CAJ
Committee on the Administration of Justice

Promoting Justice / Protecting Rights

What could substantive 'root and branch' reform of the ICRIR look like? and would it be enough?

A CAJ analysis of the extent to which reform of the Independent Commission for Reconciliation and Information Recovery (ICRIR) established by the Conservative's Legacy Act is viable.

> "I believe that both the British and Irish Governments agree that substantive reform [of the ICRIR], focused on ensuring compliance with the ECHR and genuinely regaining public trust, is necessary.
>
> The genesis of the Commission means that, understandably, many victims, survivors and families have deep reservations. Addressing such reservations will mean tackling fundamental questions in relation to the independence of the ICRIR, and its ability to carry out robust and thorough investigations. That will require significant effort – and, I believe, root and branch reform."
>
> Tánaiste Micheál Martin, British Irish Association Conference, September 2024.

November 2024

Abstract

The new UK Labour Government came to power with a manifesto commitment to repeal and replace the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ('the Legacy Act') introduced by the previous Conservative Government. Labour have however since announced an intention to retain the Independent Commission for Reconciliation and Information Recovery (ICRIR), the commission the Legacy Act set up.

Having existed in shadow form for over a year, the ICRIR formally opened its doors to take on legacy cases on the 1 May 2024. This was the same day the Legacy Act closed down hundreds of investigations sought by families under the terms of the 'Package of Measures' (inquests; legacy PSNI/Police Ombudsman investigations etc) and prohibited any further investigations by these mechanisms.

In the context of a Labour commitment to repeal the Legacy Act Conservative Ministers, in pursuit of an at times openly articulated agenda of closing down investigations into state actors, rushed to establish the ICRIR and make it operational on 1 May 2024 before the UK General election. The ICRIR Chief Commissioner was recruited before the Legacy Bill completed passage and, in a context of a long history of withholding resources from other legacy mechanisms, Conservative Ministers moved to commit £250 million to the ICRIR.

When the Legacy Act completed its legislative passage, the Council of Europe Committee of Ministers noted that support for the ICRIR remained 'minimal'. This remains the case. In contrast to the popularity of the predecessor mechanisms, six months into its formal mandate the ICRIR only has a reported caseload of five investigations. Significant concerns have been raised by competent mechanisms in the United Nations (UN) and Council of Europe; the Northern Ireland Human Rights Commission and NGOs regarding the ability of the ICRIR to conduct European Convention on Human Rights (ECHR) compliant investigations, with particular concerns regarding its independence. The question of the practical operational independence of the ICRIR has been largely parked in the domestic legal challenges as an individual case has yet to come before the courts. Despite this, the Court of Appeal recently ruled that the ICRIR legislative and policy framework is not ECHR compliant in key areas. The ICRIR also seems designed to largely focus on light-touch reviews instead of robust and thorough ECHR and international law compliant investigations.

The Labour Government have predicated the continued existence of the ICRIR upon it winning the confidence of victims and survivors' families and have committed to reforms with specific reference to its independence. The Irish Government, who retain an inter-State case challenge against the Legacy Act at the European Court of Human Rights, including on the question of ICRIR independence, have called for substantive 'root and branch' reform of the ICRIR to make it ECHR compliant and regain public trust.

This paper examines what substantive root and branch reform of the ICRIR might look like and whether it would be sufficient to gain public confidence and ensure compatibility with the ECHR and other international human rights standards, including duties to combat impunity.

This paper was informed and shaped following a workshop discussion with representatives of CAJ, the Pat Finucane Centre, Amnesty NI, Relatives for Justice and Rights and Security International. Thanks, are also extended to the following CAJ Board Members for their input: Prof. Louise Mallinder; Prof. Anna Bryson; Prof. Kieran McEvoy; Prof. Fionnuala Ní Aoláin and Anurag Deb.

Key Acronyms

CAJ	Committee on the Administration of Justice
DFA	Department of Foreign Affairs (Irish Government Department).
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FoI	Freedom of Information
GFA	Good Friday Agreement 1998
HET	Historical Enquiries Team (of the PSNI)
HIU	Historical Investigations Unit (legacy body to have been established under the Stormont House Agreement).
ICIR	Independent Commission on Information Retrieval (cross-border body to have been established under Stormont House Agreement).
ICRIR	Independent Commission for Reconciliation and Information Recovery (legacy body established by the Legacy Act 2023).
IRB	Information Recovery Body (previous name for ICRIR in 2021 UK Command Paper)
LIB	Legacy Investigations Branch (of the PSNI)
MoD	Ministry of Defence (UK Government Department)
NDNA	'Neither Confirm Nor Deny'
NIHRC	Northern Ireland Human Rights Commission
NGO	Non Governmental Organisation
NIO	Northern Ireland Office (UK Government Department)
PFC	Pat Finucane Centre
PSNI	Police Service of Northern Ireland (post GFA)
RUC	Royal Ulster Constabulary (former NI police force).
SOSNI	Secretary of State for Northern Ireland
WMS	Written Ministerial Statement

CONTENTS

3. What would 'substantive root and branch' reform of the ICRIR look like?

Appendix:

Comparator Table: the Stormont House HIU and ICRIR – independent and effective investigations

Executive Summary

Key Findings and Recommendations

- **Only a substantive and meaningful 'root and branch' reform process to produce an entirely distinct institution to the ICRIR, with a different name, legal framework and leadership unrecognisable to what is presently in place could render a reformed legacy institution viable, in the context of both human rights compliance and building sufficient confidence.**
- The necessary changes to the ICRIR are already largely developed in the official and unofficial draft legislation for the Stormont House Agreement Historical Investigations Unit (HIU), as well as lessons which could be learned from Operation Kenova. There should be significant compositional change of those running the ICRIR in which we recommend a process of internationalisation to build impartiality, confidence and to draw on numerous persons with international experience working in transitional justice.
- There should be comprehensive reforms of the legal framework of a new legacy body to guarantee ECHR-compliant investigations in cases meeting the threshold for reinvestigation and maximum disclosure in Family Reports.
- Areas of legislative reform would include: independent appointments; unqualified and robust powers to receive disclosure; removal of the 'national security veto'; guarantees of ECHR compatible investigations once the investigative threshold is met; caseload provisions to ensure outstanding cases requiring ECHR-compatible investigations are investigated; codified duties to ensure maximum permissible disclosure in reports to families; financial autonomy; independence requirements for investigators and oversight structures.
- As immediate measures, the UK Labour Government should now honour pledges to reopen civil proceedings and inquests, by urgently repealing the bans in the Legacy Act through the speediest legislative vehicle available, including the use of Remedial Orders under the Human Rights Act in light of the Court of Appeal ruling.
- It is inescapable that there is already a bilateral UK-Ireland agreement in the 2014 Stormont House Agreement, that provides for the HIU, the continuation of inquests, the continuation of civil proceedings as well as a separate cross-border information-recovery body – the ICIR, on which the two Governments concluded an agreed treaty. We recommend a 'Stormont House Agreement+' approach, with the HIU also empowered to investigate conflict-related cases engaging Article 3 ECHR (covering torture and serious injuries by state or non state actors) and a counterpart HIU established by the Irish government.

Background: The ICRIR and Legacy Act

The Independent Commission for Reconciliation and Information Recovery (ICRIR) is the new legacy body established by the former Conservative' Government's Legacy Act.

This legislation simultaneously shut down many hundreds of legacy investigations undertaken by the existing 'Package of Measures' to make way for the ICRIR opening its

doors on the 1 May 2024. This included curtailing 38 legacy inquests, 335 Police Ombudsman investigations, many hundreds of civil court cases, hundreds of prospective PSNI legacy investigations, along with independent police legacy investigations. These mechanisms were closed at a time they were increasingly popular and delivering for families whilst also identifying specific patterns of human rights violations.

The analysis in this paper demonstrates that the previous Conservative Government's agenda behind the ICRIR was grounded in seeking to shut down proper investigations and seek to replace them with light touch 'reviews.' There was also a specific agenda to introduce a mechanism, referred to as 'the national security veto', which would enable the concealment of the involvement of state agents in human rights violations from families and the public. No such power existed over the above legacy mechanisms.

The motivation behind the Legacy Act was to curtail the stream of findings emerging from legacy investigations through the existing 'Package of Measures' and prevent many more such investigations through the new legacy institutions agreed under the Stormont House Agreement. The Conservative Government's concern was that the findings from these rule of law mechanisms were creating a 'counter narrative' of the conflict, which conflicted with official truths. Whilst the motivation may have been to shut down proper investigations into state-involvement cases, the impact is felt across all categories of cases. The previous Government therefore wished to abandon the Package of Measures and proposed SHA mechanisms to instead set up the ICRIR. It follows that the intention was not to produce a new mechanism in the ICRIR which would conduct the same type of investigations the previous Government had ensured would no longer occur.

The rush to set up the ICRIR and its 'minimal support'

In this context, and in light of Labour's commitment to repeal the Legacy Act, Conservative Ministers rushed to set up the ICRIR before there was a UK General Election. The previous Government appointed all the ICRIR Commissioners to run the body and against long history of withholding resources from other legacy mechanisms committed £250 million to the ICRIR. All of this has made it significantly more costly and complex for an incoming Government to remove the institution.

The Council of Europe's September 2023 assessment that there was 'minimal' support for the ICRIR, continues to hold, with few families approaching the ICRIR despite the resources put into its promotion and presently having no other alternative. By contrast to the hundreds of investigations being delivered by the Package of Measures, the most recent figures from the ICRIR stated that, after six months, it only has a case load of five investigations (on the basis of 14 individual requests, several of which relate to the same incident). Whilst the low case numbers on most counts would be indicative of a failure of a legacy body, is by contrast a significant victory for the agenda of the previous Government to curtail legacy investigations. The eagerness to now retain the ICRIR from key figures in or supporters of the previous Conservative Government's approach is itself evidence they consider it to be delivering on their agenda.

