. The SOSNI will also assume the role of 'oversight' with a duty to 'review' within three years the work of the ICRIR. This duty is followed 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.

In relation to composition the Act directly mandates 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.

Article 2/3 compliant investigations must include the potential for state-initiation of investigations. Whilst there is some provision for this 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.

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.

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.

While the UK Government 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.

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.

Amendments to the Legacy Bill relating to independence of ICRIR[468]

As alluded to above, UK government rejected an amendment to ensure the independent NI Commission for Judicial Appointments themselves appoint the head of the ICRIR.

In the second day Committee Stage session opposition legislator Lord Des Browe tabled an amendment to address the lack of independence in the appointments to the ICRIR, a concern raised in the CM Decision. Lord Browne's amendments would have change the appointing authority for all ICRIR Commissioners so that the appointments were not made by Ministers (the Secretary of State) and would be instead made by the Northern Ireland Judicial Appointments Commission.[469] This Commission is an independent public body established because of the NI Criminal Justice Review that flowed from the Good Friday Agreement. The Commission makes independent appointments to judicial posts in Northern Ireland.[470] Despite the Bill providing for the ICRIR Chief Commissioner to be a person who holds, or has held, high judicial office the Minister Lord Jonathan Caine in response made clear the UK government would be rejecting these amendments.[471]

7.5 Appointment of Chief Commissioner of ICRIR[472]

The UK issued a response to the Committee of Ministers (CM) on the 4 May 2023.[473] This made no reference to the appointment of a Chief Commissioner of the ICRIR being at an advanced stage, this was not also publicly known.

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 ICRIR had already been recruited, despite the Bill not completing passage yet. The Minister announced former NI Lord Chief Justice Sir Declan Morgan would be the Chief Commissioner of the ICRIR, 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.[474]

[468] The following information taken from CAJ's Rule 9 Addendum of February 23.
[469] HL Hansard Volume 827: 31 January 2023 Column 572 Amendment 12
[470] https://www.nijac.gov.uk/about-nijac
[471] HL Hansard Volume 827: 31 January 2023 Column 584
[472] The following information taken from CAJ's Rule 9 addendum of May 2023 and CAJ's July 2023 Rule 9.
[473] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680ab245c
[474] Hansard House of Commons 11 May 2023, vol 829 column 1968

There was a concurrent Written Ministerial Statement[475] 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.[476]

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 ICRIR is more clearly circumscribed in law in a manner that ensures that the ICRIR is independent and seen to be independent.'[477] In this instance the establishment of the ICRIR and recruitment of Chief Commissioner were not circumscribed in law as the Bill had not completed passage.

The Bill provided that the ICRIR 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 because 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.'[478] The documents and statements on the appointment made no reference to NIJAC. Government also rejected an opposition amendment to the Bill that would have vested the role of appointing the ICRIR Chief Commissioner in NIJAC as the appropriate body to make such an appointment.[479]

Public appointments by UK Ministers are regulated by the Commissioner for Public Appointments. The Commissioner has several functions set out in the Public Appointments Order in Council 2019.[480] 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.'[481]

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.[482] The 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

[475] HCWS767 WMS Secretary of State for NI, ICRIR Implementation, Hansard Vol 732: 11 May 2023
[476] Deposited paper DEP2023-0341 - Deposited papers - UK Parliament
[477] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a93a84
[478] https://www.nijac.gov.uk/
[479] Amendments 12 & 16 introduction by Lord Browne; Response from Minister.
[480] https://publicappointmentscommissioner.independent.gov.uk/regulating-appointments/orders-in-council/
[481] https://publicappointmentscommissioner.independent.gov.uk/
[482] https://publicappointmentscommissioner.independent.gov.uk/wp-content/uploads/2020/03/NIO.pdf and List of Business 6th November 2019 (independent.gov.uk)

ICRIR commissioners.[483] Whilst we do not see this comparator as valid (the NIHRC is not set up to conducted Article 2 compliant investigations) this comparator has been argued by UK Minsters 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.

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.[484]

Notwithstanding this, it is notable that the existing recruitment process of the Chief Commissioner of the ICRIR bypassed this regulatory process.