The new British and Irish government positions on reform

The Labour Government came to power in July 2024 with a manifesto commitment to 'repeal and replace' the Legacy Act and return to working bilaterally with the Irish Government. Specific commitments were also made to reopen civil proceedings and

inquests. Labour have however since taken an apparent unilateral decision to retain the ICRIR but have committed to reform the body.

The Irish Government, who retain an inter-State case challenge against the Legacy Act at the European Court of Human Rights, including on the question of ICRIR independence, have called for substantive 'root and branch' reform of the ICRIR to make it ECHR compliant. The Tánaiste has stated 'that both the British and Irish Governments agree that substantive reform' of the ICRIR is needed 'focused on ensuring compliance with the ECHR and genuinely regaining public trust.' The NI Court of Appeal has found significant elements the ICRIR's legislative framework are not ECHR compatible, including that the ICRIR cannot emulate inquests and that the 'national security veto' is not ECHR compatible in that context. The UN Human Rights Committee has expressed concern regarding the weakness of the ICRIR 'review' function and has called on the UK to instead '*adopt proper mechanisms with guarantees of independence, transparency, and genuine investigation power that discharge the State party's human rights obligations and deliver truth, justice and effective remedies, including reparations to victims of the Northern Ireland conflict.*'

Main and Overarching Findings – Substantive Root and Branch Reform

- **Only a substantive and meaningful 'root and branch' reform process to produce an entirely distinct institution to the ICRIR, with a different name, legal framework and leadership unrecognisable to what is presently in place could render reformed legacy institution viable, in the context of both human rights compliance and building sufficient confidence.**
- The model for doing so is already there in the draft legislation for the Stormont House Historical Investigations Unit (HIU) with learning from Operational Kenova**.**
- There should be significant compositional change of those running the ICRIR and comprehensive reforms the legal framework of a reformed legacy body to guarantee ECHR-compliant investigations and maximum disclosure to families in cases meeting the threshold for reinvestigation.
- As immediate measures the UK Government should honour pledges to reopen civil proceedings and inquests, by urgently repealing the bans in the Legacy Act through the speediest legislative vehicle available, including the use of Remedial Orders under the Human Rights Act given the Court of Appeal ruling. Such legislation could also remove the disapplied immunities scheme and the 'national security' veto.
- Legislative reform to 'fix' the ICRIR on paper is clearly going to be insufficient given a major problem the institution faces is an understandable lack of confidence and trust due to the circumstances and purpose for which the ICRIR has been created. In our view this trust deficit has also been exacerbated by certain actions of the ICRIR since its establishment, examples of which are included in this report.
- It is inescapable that there is already a bilateral UK-Ireland agreement in the 2014 Stormont House Agreement, that provides for the HIU, the continuation of Inquests, the continuation of civil proceedings as well as a separate cross-border information-recovery body–the ICIR, on which the two Governments concluded an implementation treaty. We recommend a Stormont House Agreement + approach,

with the HIU also empowered to investigate conflict-related cases engaging Article 3 ECHR.

- Only a managed change process producing something unrecognisable to what is presently in place is likely to be viable. We do not consider this a difficult task as such a framework for independent robust legacy institutions has already been subject to intense discussion and political scrutiny over many years.
- We consider it would be a mistake to limit reforms to the 'minimal' and elements of the Legacy Act that are so egregious that they have already been held to meet the threshold of being unlawful under the ECHR. Rather reforms should take on and address the much broader legitimate concerns expressed by the UN, Council of Europe, the Irish Government, the Northern Ireland Human Rights Commission, human rights groups, victims and survivors, parliamentarians and others. Otherwise, there is little chance of gaining public confidence in a new institution and it being able to function effectively.

Composition of the ICRIR

- **We recommend a process of internationalisation of a reformed legacy body to build impartiality, confidence and draw on the numerous persons with international experience in transitional justice.**
- **Commissioners running a reformed legacy body should all be re-recruited following an independent and international process, along with refreshing senior staff, to build confidence in the institution and augment its skills set and independence.**
- **The reformed legacy body should follow the independence requirements for investigators adopted by Operation Kenova and Police Ombudsman legacy cases**.

The ICRIR Commissioners were appointed by the previous Conservative Government, at a time where there was a particular impunity agenda of shutting down effective legacy investigations. The toxicity of the Legacy Act itself and the unilateral nature of the appointments by the UK Government will have put off many well qualified applicants who could command confidence and be an asset to a reformed legacy body.

There needs to be a replacement and re-appointment of Commissioners to a legacy body in a process that is independent from UK Government and the previous Governments agenda. We contend that an internationalisation of office holders would significantly help to build confidence and impartiality. International involvement in peace-process bodies was commonplace at the time of the Good Friday Agreement.

The insistence of breaking with existing practices to involve former RUC officers in key positions in legacy investigations and the self-declaration and individual case model adopted by the ICRIR risks repeating the processes which contributed to the demise of the PSNI Historical Enquiries Team (HET). The new legacy body should instead follow the independence requirements adopted by Operation Kenova and in the Police Ombudsman legacy cases.

Reforming the ICRIR legislative framework

The following sets out a number of key areas where the legislative framework presently established for the ICRIR could be reformed for a new legacy body. An appendix at the end

of this report also sets out key differences between the legislative framework in the Legacy Act and the Stormont House legislation.

Powers of disclosure <u>to</u> the reformed legacy body

- **In replacement legislation for the Legacy Act do not replicate the qualification on powers of disclosure to the ICRIR.**
- **Ensure a reformed legacy body has a robust and unambiguous power of disclosure, including relevant sanctions, in line with recommendations in the SHA Model Bill.**

This provision refers to the provision of documents, records and other materials *to* the legacy body by relevant public authorities. (Rather than onward disclosure *from* the legacy body to families and others). To date, the domestic courts have held that the powers of the ICRIR to obtain disclosure are sufficient to meet the *minimum requirements of ECHR compatibility*. However, this standard is not the only measure and it does not mean there are no legitimate concerns about their limitations based on experience of operating similarly formulated powers of disclosure in NI legacy cases. Concerns have been raised by the Council of Europe Committee of Ministers, former Police Ombudsman (now Baroness) Nuala O 'Loan and the former head of Operation Kenova Jon Boucher that the qualification that disclosure power being qualified by what the ICRIR 'may reasonably require' could be subject to legal wrangling. This is grounded in past experience of relentless efforts by state agencies to limit, delay and impede disclosure. If there is a genuine commitment from Government to now ensure that the legacy body has full powers to compel disclosure, there could be no reasonable objection to it removing the qualifications over disclosure powers in the manner they are presently framed for the ICRIR.

Powers of disclosure <u>by</u> the ICRIR – the national security veto

- **Do not retain any sort of 'national security veto' in a reformed legacy body, as a necessary requirement for human rights compliance and to gain public confidence.**
- **This includes repeal and non-replication of any part of the national security veto and all of its associated duties.**
- **Avoid any approach of seeking to retain the national security veto in another guise, such as seeking to codify the same limits, or previous regressive interpretations of the NDNA policy, into the legislative framework of the investigative body. In particular by vesting a 'national security' veto in alternative office holders.**

One of the most significant problems with the ICRIR legal framework is what can be referred to as the 'national security veto.' There is no such 'national security veto' over the existing Package of Measures investigative bodies which have functioned successfully without one (including called in police investigations like Operation Kenova, PSNI LIB, the Police Ombudsman and inquests. There are some similar problems with public inquiries given the breath of ministerial powers of interference under the Inquiries Act 2005). The attempted insertion of the national security veto into the draft official SHA legislation derailed its implementation. The ICRIR's national security veto codifies a complex system of pre-marking of information as 'sensitive' if it engages UK 'national security' issues or originates from the security and intelligence services, RUC Special Branch or army intelligence. Ministers are then granted powers to prohibit the ICRIR from including any such information in their reports that engages UK national security interests. In essence, Ministers can redact reports

of a supposedly independent body and the provision can be used (and is undoubtedly designed) to conceal improper and unlawful conduct by state agents including involvement in serious human rights violations.

- **ECHR compatible investigations: The legislative framework for the investigative body should be codified ensure that when the investigative threshold is met and powers of investigation are used, then the legacy body should be legally obliged to ensure that its *investigations* meet the requirements of ECHR Articles 2 & 3**.

The above recommendation would not preclude the retention of a 'review' then 'investigation' model once a threshold is met, linked to the *Brecknell* test as provided for in the SHA legislation. The legacy body should also continue to have powers to investigate grave and exceptional officer misconduct across agencies, similar to the Police Ombudsman.

Key learning would point to it not being sufficient for a reformed legacy body to merely be 'capable' of carrying out ECHR-compatible investigations at its discretion. Such a limitation allows scope for bodies like the ICRIR to conduct light touch reviews and not conduct investigations or report to an ECHR Article 2/3 compliant standard. This discretion without binding duties to follow ECHR standards is a cause for concern given the agenda under which the ICRIR was established. ICRIR policy documents which summarise Article 2/3 good practice for investigations do not reference the Article 2 ECHR duties to determine whether the use of force in state involvement cases was justified.

The unofficial SHA Model Bill codifies binding duties for ECHR compliant investigations in order to build confidence and ensure effective investigations take place, proving that HIU investigations: (*a) establish as many as possible of the relevant facts; (b) identify, or facilitate the identification of, the perpetrators; (c) establish whether any relevant action or omission by a public authority was lawful (including, in particular, whether any deliberate use of force was justified in the circumstances); (d) establish whether any action or omission of a perpetrator was carried out with the knowledge or encouragement of, or in collusion with, a public authority; (e) obtain and preserve evidence; (f) identify material which is or may be relevant to motive (including, in particular, racial, religious or other sectarian motive); (g) identify acts (including omissions; and including decisions taken by previous investigators or other public authorities) that may have prevented the death from being investigated or a perpetrator being identified or charged; and (h) take any other action that the HIU thinks appropriate.*

- **Safeguards over powers: Ensure powers of compulsion by the legacy body are subject to the established safeguards around police powers.**

Whilst the ICRIR and HIU would have police powers, which will be subject to the usual safeguards in their exercise within criminal law, by contrast the powers under section 14 of the Legacy Act to summons any person without reasonable suspicion risk arbitrary and discriminatory application.

- **Caseload: We recommend that a reformed legacy body with the capacity to conduct ECHR compatible investigations picks up the outstanding cases that were agreed for transfer under Stormont House and also extends its remit to cover ECHR Article 3 violations.**

In relation to caseload, the Stormont House HIU was to pick up the outstanding legacy caseload of the HET, and Police Ombudsman, as well as other outstanding conflict related

deaths up to 2004. This includes hundreds of deaths dealt with by the HET in Royal Military Police (RMP) cases which the HMIC found had not met investigatory standards. The ICRIR starts with a blank caseload and the Legacy Act simultaneously shut down investigations into all other outstanding cases. The significant limitation of the SHA model was that it was restricted to deaths. The unofficial SHA Model Bill proposed an extension to Article 3 violations given the parallel ECHR duties of independent effective investigation. The ICRIR has an extension beyond this to serious injuries to other conflict related harms when referred by the SOSNI.

- **Content of Reports: The reformed legacy body should follow the SHA Model Bill in codifying maximum permissible disclosure into its reports for families and others.**

Under the official SHA legislation, the HIU was obliged to provide 'comprehensive family reports' with the legislation stipulating that they must be 'as comprehensive as possible.' The unofficial SHA Model Bill further codified this approach providing for family reports that must 'include as much information about the investigation and its findings as the HIU believe can be made public without prejudicing the administration of justice' including matters required to ensure ECHR compliance. There are no such provisions to require maximum permissible disclosure in the legislative framework for the ICRIR, the mandatory contents of its reports are limited to a statement setting out how the review was conducted and, where practicable, responses to initial questions.

- **The reformed legacy body should have financial autonomy and independent oversight structures.**

The Stormont House HIU was to be accountable to the Policing Board, Criminal Justice Inspector and the Police Ombudsman and for the issuing by the Policing Board of a binding Code of Ethics on HIU Officers concerning conduct and human rights obligations.

Reopening Legacy Inquests

- **Take the fastest legislative route, including using Remedial Orders under the HRA, to repeal entirely the ban on existing and new legacy inquests**, to allow those in the LCJ five-year plan to complete and new inquests opened by the Attorney General should be put into the system and heard. The power to open new legacy inquests should also be returned to the Attorney General.
- **Avoid trying to revive the contention that the ICRIR can run a form of pseudo-inquest** and instead honour commitments which allow families to have the choice of mechanism.
- **Drop appeals brought by the previous Conservative Government in relation to the powers of coroners to disclose sensitive information.**
- **In inquests involving sensitive material** desist from taking a regressive approach to seeking to exclude sensitive material from inquests and explore options to further evolve the ECHR compatibility of this small cohort of inquests in such cases.
- **Adequately resource inquests through the Department of Justice** through the reallocation of resources from the £250m offered to the ICRIR to ensure Inquests can take place expeditiously.

These recommendations would be consistent with Labour's manifesto and commitments made to families, as well as a return to the principles of Stormont House which retained inquests.

Reinstating Civil Proceedings

- **Take the fastest legislative route, including using Remedial Orders under the HRA, to repeal entirely the ECHR-incompatible ban on civil litigation** in the Legacy Act and reinstate civil proceedings in relation to Troubles-related cases.

We would also urge Government to avoid any fast-track scheme to be offered as an alternative to civil proceedings. Any such move would appear to be designed to hamper the vital information recovery and historical clarification that have occurred to date through narrative verdicts and findings in civil proceedings. Any such a move would understandably be understood as Government trying to again close down findings of wrongdoing via an alternative different route. We also recommend there should be adequate resourcing of the judicial system to deal with civil claims.

Other recommendations

- **Deliver the commitment to hold an independent public inquiry into the death of Pat Finucane in a manner compatible manner with the ECHR and broader human rights standards.**
- **Given the interlinking nature of reconciliation being the 'primary objective' of the ICRIR we would recommend that as part of the repeal and replace commitment of the Act, the role of reconciliation in the process is brought in line with international standards and conceptualisation in the transitional justice context. The initiatives on memorialisation and an 'official/public history' taken forward under the previous Government's agenda should also be discontinued.**
- **Honour the commitment in the SHA and its associated bilateral treaty to establish the Independent Commission on Information Retrieval (ICIR). This should operate separately to the investigative body and on a cross-border basis.**

Whilst the current Government and ICRIR have implied that the ICRIR in effect combines the HIU and ICIR functions, this is plainly not the case. The ICRIR does not have the functions of the SHA ICIR: It was not agreed with the Irish Government, it is not established as an international cross-border entity, it has no jurisdiction in the Republic, and above all, it has no provisions for Protected Statements, the central ICIR provision for securing information. It is inescapable that there is an existing agreement, treaty and level of buy-in to this mechanism.

Background information to the agenda behind and role of the ICRIR

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

Prior to their closure by the Legacy Act Northern Ireland, legacy investigations were dealt with by the 'Package of Measures' established by the UK authorities in response to adverse rulings of the European Court of Human Rights (ECtHR). These included: *Public Inquiries; Legacy investigations by the Police Ombudsman; Legacy Inquests; PSNI investigations and reviews under first the Historical Enquiries Team (HET) and subsequently Legacy Investigation*

Branch (LIB); Independent 'call in' external police investigations (e.g. Operation Kenova); changes into prosecutorial decision making. Families also took forward civil litigation on conflict related cases.

Whilst there was a long history of UK authorities and agencies seeking to limit or obstruct the work of the Package of Measures to prevent effective investigations into conflict related cases more recently barriers had been overcome the mechanisms had begun to deliver significant information recovery and historical clarification in particular for families.

- The *Legacy Act closed down 38 programmed legacy inquests* – 14 of which had commenced but not reached findings stage. Of those inquests that had been completed a considerable number provided historical clarification, including in relation to military shootings which corrected previous official accounts.
- *Legacy Act curtailed 335 Police Ombudsman investigations, 54 which were open.* A significant number of Police Ombudsman legacy reports, many of which related to multiple deaths and other offences, had identified patterns of human rights violations some of which were systemic.
- *The Legacy Act had also curtailed many hundreds of civil court cases.* Civil cases had been leading to significant reparations and information recovery, including findings of torture (specifically waterboarding) and collusion.
- *The Legacy Act closed down PSNI Legacy Investigations Branch investigations which had focused on both state and non state actors.* These had led to a small number of prosecutions mostly against non-state actors but also the first prosecutions of soldiers in legacy cases, leading to one conviction and a suspended sentence.
- *The Legacy Act closed down investigations by 'called in' independent police teams, the most prominent of which has been Operation Kenova,* whose Interim Report found that state agents were involved in human rights violations including murder and torture and were shielded from the criminal justice system.

These mechanisms had been internationally commended with the Committee of Ministers having noted the 'vital role played by the inquest system' as well as the Police Ombudsman.

Stormont House Agreement 2014

In the context of the piecemeal nature of the 'Package of Measures' and the then barriers to its delivery, the British and Irish Governments and parties in the Northern Ireland Executive negotiated what became the 2014 Stormont House Agreement (SHA). The SHA would have established the following new main legacy bodies to run alongside legacy inquests and civil proceedings:

- *Historical Investigations Unit (HIU)* – independent body in NI to conduct ECHR-compliant investigations and produce information-recovery reports for families.
- *Independent Commission on Information Retrieval (ICIR)* cross-border body to receive information in confidence in the form of Protected Statements, that cannot be used in civil or criminal proceedings.

An implementation treaty for the ICIR was concluded by the UK and Ireland in 2015, and a public consultation demonstrated significant levels of support. SHA implementation was derailed by the UK Governments insertion of a 'national security veto' into the draft

legislation which would empower Ministers to redact 'sensitive' information from reports. This mechanism would have permitted ministers to conceal human rights violations relating to agents of the state. The mechanism was revived in the Legacy Act for the ICRIR.

The backdrop to the Legacy Act

The Legacy Act was unilaterally introduced by the Conservative UK Government who abandoned on the SHA in March 2020, despite having recommitted to legislating for the SHA in the UK-Ireland *New Decade New Approach* deal of January 2020. This followed a mobilisation, including a tabloid campaign, alleging a 'witch-hunt' against military veterans in legacy cases with senior politicians, including members of the previous Government, falsely alleging bias against the security forces by the justice system in Northern Ireland.

By contrast in late April 2024 the Report issued by the *International Expert Panel into State Impunity and the Northern Ireland Conflict* concluded following its year-long analysis that the UK had in reality '*operated a widespread, systematic, and systemic practice of impunity, protecting security forces from sanction'* and '*not only engaged in collusion but also blocked proper police investigations into conflict-related killings to protect implicated security force members and agents.'* The Panel recommend that the Legacy Act be repealed in its entirety and replaced with a 'Stormont House+' model of mechanisms, along with an international commission to examine themes and patterns.

The International Panel had been convened by the Norwegian Center for Human Rights at the University of Oslo at the request of CAJ and the Pat Finucane Centre. The Panel of international experts, consisting of academics, lawyers, human rights activists and former police officers, was tasked with providing an authoritative independent assessment of the extent to which there has been state impunity for human rights violations during the Northern Ireland conflict. The report contains a foreword from former UN Special Rapporteur Juan Méndez and an afterword from former South African Truth and Reconciliation member Yasmin Sooka, who had been involved in the initiation of the Panel.

The motivation behind the Legacy Act and its development

The official truth and controlling the narrative

When introducing the Legacy Bill and explaining the rationale for doing so the then Secretary of State for Northern Ireland (SOSNI) Brandon Lewis MP raised concerns that the existing legal proceedings in legacy cases were effectively 're-writing history'. This echoed concerns from a previous SOSNI Theresa Villiers implying legacy investigations were creating 'pernicious counter narrative.' This phrase was also used by Lord Caine, later to become the public face of the Legacy Act in the Lords. Former SOSNI Karen Bradley MP, pressed before a Parliamentary Committee on a Statute of Limitations to prevent prosecutions of veterans, replied that the problem was that a Statute of Limitations would not prevent investigations and inquests which were 'much of the problem' which she really wanted to 'stop'. She also described legal due process as 'harassment in the courts.' Sir Declan Morgan shortly after taking up his ICRIR role produced a media platform piece headlined the 'current system for dealing with the past is defective and unfair.'