Subsequent questions in the UK Parliament confirmed that the process for recruitment had not been regulated by the UK Commissioner for Public Appointments whose remit did not extend to the role[485] and that the Northern Ireland Judicial Appointments Commission (NIJAC – an independent body set up as an outworking of the Good Friday Agreement to ensure independence in judicial appointments) had also had no role in the appointment.[486]

There is limited detail available regarding the actual process followed. As it was not conducted publicly, it is unclear when the process 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 fulfil the role of Chief Commissioner of the ICRIR, so that the Secretary of State can consider them for appointment.[487]

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, unless only one person was recommended.

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 ICRIR 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

[483] Hansard House of Lords 31 January 2023 vol 827 clm 583

[484] 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

[485] https://questions-statements.parliament.uk/written-questions/detail/2023-06-02/187237

[486] https://questions-statements.parliament.uk/written-questions/detail/2023-06-02/187238

[487] NIO_Lord_Caine_ICRIR_Appointments_Processes_18_April_2023.docx (live.com)

> 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.[488]

The Bill 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.[489] However, this appeared to also have been bypassed as the recruitment already occurred.

At a time when the Bill was completing passage the Permanent Secretary of the NIO (the Department's most senior official who took up post in January 2020) would 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.[490]

A number of parliamentary questions have also highlighted that the ICRIR is currently staffed by government officials. By the 25 July Ministers stated ICRIR had 25 staff, 46% of whom had come from the Northern Ireland Office (NIO), 42% from other UK Central Government Departments and 12% from other public sector bodies.[491] The recruitment process for ICRIR Commissioner for Investigations was restricted to British citizens.

Subsequent to the rule 9 ICRIR recruited a former senior RUC/PSNI officer, who presided over special branch, as its Commissioner of Investigations. Such an appointment is surely in conflict with requirements of investigators to be and be seen to be independent from all those who may be under investigation. It all but ensures few families representing victims of the state would have the confidence to come forward to the ICRIR.

Launch of ICRIR online before Bill's passage[492]

Online presence of the ICRIR was also established with the entity already having a dedicated website before the Bill's passage.[493] The ICRIR even launched its own 'have your say' survey about the functioning of the ICRIR.[494] This been criticised by victims and NGOs. This is in the context of the lack of any meaningful engagement on the current Bill before it was finalised. There had previously been public consultation on the Stormont House Agreement. Over 17,000 written responses were received, and they indicated broad public support for the approach and

[488] https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2023)87E%22]}
[489] https://bills.parliament.uk/bills/3160/stages/17158/amendments/94304
[490] 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.
[491] See: https://questions-statements.parliament.uk/written-questions/detail/2023-07-17/194619 and previously https://questions-statements.parliament.uk/written-questions/detail/2023-07-03/192126 and https://questions-statements.parliament.uk/written-questions/detail/2023-06-02/187401
[492] The following information taken from CAJ's July 2023 Rule 9.
[493] https://icrir.independent-inquiry.uk/
[494] https://icrir.independent-inquiry.uk/have-your-say-in-our-survey/

opposition to an amnesty.[495] By contrast the Bill was initially developed unilaterally by the UK behind closed doors. Stakeholders were then asked for their 'views' at a juncture when the Bill was complete. Speaking to the BBC Paul Gallagher a member of the Victims Forum and representative of WAVE Trauma Centre said 'For me, it's a bizarre circumstance now we're being asked to fill in a survey to sort of rubber-stamp this fait accompli… I think it's actually a cruel thing to ask people to do.'[496]

The UK authorities have mobilised considerable resources to seek buy-in to the Bill and its products in advance of passage. This includes the announcement of £5 million for the memorialisation elements of the Bill. This will involve the organisations designated by the Secretary of State developing a strategy to identify and fund new memorialisation structures and initiatives.[497]