The 2020 Written Ministerial Statement and 'options paper'

The SOSNI Brandon Lewis signalled the abandonment of the SHA in a Written Ministerial Statement (WMS) in March 2020, intentionally timed to coincide with the introduction into

the UK Parliament of what became the Overseas Operations (Service Personnel and Veterans) Act 2021, which limits the ability to prosecute British soldiers for war crimes abroad. The policy objective was signalled as one to protect NI veterans in a similar way, with the WMS, whilst vague, proposing a new single legacy body.

Papers revealed in the High Court challenge to the Legacy Act included an 'official options' paper prior to the WMS. This included the option of retaining the Package of Measures or implementing the SHA, notably a core reason for not taking forward these options was expressly that they would have involved continued *investigations* of veterans. Instead, a further option of scrapping the SHA for a 'Family Report Body' – which would not conduct investigations, but recover information, and would also stop inquests and limit civil claims was favoured along with amnesty scheme.

The Court of Appeal ruling further revealed that the rationale set out in an official Policy Paper for curtailing legacy civil cases was that they 'continue to undermine public confidence in the state' and affect public perception of the police and military.

Following the WMS, the Legacy Act legislation was developed behind closed doors bypassing consultation and Equality Scheme duties on impact assessment and transparency. The development of policy was taken forward by a NIO 'Legacy Investigations Senior Working Group' whose membership was revealed further to a CAJ freedom of information request. In practice the legacy proposals appear to have been developed with extensive involvement of those with policing and national security backgrounds and roles.

2021 Command Paper

By the time of a 2021 Command Paper the envisaged 'Family Report Body' had been renamed the 'Information Recovery Body' (IRB). It was clear from the Command Paper the IRB was only to conduct light-touch desktop reviews and rely on voluntary testimony linked to an amnesty. It was clearly not designed to conduct ECHR-compliant investigations.

These proposals evolved into the Legacy Act and ICRIR. Whilst a name change was presumably prompted by a belated realisation the acronym IRB had historical significance in Ireland, the addition of word 'reconciliation' to the title of the ICRIR, is likely to have been by way of seeking (ultimately unsuccessfully) to provide legal cover for the amnesty scheme. The addition of further powers to the ICRIR is likely to have been in light that the 'IRB' would have floundered badly in court regarding any ability to conduct an investigation. Nevertheless, the IRB powers (or lack thereof) do reflect the type of light-touch review mechanism the architects of the Legacy Act clearly had in mind.

The introduction of the Legacy Act and 'review' structure of the ICRIR

Whilst some discourse around the Legacy Act sought to portray the approach as one relating to information recovery at other times Ministers were quite open about the objective of the bill being to end *investigations* into military veterans.

The Legacy Act did introduce powers to compel testimony to the ICRIR and also powers for ICRIR officers being designated to exercising police powers. However, statements from Ministers and the structure of the provisions for the ICRIR are indicative of there not being a policy 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'.

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.

The draft official SHA legislation provided for '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. The draft SHA legislation sought to build in safeguards to ensure the HIU would conduct Article 2 ECHR 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. These safeguards are stripped out of the Legacy Act and do not apply them to the ICRIR.

Instead, the ICRIR Commissioner for Investigations, has discretion to decide on the steps the Review will take. ICRIR Reviews must only to 'look into' the circumstances of the death or injury in question. At this early stage we have heard concerns that families approaching the ICRIR risk being 'funnelled' into light touch reviews rather than thorough investigations.

A Labour amendment during the passage of the Bill sought to introduce some minimum standards for the ICRIR reviews based on Operation Kenova investigations. Even this minimum standard was *rejected* by then UK Government, as were amendments which would have required ECHR compatible investigations, or which would have replaced the concept of an ICRIR 'review' with an ICRIR 'Investigation.'

There has been some indication from the current ICRIR Commissioner for Investigations and others that an approach may be taken to some reviews more focused on answering victims' questions on how a person died rather than the broader circumstances and culpabilities around their death. To this end the ICRIR has put forward the model of a 'focused investigation' as among one of the three 'review' processes it will decide, at its discretion, to use. This type of 'investigation' would focus on answering questions from families, in what the Commissioner of Investigations has described as a 'very different process.'

Independence and the ICRIR

The Legacy Act departs from the practice of Kenova and the Police Ombudsman of precluding the employment of former RUC / military officers as investigators. Instead, the legislation requires a proportion of ICRIR officers to have prior NI policing experience.

The High Court did briefly explore the question of the ICRIR Commissioner for Investigations being a former senior RUC officer and independence requirements. The Court states this would have to be dealt with on a case-by-case basis stating that it was self-evident that '*he must recuse himself from any review involving an incident in which he was involved as a former RUC/PSNI officer, or in respect of which there is a personal conflict of interest.*' in the case of the Commissioner for Investigations, it is not clear how a case-by-case assessment would work when dealing with a former officer whose career was not restricted to junior roles but rather was also a senior officer. It would be inevitable that the Commissioner for Investigations could be regularly overseeing reviews which engage the actions of former

colleagues. The Court in practice largely parked the question of practical independence of the ICRIR on grounds that it was not dealing with an individual case.

Concerns have been raised regarding the structural independence of the ICRIR (in particular the role of the SOSNI) by Council of Europe bodies, Parliamentarians, the Irish Government, Human Rights Commission and many others. The Court of Appeal did reiterate the finding of the High Court that it considered the ICRIR had met the 'structural' independence requirements of the ECHR. However, the Court was not holding that such concerns were unwarranted, rather in its view they did not breach the minimum legal requirements of the ECHR. The Court of Appeal did rule that the ICRIR lacked independence to control the content of its reports to families due to the 'national security veto' vested in the SOSNI.

Most notably, independence concerns have centred on the broader powers of the SOSNI in the legislation which include the appointments of all ICRIR commissioners; 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; providing all oversight of the ICRIR. To this end, the Decisions of the Council of Europe Committee of Ministers, regularly urged the UK during parliamentary passage to amend the legislation 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*;' No UK Government amendments were forthcoming to this end, and Government resisted opposition amendments aimed at addressing these concerns.

In relation to broader concerns from the Council of Europe bodies, the Commissioner for Human Rights, Dunja Mijatović, raised concerns that adopting the Legacy Act would 'undermine justice for victims, truth seeking and reconciliation', and that the UK was ignoring 'the many warnings that this legislation would violate the UK's international obligations and put victims' rights at risk.' Stressing that she had 'repeatedly warned' the Legacy Act would undermine the human rights of victims, she also noted that: 'Serious concerns have also been expressed by the Council of Europe's Committee of Ministers, the Parliamentary Assembly of the Council of Europe, the UN High Commissioner for Human Rights, UN Special Rapporteurs, national human rights institutions, parliamentary committees and civil society organisations, including victims' groups.'

The Committee of Ministers raised issues relating to the ICRIR's independence, disclosure and initiation of reviews. This included issues regarding the independence of the ICRIR appointment process. The Committee of Ministers urged the UK authorities to take steps to gain the confidence of victims and families.

In relation to the UN human rights machinery into 2024, the UN Human Rights Committee raised concerns regarding the Legacy Act, specifically expressing concerns about the 'the weakness of the 'review' function of the' ICRIR urging the UK to 'repeal or reform' the Legacy Act and '*to adopt proper mechanisms with guarantees of independence, transparency, and genuine investigation power that discharge the State party's human rights obligations ….'*

Introduction – from repeal to 'root and branch reform' of the ICRIR

1.1 Labour Manifesto Commitment to repeal the Legacy Act

The UK General election on the 4 July 2024 led to the election of a Labour government committed to repealing the *Northern Ireland Troubles (Legacy and Reconciliation) Act 2023* (The Legacy Act). The Labour leader Keir Starmer had first made a public commitment to repeal the Legacy Act in January 2023 in Belfast.[1] The commitment was then consistently reiterated by successive shadow ministers and included in Labour's Election Manifesto as a commitment to 'repeal and replace' the Legacy Act and return to the principles of the Stormont House Agreement (SHA).[2]

Commitments were also made to a 'reset' of relationships with the Irish Government and a return to bilateral decision making in relation to the peace process. This was by way of contrast to the unilateral approach to legacy and other matters undertaken by the previous Conservative Government.

The Legacy Act was introduced into the UK Parliament in May 2022 and completed passage in September 2023. The main provisions of the legislation were to:

1. Permanently close down existing mechanisms investigating NI legacy cases (the 'Package of Measures') on the 1 May 2024.
2. Introduce a broad amnesty in the form of a 'conditional immunities scheme.'
3. Set up a new temporary legacy body the Independent Commission for Reconciliation and Information Recovery (ICRIR) to undertake 'reviews' of certain cases – as the only body permitted to take on legacy cases.

1.2 The rush to establish the ICRIR and its operational activity to date

In the context of the Labour commitment to repeal the Legacy Act, Conservative Ministers rushed to establish the ICRIR and make it operational on 1 May 2024 before there was a likely change of Government. The Chief Commissioner Sir Decan Morgan was recruited without open competition in May 2023 long before the Legacy Bill completed passage and the power to make such an appointment became law. The other ICRIR Commissioners were also appointed by Conservative Ministers. Against the backdrop of years of resources being withheld from other legacy mechanisms, Ministers committed £250 million to the ICRIR.[3] The ICRIR departed from civil service pay scales (used by other independent public bodies), developed its own *ad hoc* pay framework and offered high salaries to incentivise recruitment.[4] The ICRIR was therefore under development for a year before it assumed its powers to take on cases for investigation ('reviews') on the 1 May 2024. All of this appears to have been designed to create facts on the ground, making it difficult and costly for an incoming Government to dismantle it.

---

[1] Keir Starmer says he would repeal controversial Northern Ireland legacy bill if elected PM (youtube.com)

[2] Labour Manifesto 2024: "The Legacy Act denies justice to the families and victims of the Troubles. Labour will repeal and replace it, by returning to the principles of the Stormont House Agreement, and seeking support from all communities in Northern Ireland"

[3] Correspondence from the Secretary of State to the ICRIR, 14 December 2023 https://icrir.independent-inquiry.uk/document/icrir-funding-letter/

[4] ICRIR Pay Policy March 2024 - Independent Commission for Reconciliation & Information Recovery

As detailed elsewhere in this paper, the concerns of the UN and Council of Europe regarding the Legacy Act extended well beyond than the amnesty scheme and included concerns regarding the ICRIR's independence, disclosure powers and 'reviews.' For example, in September 2023, the Council of Europe Committee of Ministers noted that (despite efforts from the then UK Government to promote it) support for the ICRIR remained 'minimal.'[5]

In January 2024 the Irish Government had also formally lodged an inter-State case against the Legacy Act in the European Court of Human Rights challenging a number of provisions including that the ICRIR did not meet ECHR independence requirements.[6]

In February 2024, the High Court in Northern Ireland ruled that certain provisions of the Legacy Act, including the amnesty scheme the ICRIR was to operate, were unlawful. The then UK Government appealed this. On the issue of ICRIR independence, the High Court effectively parked the question of practical independence, ruling that this needed to be dealt with in the circumstances of specific individual cases. The High Court did rule that the ICRIR met the structural independence requirements of the ECHR. This was cross appealed by the applicant families. As further detailed below the Court of Appeal in September 2024 went further to find aspects of the ICRIR's legal framework incompatible with the ECHR

Having assumed its powers to conduct 'reviews' on 1 May 2024, the ICRIR declined to answer questions regarding its caseload. Further to a Freedom of Information challenge from CAJ, the ICRIR did release caseload figures on the evening of Sunday 8 September (the day before the draft Northern Ireland Programme for Government was released, and just as the British Irish Association Conference, where ministers had discussed the ICRIR, had concluded). The figures suggested that the ICRIR has a total caseload of only eight cases in the first four months of operation.[7] Whilst not clarified at the time it subsequently transpired that the number of ICRIR investigations was lower, at between two or four investigations.[8] (The eight cases figure had included different requests for the same investigation). Into November 2024 the number of live investigations on the ICRIR website reflecting its first six months of operation, stood at five.[9]

Suggestions that the slow start can be explained by the unique level of care and attention given to a trauma-informed approach to this work unfairly implies that others do not routinely invest the time and energy necessary to deal with families in a victim-centred and trauma-informed fashion.

Indeed, the approach of the ICRIR can be contrasted with the hundreds of families who had confidence to seek investigations from the Package of Measures until they were closed down by the Legacy Act.

[5] CM/Del/Dec(2023)1475/H46-44 (coe.int)
[6] New inter-State application brought by Ireland against the United Kingdom European Court of Human Rights Press Release.
[7] https://www.irishnews.com/news/northern-ireland/troubles-legacy-body-icrir-takes-on-just-eight-cases-in-first-four-months-ZBJBITC2J5AINPLEJ7X3I4S7MU/
[8] ICRIR FOI response to CAJ FOI/2024/014, 4 November 2024.
[9] ICRIR Live Investigations (accessed 25 November 2024): https://icrir.independent-inquiry.uk/live-investigations-in-information-recovery/

1.3 Labour's first moves in Government

On the 17 July 2024 the new Labour Government set out its legislative programme (King's Speech). This included a commitment to 'begin the process of repealing and replacing the' Legacy Act.[10] There was a commitment to repealing the immunities scheme and to reversing the 'policy prohibiting victims and families from bringing civil claims.' Whilst a commitment to reopen legacy inquests had been consistently given in opposition, it appeared to now be more qualified to those 'prematurely halted.'[11]

In relation to the ICRIR, Labour announced it would be retained with 'options explored' to strengthen its independence. The reasons given was that the Legacy Act could not be repealed 'in its entirety without anything to replace it.'[12] It is unclear however, how this would be the case. Repeal of the entire Legacy Act in practice would *de jure* and *de facto* have returned Northern Ireland to the position of the 30 April 2024, and the existing legacy investigations by the Package of Measures (the Police Ombudsman, PSNI, Inquests, and civil actions would have just returned to their existing caseload).

Retention of the ICRIR, at least for an initial period, had been indicated in the run up to the election, by the then Shadow Secretary of State Hilary Benn MP. In addition to making clear that civil proceedings and inquests would be restored, he had indicated he would 'see how it goes' with the ICRIR the test being 'will it work for families' and indicating reforms to boost confidence.[13]

Following the election in a Written Ministerial Statement (WMS) to the UK Parliament on the 29 July 2024[14], the now Secretary of State Hilary Benn announced that the new Government would drop the appeals against the High Court ruling insofar as they related to ECHR incompatibility of the amnesty scheme and the ban on civil proceedings.[15] The new Labour Government did however continue to defend the cross-appeals brought by families over ICRIR independence.

In relation to the ICRIR the WMS, whilst expressing confidence in the ICRIR Chief Commissioner, appears to condition the future of the ICRIR on its need to 'gain the confidence of victims and survivors in its work.'[16]

The July 2024 WMS made clear the initial form of repeal of the Legacy Act would be through a remedial order under section 10 of the Human Rights Act. Such orders would be limited to matters found to be ECHR-incompatible by the Courts (at this stage the amnesty provisions and retrospective ban on civil proceedings). The clear commitment to reversing the ban on civil proceedings was reiterated in the WMS.

---

[10] https://www.gov.uk/government/speeches/the-kings-speech-2024
[11] https://www.gov.uk/government/publications/kings-speech-2024-background-briefing-notes
[12] https://www.gov.uk/government/publications/kings-speech-2024-background-briefing-notes
[13] https://www.bbc.co.uk/news/uk-northern-ireland-68930602
[14] https://questions-statements.parliament.uk/written-statements/detail/2024-07-29/hcws30
[15] A different position was taken in relation to the findings of incompatibility with GFA rights protected by Article 2 of the Windsor Framework. For further detail see: The Dillon Judgment, Disapplication of Statutes and Article 2 of the Northern Ireland Protocol/Windsor Framework, Anurag Deb and Colin Murray: https://eulawanalysis.blogspot.com/2024/03/the-dillon-judgment-disapplication-of.html#:~:text=Article%202%20of%20the%20Framework%20does%20not
[16] https://questions-statements.parliament.uk/written-statements/detail/2024-07-29/hcws30

1.4 The ICRIR and Inquests

The scope of the commitment on reopening legacy inquests remained more open to interpretation in the WMS, which was again limited to a commitment to 'measures to allow inquests previously halted to proceed.' A number of contextual issues are worth emphasising at this juncture. The Legacy Act closed down a broad range of legacy inquests. The Legacy Bill had in fact been amended during passage by the then Conservative Government to *increase* the number of inquests that would be closed down. 38 legacy inquests were shut down on the 1 May 2024, 14 of which had not reached findings stage and 24 that had not been assigned to a coroner.[17] These figures cover inquests in the existing legacy inquest programme and further cases that had been referred by the Attorney General. Overall, these inquests cover over 70 deaths.[18] Whilst most legacy inquests had functioned well, a small number saw several instances of very public interventions by then Ministers seeking to prevent coroners revealing 'national security' information, understood (and on occasions confirmed), to often relate to the suspected involvement of state agents in human rights violations. This was the case in the inquest into the death of Sean Brown, where the Coroner publicly identified that there were state agents among the 25 suspects to the murder and recommended that a Public Inquiry be the appropriate mechanism, not the ICRIR, to conclude an Article 2 ECHR compliant investigation.[19]

The July 2024 WMS stated the new Government will 'consider the best way forward for those inquests involving a significant amount of sensitive information which were unable to conclude within the coronial system.'[20]

The ICRIR had argued it could emulate inquests within its framework putting forward an 'Enhanced Inquisitorial Proceedings' model.[21] CAJ and others had considerable scepticism over this model of emulating inquests, not least as there would be no independent judge, no court, families would not have their own lawyers, or rights to receive disclosure and the Executive branch of Government would be able to re-write the 'judgment' through the 'national security veto'[22]

The Secretary of State however declined to open the public inquiries recommended by coroners and instead pointed families to the ICRIR, despite families' objections.[23]

1.5 Consultation and the Irish Government's position

The July WMS committed to a period of consultation with 'interested parties' in 'the months ahead.' This is set out to include victims and survivors and also veterans. There is also a commitment to engage with the NI parties and the Irish Government with whom the new

[17] The Troubles: 'Legacy Act denies victims like me closure' - BBC News

[18] Northern Ireland inquests involving 74 deaths during Troubles will not go ahead after Legacy Act takes effect – The Irish Times

[19] https://www.irishnews.com/news/northern-ireland/high-court-judge-believes-legacy-body-not-appropriate-mechanism-to-investigate-sean-brown-murder-E6NQLSUB65DRJC4DIUWCNCZ4AI/

[20] https://questions-statements.parliament.uk/written-statements/detail/2024-07-29/hcws30

[21] Enhanced Inquisitorial Proceedings: A brief explanation - Independent Commission for Reconciliation & Information Recovery (icrir.independent-inquiry.uk)

[22] For further details on the National Security Veto see section .

[23] Families of loyalist murder victims 'not giving up' after public inquiry request refused – The Irish Times see for example, UK government refuses to grant public inquiry into murder of Seán Brown in Co Derry in 1997 – The Irish Times

UK Government committed to working with in partnership. The precise form that this consultation will take remains unclear.