Despite contending such structures would be 'inclusive' the Secretary of State chose to make the memorialisation announcement in the UK Imperial War Museum (IWM) in London. The sensitivity of using such a location was heightened in the context that a BBC Panorama investigative documentary had previously revealed that this museum had had on display an assault rifle used in a 1992 massacre of civilians and other Loyalist killings in south Belfast. This occurred whilst there was ongoing Police Ombudsman investigation into police collusion with the loyalist group responsible. The Ombudsman investigation records 'discussions' between the then police force and Imperial War Museum regarding the weapon had occurred 'within weeks' of the massacre, with the rifle ultimately 'donated' to the museum in 1995. A pistol used in the massacre was also given to the museum by the military. The Police Ombudsman report states that 'These decisions, which led to the VZ58 rifle being placed on public display at the IWM, have understandably caused considerable distress to victims and survivors and suspicion as to the manner in which this weapon was disposed of by police.'[498]

7.6 ICRIR effectiveness review versus investigation[499]

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**.**

[495] 'The clear majority of all respondents to the consultation argued that a statute of limitations or amnesty would not be appropriate for Troubles related matters' NIO (2019) Addressing the Legacy of Northern Ireland's Past: Analysis of the Consultation (p.21).
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836991/Addressing_the_Legacy_of_the_Past_-_Analysis_of_the_consultation_responses__2_.pdf
[496] https://www.bbc.co.uk/news/uk-northern-ireland-66310756 see also view of CAJ in https://www.irishtimes.com/ireland/2023/07/26/new-ni-legacy-body-offers-real-opportunity-to-deliver-answers-people-are-seeking/
[497] https://www.gov.uk/government/news/secretary-of-state-announces-5m-legacy-memorialisation-fund-and-digitisation-project
[498] See https://www.bbc.co.uk/news/uk-northern-ireland-33140144 and Ombudsman report: https://www.policeombudsman.org/Media-Releases/2022/Investigative-and-intelligence-failures-and-collus (paragraph 6.6 and 18.104)
[499] The following information taken from CAJ Rule 9 of July 2022.

The Bill did 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, however, statements from Ministers and the structure of the provisions for the ICRIR are indicative of there not being an intention for police powers to be used, particularly against State actors.

The functions set out in the bill for the ICRIR expressly restrict its remit to conducting 'reviews' rather than 'investigations.'[500]

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.

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 contributed to the assessment by the Inspector of Constabulary that the HET had not been operating lawfully in line with Article 2 ECHR obligations.[501]

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.

There is no such formulation for the ICRIR and refers only to 'reviews' of the ICRIR. [502] 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.[503] 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.[504] 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.

As referenced above 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. The Secretary of State for Northern Ireland in introducing the Bill has also given military

[500] Clause 2(4) of the Bill (as introduced HC)
[501] For a narrative on this see "THE APPARATUSOF IMPUNITY? Human rights violations and the Northern Ireland conflict' CAJ, January 2015. HET chapter.
[502] See clauses 13 and 2(4) of the Bill (as introduced HC).
[503] Clause 13(3)
[504] Clause 13(5)

veterans assurances that imply police powers such as arrest and questioning will not be used against them by the ICRIR. [505]

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.

Due to 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 stripped out all these safeguards from the Bill and does not apply them to the ICRIR.

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 had been a key provision for investigations by the Police Ombudsman.

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.[506] This provides a further indication there is no real intention of ensuring the ICRIR conducts 'investigations' rather than light touch reviews.

In the absence of the ICRIR conducting effective investigations it is difficult to envisage how any prosecutions can proceed. The ability of the Director of Public Prosecution to pursue prosecutions becomes largely theoretical. Such a scenario would amount to a de facto general amnesty but without having to face the political and opprobrium which greeted the Command Paper in 2021.

It is also not clear what safeguards individuals will have against 'fishing' expeditions where persons are summonsed to testify before the ICRIR without individual reasonable suspicion, or similar safeguards that are provided for in criminal justice processes.

One express mechanism to preclude attendance is vested in a procedure for representations from security and policing bodies or Ministers that an individual may not attend on grounds it would be contrary to the UK's national security interests and that an alternative should be fielded.[507] 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 based on fears the individual will make disclosures regarding human rights

[505] "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/

[506] 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

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

violations the security services or police object to their giving testimony and seek to field an alternate.