Given that the decision by the new UK Government to retain the ICRIR was apparently taken unilaterally, the Irish Government have been quite measured in their position to date. Dublin has made clear the inter-State case will not be withdrawn at this juncture, pending a satisfactory resolution of the concerns raised.[24]

The Tánaiste Micheál Martin, set out the position of the Irish Government in relation to the ICRIR in a speech at the British Irish Association Conference on the 7 September 2024. This called for substantive 'root and branch' reform of the ICRIR to make it ECHR compliant:

> One key element of that is the role and mandate of ICRIR. I believe that both the British and Irish Governments agree that substantive reform, focused on ensuring compliance with the ECHR and genuinely regaining public trust, is necessary.
>
> The genesis of the Commission means that, understandably, many victims, survivors and families have deep reservations. Addressing such reservations will mean tackling fundamental questions in relation to the independence of the ICRIR, and its ability to carry out robust and thorough investigations.
>
> That will require significant effort – and, I believe, root and branch reform. And both [SOSNI] Hilary [Benn] and I have said clearly and publicly that the views of the individuals and families directly affected have to be at the heart of this effort...[25]

1.6 The Court of Appeal ruling

Later in September 2024, the Court of Appeal gave its ruling in relation to the Legacy Act Appeals. In addition to upholding the High Court's decisions over compatibility with GFA rights underpinned by the Windsor Framework and finding that the ban on civil cases per se (rather than its retrospective elements) was unlawful, the Court of Appeal also ruled that the ICRIR was not capable of conducting ECHR compatible investigations in a number of respects, centring on the question that it could not emulate inquests.[26]

This first substantive concern related to the lack of independence of the ICRIR in terms of its ability to produce its own findings, with the 'national security veto' powers of Ministers being found to be unlawful. Secondly, the Court found that the ICRIR could not emulate ECHR-compatible inquests as it could not meet the requirements of next-of-kin participation.

The Court ruling states that the aim of promoting peace and reconciliation 'can realistically only be achieved upon consultation and with a degree of buy-in from all those affected.'[27]

In addition to matters relating to immunity the Court of Appeal made declarations of ECHR incompatibility in relation to s43 of the Legacy Act (overall ban on civil proceedings); and on provisions relating to the 'nationals security veto' relevant to next of kin participation in inquests. The Court of Appeal, in light of the finding that the ICRIR could not emulate inquests in an ECHR compatible manner, and in the context where there was no other mechanism which can currently comply with Article 2 ECHR in cases where an inquest is

[24] Ireland will not immediately drop case against UK over Legacy Act – Taoiseach – The Irish News
[25] https://www.gov.ie/en/speech/6119c-tanaistes-remarks-at-the-british-irish-association-conference/
[26] https://administrativecourtblog.wordpress.com/2024/09/20/the-legacy-act-judgment/.
[27] Dillon [2024] NICA 59 [270].

required, also issued a declaration of incompatibility in relation to s44 of the Legacy Act (the ban on Troubles-related inquests.[28]

The initial response of the Labour Government came in a further Written Ministerial Statement (WMS) of the 7 October 2024.[29] This reiterated an intention to 'strengthen independence and powers' of ICRIR and noted the additional declarations of ECHR incompatibility by the court. In relation to these additional findings, the WMS stressed that in relation to conflict-related civil proceedings the Labour Government had already committed to reversing the Legacy Act ban. The WMS also set out the other two findings related to the incompatibility of the ICRIR plans to emulate inquests and the national security veto. The WMS does not commit to ending the veto nor ICRIR inquest plan, rather it implies Government may try and 'fix' the legislation to allow the ICRIR to emulate inquests, rather than simply bringing forward legislation to reinstate inquests.[30] The WMS continues to argue that the ruling 'introduces legal uncertainty' regarding Article 2 of the Windsor Framework, despite the detail Court of Appeal ruling providing such certainty. There is also no commitment to remove the 'national security veto' from the legislation, rather a statement is made regarding Governments commitment to address legacy issues 'within the framework that rightly exists to ensure that those who work to keep the citizens of the United Kingdom safe are themselves protected from harm.'[31] There is a commitment to reviewing Remedial Orders prepared following the High Court ruling but not specifically to Remedial Orders to remedy the incompatibilities identified by the Court of Appeal even in areas like the reopening of civil proceedings where repeal commitments have been unequivocal.

On the 18 October 2024 Reuters first broke the news that the Labour Government intended to appeal the Court of Appeal ruling.[32] It is understood that this is on both ECHR and Windsor Framework grounds, with an NIO statement also referencing an intention to reform the ICRIR and make changes to the Act.[33] In response bereaved families raised concerns that the Secretary of State had 'turned his back' on victims.[34]

The final section of this paper focus upon what root and branch reform of the ICRIR might look like, and whether this would be enough to enable *investigations* that would comply with the ECHR, other international standards and command confidence of victims.

In order, to do this the next section will set out in detail the background context, agenda and legal framework behind the ICRIR in detail.

---

[28] Court of Appeal Order, 18 October 2024.

[29] https://www.gov.uk/government/speeches/written-ministerial-statement-legacy-northern-ireland

[30] "The Government has already made clear its intention to propose measures that allow legacy inquests previously halted to proceed, should that be the preference of families. Notwithstanding this, the Government takes these further declarations of incompatibility very seriously, and it remains my priority to ensure that the ICRIR can provide human rights compliant investigations in all relevant cases."

[31] https://www.gov.uk/government/speeches/written-ministerial-statement-legacy-northern-ireland

[32] https://www.reuters.com/world/uk/uk-plans-further-appeal-northern-ireland-amnesty-ruling-2024-10-18/

[33] https://www.bbc.co.uk/news/articles/c756pq9gezro

[34] https://www.bbc.co.uk/news/articles/cz6w6xqj4lvo

2 Background Context and ICRIR legal framework

2.1 The Legacy Act, Package of Measures and the Stormont House Agreement

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

As noted above prior to their closure by the Legacy Act Northern Ireland, legacy investigations were dealt with by the 'Package of Measures' established by the UK authorities in response to adverse rulings of the European Court of Human Rights (ECtHR).

The 1998 Good Friday Agreement (GFA) contained no overarching transitional justice mechanism to comprehensively 'deal with the past.' However, the GFA did commit to the incorporation of the ECHR into Northern Ireland law, undertaken through the Human Rights Act 1998 and that commitment has underpinned much of the investigative work done on legacy cases in the intervening years.

A series of cases to the ECtHR (the *McKerr* group of cases, or Cases Concerning the Actions of the Security Forces in Northern Ireland) found procedural violations of Article 2 ECHR (the right to life) in relation to cases involving both direct killings by the security forces and security force collusion with loyalist paramilitary groups.[35]

These cases significantly contributed to the development of Article 2 (right to life) procedural requirements that an effective *investigation* into killings, independent from those potentially implicated in wrongdoing must take place with sufficient involvement of the next of kin.[36] Similar investigative obligations have also been held to apply to Article 3 (prohibition on torture, inhuman and degrading treatment etc) of the ECHR.[37]

The above group of cases, still under supervision by the Council of Europe Committee of Ministers (CM), led to the UK Kingdom agreeing the 'Package of Measures' of changes to existing judicial and investigative bodies in Northern Ireland, to deliver ECHR-compatible investigations into conflict-related cases. The Package of Measures focused on:

- Public Inquiries.
- Legacy investigations by the Police Ombudsman.
- Legacy Inquests.
- PSNI investigations and reviews under first the Historical Enquiries Team (HET) and subsequently Legacy Investigation Branch (LIB).
- Independent 'call in' external police investigations (e.g. Operation Kenova).[38]
- Changes into prosecutorial decision making.

Families also took forward civil litigation on conflict related cases.

As CAJ has detailed elsewhere, there has been a long history of UK authorities and agencies seeking to limit or obstruct the work of the package of measures to prevent effective

[35] https://hudoc.exec.coe.int/eng#{%22execidentifier%22:[%22004-2202%22]}
[36] For full details on Article 2 ECHR obligations see: Guide on Article 2 - Right to life (coe.int)
[37] https://ks.echr.coe.int/documents/d/echr-ks/guide_art_3_eng paragraph 119 on.
[38] https://www.opkenova.co.uk/

investigations into conflict related cases.[39] Legal challenges to such strategies of delay and obfuscation from families, NGOs and their legal representatives and pressure from the Council of Europe Committee of Ministers have meant that in recent years the 'Package of Measures' had begun to actually deliver significant information recovery and historical clarification for families. This is further detailed in the next section.

Stormont House Agreement 2014

In the context of the piecemeal nature of the 'Package of Measures' and the then barriers to its delivery, the British and Irish Governments and parties in the Northern Ireland Executive negotiated over many years what became the 2014 Stormont House Agreement (SHA).[40] The SHA would have established the following new main legacy bodies:

- *Historical Investigations Unit (HIU)* – independent body in NI to conduct ECHR-compliant investigations and produce information-recovery reports for families.
- *Independent Commission on Information Retrieval (ICIR)* cross-border body to receive information in confidence in the form of Protected Statements, that cannot be used in civil or criminal proceedings.
- *Oral History Archive:* designed to provide a central and independent place for existing and new material from people from all backgrounds (across the UK and Ireland) to share experiences and narratives related to the Troubles.
- The SHA also expressly provided for the continuation of legacy inquests; the SHA did not affect civil court proceedings. An Implementation and Reconciliation Group (IRG) was also to commission a report on themes.

An implementation treaty for the ICIR was concluded by the UK and Ireland in 2015.[41]

The implementation of the Stormont House Agreement was however delayed when the British Government insisted on inserting a 'national security veto' into the draft legislation. Such a veto was designed to allow UK Ministers to redact and hence have the final say on HIU reports on the basis of 'national security' grounds. This was opposed by the Irish Government with the then Minister for Foreign Affairs, Charlie Flannigan TD pointing to the 'smothering blanket of national security' through the proposed veto as the stumbling block to progressing the SHA.[42]

The NIO ultimately conducted a 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. According to the NIO's own analysis of the consultation process, 'there was majority broad support for the institutional framework of the SHA' and that a 'clear majority of all respondents' opposed an

[39]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. See also the Operation Kenova Interim Report.