Amendments relating to effective investigations[508]

A series of amendments were tabled by Baroness Nuala O'Loan, a former NI Police Ombudsman, to probe the investigative function of the proposed independent Commission for Reconciliation and Information Recovery (ICRIR).[509]

The amendments citing *inter alia*, the concerns of the Committee of Ministers, would change the term 'review' in the legislation to the term 'investigation', to ensure the function of the ICRIR was to carry out investigations and not 'reviews.' A further amendment would require ICRIR 'investigations' when a person is seeking immunity. [510]

The Minister Lord Jonathan Caine in response made clear the UK government would be rejecting all these amendments.[511]

Impact of Immunities Scheme[512]

Ministers claimed that ICRIR 'reviews' can constitute Article 2 ECHR compliant investigations due to the ICRIR being able to exercise police powers.[513] The Minister evaded questions during the passage of the bill as to whether such powers could be used against a person who holds *immunity* for an offence.[514]

Ministers have even described the immunities scheme as the 'principal aim' of the legislation.[515] Government amendments at Report Stage exacerbated this problem by incentivising applications to the immunities scheme hence placing more suspects beyond the reach of effective investigations.

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[508] This information taken from CAJ's Rule 9 Addendum of February 2023

[509] HL Hansard Volume 827: 24 January 2023 Column 152-3

[510] HL Hansard Volume 827: 24 January 2023 Column 152-3

[511] HL Hansard Volume 827: 24 January 2023 Column 168-9

[512] Information taken from CAJ Rule 9 of July 2023.

[513] See for example paragraph 30 of the ECHR Memorandum on the Bill.

[514] CAJ's Rule 9 addendum of May 2023 also records how ministers evaded a question on how the ICRIR would be restricted in its use of police powers: "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?[514]' The Minister gave no answer to these questions in his response." Hansard House of Lords 11 May 2023 vol 829 clm 1964; Hansard House of Lords 11 May 2023 vol 829 clm 1971.

[515] https://hansard.parliament.uk/lords/2023-09-12/debates/47CED643-8AA0-4090-B8AC-F76E6BB13222/NorthernIrelandTroubles(LegacyAndReconciliation)Bill

7.9 Limitations of disclosure powers and 'National Security +' veto[516]

There is a long history of state agencies delaying and obstructing disclosure to the existing package of measures mechanisms.

The Bill provides that a 'relevant authority' must make available to the ICIRIR documents that the ICRIR "may reasonably require for the purposes of, or in connection with, the exercise of the review function or the immunity function."[517]

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.

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.[518]

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."[519]

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.

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 must be taken in the context of Police Ombudsman reports in particular having revealed patterns and practices of

[516] Information taken from CAJ Rule 9 of July 2022.
[517] Bill (as introduced HC) clause 5.
[518] 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."
[519] 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/

human rights violations relating to collusive actions between the police and informants engaged in serious crime.

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

Police Ombudsman reports have been heavily reliable on intelligence-based information – it would be no exaggeration to state that several 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.

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.

Whilst the relevant provision of the ICRIR legislation 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.

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 above 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.

7.10 ICRIR caseload

The ICRIR Chief and other Commissioners have no control over the ICRIR caseload even if cases requiring ECHR-compliant investigations come to their attention.

Substantive powers to shape the broad caseload of the ICRIR are vested in the Secretary of State. Whilst Article 2/3 compliant investigations require the potential for state-initiation this could be vested in an independent office holder rather than Ministers.

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. In contrast, such cases would have automatically become part of the Historical Investigations Unit envisaged in the SHA and the relevant draft enabling legislation.

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 a power qualified by a veto on national security grounds by the UK Advocate General.

Victims who were *seriously* injured in Troubles-related incidents can 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 caseload of the ICRIR. Given the openly articulated desire of Ministers for legacy mechanisms to focus less on state involvement cases it is foreseeable Ministers will shape the caseload to this end regardless of cases identified as requiring ECHR-compatible investigations.

There is no power for the ICRIR Commissioners to change this.

If you have any comments or questions about this report, please contact CAJ on info@caj.org.uk.

Accessible versions are available upon request.

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