[40] https://www.gov.uk/government/publications/the-stormont-house-agreement

[41] Ireland FATRdoclaid210116_100026.pdf (oireachtas.ie) UK: Formatted UK Precedence - ICIR Agreement text 7 October (parliament.uk)

[42] Charlie Flanagan critical of national security 'smothering blanket' *Irish News* 27 November 2015. "*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"*

amnesty or statute of limitations, with many arguing such a move 'could risk progress towards reconciliation'. [43]

In the absence of the implementation of the SHA, the legacy cases continued to be dealt with by the 'Package of Measures.'

The UK re-committed to legislating for the SHA 'within 100 days' in the January 2020 UK-Ireland New Decade, New Approach (NDNA) deal which re-established Stormont from suspension.[44] However, the then Prime Minister Boris Johnson then removed the Secretary of State, Julian Smith MP, replaced him with Brandon Lewis MP and unilaterally abandoned the SHA to instead pursue the process that led to the Legacy Act.

The Legacy Act and ICRIR

The *Northern Ireland Troubles (Legacy and Reconciliation) Act 2023*[45] completed Parliamentary passage and became law on 18 September 2023.

The Legacy Act was unilaterally introduced by the Conservative UK Government following its abandonment of the SHA. This followed a mobilisation, involving a tabloid campaign alleging a 'witch-hunt' against military veterans in legacy cases with senior politicians, including members of the previous Government, falsely alleging bias against the security forces by the justice system in Northern Ireland.[46]

The main provisions of the Legacy Act operate to:

- Close down legacy investigations by the Package of Measures on the 1 May 2024 and also retrospectively curtail civil litigation in legacy cases.
- Introduce a 'conditional immunity scheme' providing for a supposedly conditional amnesty for serious Troubles-related offences and an unconditional amnesty for other conflict-related offences.
- Establish the ICRIR to deliver the amnesty and 'reviews' of legacy cases opened by the Secretary of State or families.
- Establish provisions on Troubles *memorialisation*, largely under the control of the Secretary of State.

2.2 Delivery of Truth and Justice prior to the Legacy Act

On the 1 May 2024, the Legacy Act closed most of the Package of Measures leaving numerous pending legacy cases without investigations. This included 335 Police Ombudsman investigations (54 of which were open investigations).[47] Also curtailed were 38 programmed legacy inquests, 14 which had not reached findings stage and 24 that had not been assigned to a coroner.[48] Also closed were PSNI Legacy Investigations Branch

[43] Northern Ireland Office, *Addressing the Legacy of the Northern Ireland's Past: Analysis of the Consultation Responses* (2019), p12 & 21.
[44] 2020-01-08_a_new_decade__a_new_approach.pdf
[45] https://www.legislation.gov.uk/ukpga/2023/41/enacted
[46] For further detail see section 2.4 and for a full critique see 'Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis Of Proposals On Dealing With the Past in Northern Ireland' (Kieran McEvoy, Daniel Holder, Louise Mallinder, Anna Bryson, Brian Gormally & Gemma McKeown, April 2020).
[47] The Ombudsman can still issue Reports in 95 investigations it had previously completed.
[48] The Troubles: 'Legacy Act denies victims like me closure' - BBC News

investigations and further 'called in' independent police investigations. The Legacy Act had also curtailed many hundreds of civil court cases.

It is worth reflecting on the level of delivery of the Package of Measures, including the accountability they provided for patterns of human rights violations prior to their closure, as this provides the context as to why the previous Government were keen to replace these mechanisms with the ICRIR.

There was a considerable level of activity of the Package of Measures in recent years. In 2022 we commented on legacy inquest decisions and on 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. Civil cases were also leading to reparations and information recovery. The Council of Europe Committee of Ministers noted the 'vital role played by the inquest system' as well as the Police Ombudsman.[49] The next section offers illustrations of how for each mechanism was able to provide significant levels of information recovery.

Inquests as a route to information recovery and historical clarification

In relation to *inquests*, a programme of legacy inquests was established as a Five Year Plan by Sir Declan Morgan when he was the Lord Chief Justice. Whilst there have been inquests into the actions of non-state actors (the Kingsmill massacre and Birmingham pub bombings), a broad number of legacy inquests focusing on state actions have contradicted previous official versions of events and found the actions of state actors to be disproportionate and unjustified, including:

- The Ballymurphy Massacre inquest completed in July 2021, after 100 days of evidence Mrs Justice Keegan (now Lady Chief Justice) 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.[50] 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 that were previously denied.
- 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 shooting 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 7 August 1974, Coroner held (verdict 21.01.21) that the shooting cannot be justified.

[49] 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
[50] https://www.judiciaryni.uk/ballymurphy-inquest

- 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.[51]

As noted, the previous UK Government amended the Legacy Bill in the House of Lords during passage to ensure that it would prematurely close *more* Legacy Inquests than would have been captured by the original framing in the legislation.

Civil proceedings as a route to information recovery, reparations and historical clarification

Civil litigation on legacy issues initiated by victims and survivors provided reparations, accountability and information recovery in relation to conflict-related incidents. By 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 previous last three years, 29 resulting in financial settlements from the MoD and 14 claims discontinued or resolved by other means.[52] This does not include claims against other state agencies. We were not aware of a single civil claim that has been determined to be invalid or ill founded.

Civil actions initiated by victims and survivors had also proved an effective mechanism to obtain discovery, findings and historical clarification denied to victims and survivors through other routes. For example:

- The Sean Graham bookmakers killing on the Ormeau Road in 1992 where the loyalist paramilitary UDA 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. This was therefore a high-profile case reported on by the Police Ombudsman in 2022. During the Ombudsman investigation, it became clear as a result of discovery via a civil action taken by the family that significant material 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.[53]
- 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 relatives had taken a civil claim against state agencies alleging security force collusion with loyalist paramilitaries in the killings.[54]
- In March 2022 the High Court in Belfast awarded damages of £350,000 to the family of the late Liam Holden in a ruling that found he had been tortured by the British

[51] CAJ Submission to the Council of Europe Committee of Ministers, July 2023.
[52] https://www.theyworkforyou.com/wrans/?id=2022-05-19.HL374.h
[53] For further information see the Police Ombudsman Operation Achille report.
[54] https://www.bbc.co.uk/news/uk-northern-ireland-59641564

Army, including a finding that the Army had engaged in 'waterboarding.' The narrative verdict by the Court runs to 60 pages, providing substantive information recovery.[55]

- In another case the High Court awarded five figure compensation 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*.'[56]

Against this backdrop, the Legacy Act sought to prohibit any further civil legacy cases. This was ultimately found to be unlawful by the courts.[57]

Police Ombudsman reports and information recovery

In January 2022, the Police Ombudsman released her Operation Greenwich 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.[58] This included the murder of Patrick Shanaghan, subject to the *Shanaghan v UK* findings.

The Operation Greenwich report provides 338 pages of legacy information recovery and raises significant concerns regarding collusive activity by the Police in relation to the killings, finding complaints by families that had led to the long running investigation had been 'legitimate and justified'. The 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.

[55] 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, that 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". 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-rules

[56] https://www.belfasttelegraph.co.uk/news/courts/belfast-man-awarded-90k-damages-over-grandfathers-killing-involving-police-informant/729726937.html

[57] The High Court ruling found that the ban on further civil case was unlawful insofar as it was retrospective. The Court of Appeal went further to find the ban on civil cases ECHR-incompatible per se.

[58] https://www.policeombudsman.org/getmedia/ac49ce6c-dbc5-47ee-af6f-ce354ab3e224/OPERATION-GREENWICH_1.aspx?ext=.pdf

- The failure by police to adequately address the UDR [Ulster Defence Regiment – military] officers passing information to paramilitaries described as '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 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 northwest 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 intervene 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.[59]

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.[60] The Police Ombudsman's report identified 'significant investigative and intelligence failures' and 'collusive behaviours' by the RUC 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.

[59] https://www.policeombudsman.org/getmedia/ac49ce6c-dbc5-47ee-af6f-ce354ab3e224/OPERATION-GREENWICH_1.aspx?ext=.pdf

[60] https://www.policeombudsman.org/investigation-reports/historical-investigations/investigative-and-intelligence-failures-and-collusive-behaviours-by-police-in-relation-to-series-of

- 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 whose reports are still outstanding, including complex investigations (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.'[61]

In June 2022 the Police Ombudsman issued a further legacy report into the 'Derry 4'. This relates to 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.'[62]

In April 2023 the Police Ombudsman issued a further historical investigations report into the 1974 loyalist killing of an independent elected representative Patrick Kelly. The investigation 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 alibis 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 that some actions were indicative of collusive behaviour.[63]

In this context, the Legacy Act closed down any further legacy investigations by the Police Ombudsman, with hundreds of outstanding investigations sought by victims discontinued.

PSNI Legacy Investigations and HET and LIB

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. Whilst a criminal justice outcome remained a possibility the then Chief Constable Sir Hugh Orde set out that the main work of the HET was focused on providing the maximum information possible to families in family reports.[64] The HET completed reviews of 1,625 cases relating to 2,051 deaths, of these 1,038

[61] https://www.irishnews.com/news/northernirelandnews/2022/02/08/news/police-ombudsman-collusive-behaviours-identified-in-operation-achille-are-systemic--2584061/

[62] https://www.policeombudsman.org/investigation-reports/historical-investigations/young-men-were-subjected-to-coercion-and-oppression-before-confessing%E2%80%9D-to-terrorist-crimes

[63] Patrick Kelly's Family 'Failed by Police' (policeombudsman.org)

[64]: '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 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,' Sir Hugh Orde, War is Easy, Peace is the Difficult Prize, The Annual Lord Longford Lecture 2 December 2009, Available at Sir Hugh Orde: 'War is easy. Peace is the difficult prize' - The Longford Trust

were attributed to republicans, 536 to loyalists, 32 to the army, and 9 cases unknown.[65] Hundreds of family reports were produced which brought a measure of resolution to many families.[66]

Ultimately the HET was stood down following a highly critical inspection by the HM Inspector of Constabulary which found that the HET had given such preferential treatment to military cases that it had not acted in a manner compliant with ECHR Article 2. This in large part related to the involvement of HET personnel who were former RUC officers and the consequent issues of independence. Notably not a single one of the cases referred for full investigation by the HET was a 'state involvement' case. The PSNI Chief Constable consequently directed that all 238 military cases that had been in the remit of the HET be the subject of a fresh investigation and established a new Legacy Investigations Branch (LIB).

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).[67] The higher number of security force cases reflects the deficiencies in previous investigations.

The PSNI 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.[68] 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.[69] A position that the LIB lacked independence in state involvement cases had already been taken by the Westminster Joint Committee on Human Rights.[70] The issue was subsequently dealt with by the UK Supreme Court in 2021 in the cases of McQuillan, McGuigan and McKenna [2021] UKSC 55 which held that it had not been established 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.[71]

Figures provided in April 2024 by the Public Prosecutions Service (PPS) stated that since 1 January 2012 53 prosecutorial decisions in 'Legacy Cases' were recorded. 28 of these related to alleged offences involving republicans (with decisions to prosecute in 12 cases, with seven concluded, leading to three convictions, two acquittals, and two discontinued one following the death of the defendant). Nine of the 53 cases related to alleged loyalist paramilitary activity, with four decisions to prosecute, two convictions, one acquittal and

---

[65] Troubles legacy cases bias disputed by figures BBC News Online 2 February 2017,

[66] See the Committee of Ministers, Interim Resolution CM/ResDH(2009)44.

[67] http://www.bbc.co.uk/news/uk-northern-ireland-38844453

[68] 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

[69] 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.

[70] 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.'*

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

one ceased after the death of a defendant. Eight of the cases related to military veterans (a total of 34 suspects, 17 of which related to Bloody Sunday). These cases resulted in decisions to prosecute in six cases, two of which were live, one resulting in the acquittal of two soldiers (Soldier A & C). Two were withdrawn following the death of a defendant (Dennis Hutchings) and a suspect (solider B). Two were live (Soldier F, Bloody Sunday) and a MRF case. There was one conviction – of David Holden, found guilty of the manslaughter of Aidan McAnespie. The final eight cases involved police officers, and all resulted in a decision not to prosecute.[72]

The conviction of the former soldier for the manslaughter of a civilian Aidan McAnespie in 1988 was the first occasion a member of the security forces had been convicted in a legacy case relating to the Northern Ireland conflict.[73] A sentence of three years in prison was handed down but suspended with no jail time being served.[74]

These figures cover PSNI investigations but do not cover Operation Kenova. To date all decisions in relation to Kenova (relating to state and non-state actors) have resulted in decisions not to prosecute.

'Call In': Operation Kenova criminal investigations

Another element of the Package of 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 Jon Boucher, named after its first investigation Operation Kenova (into the running of an alleged state agent in the IRA), had responsibility for '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.[75]

In March 2024 the interim report of Operation Kenova was finally published.[76] The report commented on the obstruction and delay on the part of state agencies to other legacy mechanisms:

> It is abundantly clear that agencies of the state involved in dealing with the Troubles have made decisions not to disclose information that should have been passed to legacy investigations, and have permitted a culture of delay and obstruction. Those leading previous legacy investigations have evidenced these actions. This should not happen, particularly where grounds exist to indicate the state was complicit in or turned a blind eye to serious criminality.[77]

The Kenova Interim Report found that state agents were involved in human rights violations including murder and torture and were shielded from the criminal justice system:

---

[72] PPS LEGACY OVERVIEW – AS OF 10th APRIL 2024, (correspondence from PPS, April 2024).
[73] https://www.judiciaryni.uk/judicial-decisions/2022-nicc-29
[74] https://www.amnesty.org.uk/press-releases/northern-ireland-ex-soldier-guilty-manslaughter-aidan-mcanespie-troubles-case
[75] 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).
[76] https://www.kenova.co.uk/Kenova%20Report%202024%20Digital%20version%20-%20FINAL.pdf
[77] https://www.psni.police.uk/sites/default/files/2024-03/Operation%20Kenova%20Interim%20Report%202024.pdf Operation Kenova Interim Report,para 37.2

> We have also established that agents were involved in murder. There is no evidence to suggest that the authorities considered holding these agents liable for their criminal acts. In some instances, the RUC was not even informed of the involvement of Army agents in criminality. After his resettlement, one agent assisted the security forces providing lectures to new agent handlers and other security force personnel. These training presentations included admissions to serious criminal offences that have not been dealt with by the criminal justice system. [paragraph, 71.8]
>
> The security forces sometimes knew serious offences were taking place, including murder and torture, but to protect their sources they did not always pass on or act on this intelligence to the detriment of the rule of law. In many cases, the perpetrator reoffended and the organisation handling the agent concerned continued to protect them despite the agent's repeated involvement in serious criminal offences. [16.23]
>
> Some Kenova victims who survived PIRA mistreatment have named those responsible for violence against them and I have established that some of them were agents when they committed acts of torture, including shootings. [67.3]
>
> We have identified occasions when agents were under surveillance by the security forces and the surveillance team was withdrawn leaving the victim exposed to torture and murder.

Against the backdrop of the Kenova reports, the Legacy Act prohibits any further legacy investigations by 'called in' independent police teams.

2.3 State Impunity and the Northern Ireland conflict, the International Expert Panel report

In late April 2024 '*Bitter Legacy', The Report of the International Expert Panel into State Impunity and the Northern Ireland Conflict* was published, with launches in Belfast, Dublin and London. [78]

The International Panel had been convened by the Norwegian Center for Human Rights at the University of Oslo at the request of CAJ and the Pat Finucane Centre. The Panel of international experts, consisting of academics, lawyers, human rights activists and former police officers, was tasked with providing an authoritative independent assessment of the extent to which there has been state impunity for human rights violations during the Northern Ireland conflict. The report contains a foreword from former UN Special Rapporteur Juan Méndez and an afterword from former South African Truth and Reconciliation member Yasmin Sooka, who had been involved in the initiation of the Panel.

The Panel were supported by teams of postgraduate and other students examining a vast array of archival records and evidence from legal proceedings and the Package of Measures; the Panel conducted seven site visits to Northern Ireland to gather evidence from dozens of families and practitioners. The Panel looked in detail at the question of state impunity in the thematic areas of direct state killings, torture and collusion.

[78] https://www.jus.uio.no/smr/english/about/id/law/nipanel.html See summaries in media including the Irish Times and Guardian)

The Panel was established in light of the introduction of the Legacy Act closing down independent investigations under the Package of Measures, in the context of official claims that such legacy investigations were 'imbalanced' or had constituted a 'witch-hunt' against the security forces. By contrast, the International Expert Panel concluded in its report that the UK had in reality '*operated a widespread, systematic, and systemic practice of impunity, protecting security forces from sanction'* and '*not only engaged in collusion but also blocked proper police investigations into conflict-related killings to protect implicated security force members and agents.'*[79]

The conclusions of the panel echo the concerns of Pablo de Greiff, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, who was invited by the UK Government as part of his mandate to assess the NI situation and undertook official visits in 2015 and 2016. His November 2016 UN 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.'[80] The Special Rapporteur ultimately concluded 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.'[81]

The International Expert Panel recommend that the Legacy Act is repealed in its entirety and replaced with a Stormont House + model, extending the remit of Stormont House mechanisms to also cover Article 3 ECHR violations, and for the Irish Government to also legislate to establish a counterpart HIU for its jurisdiction. In order to examine themes and patterns the Panel also recommends that two Governments: *seek to establish, with the assistance of the United Nations and Council of Europe human rights mechanisms, an independent international commission to thematically examine patterns of human rights violations and impunity during the Northern Ireland conflict, including torture and collusion, with legislation to provide full powers of disclosure.*[82]

2.4 Origins of and agenda behind the ICRIR: the motivation for the Legacy Act

This section explores the origins and agenda behind the Legacy Act and its establishment of the ICRIR. It begins by examining the motivations of its key architects and protagonists, relying on the public statements they made at relevant junctures.

Perceived Need to Halt the 're-writing' of history

[79] https://www.jus.uio.no/smr/english/about/id/law/nipanel.html

[80] 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.

[81] As above, paragraphs 54 and 59.

[82] https://www.jus.uio.no/smr/english/about/id/law/nipanel.html

When introducing the Legacy Bill and explaining the rationale for doing so the then Secretary of State for Northern Ireland Brandon Lewis MP raised concerns that the existing legal proceedings in legacy cases were effectively 're-writing history.'

Mr Lewis attacked law firms who have worked on legacy cases and what he described as 'protracted and adversarial legal processes' that he claimed were 'delivering neither justice nor information in the overwhelming majority of cases.' Rather he argued these independent legal processes were feeding '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.'[83]

In light of the Secretary of State's concerns that these increasingly effective mechanisms were casting the State in a bad light, and informing an uncomfortable historical narrative, he considered that such processes must be put to a 'halt' to prevent the re-writing of history.[84]

In the same article, Lewis explained that 'That is why the [Legacy] Bill will also set up a major new oral history initiative' and 'I will also be commissioning an official history of the UK Government's policy in Northern Ireland.'

From this clearly articulated rationale, it is clear that a desire to reassert a particular 'official truth' was a key driving force behind the Legacy Act and the replacement of the existing system under the Package of Measures with the ICRIR.

Secretary of State Theresa Villiers 'pernicious counter narrative' speech

The concerns raised by Brandon Lewis echoed earlier concerns articulated by a previous Secretary of State, Theresa Villiers MP. In February 2016, Ms Villiers made what became known as her 'pernicious counter narrative' speech on the way forward for dealing with the past in Northern Ireland. This intervention also occurred at a time when the legal and investigative mechanisms enabled by the Package of Measures were increasing delivery of significant information recovery and historical clarification– most notably at that time in the Police Ombudsman's report into the Loughinisland massacre. Citing the bravery of the security forces and their dedication, the Secretary of State argued:

> Yet 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.

[83] "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/

[84] As above.

> For some, every allegation of wrongdoing by the State … or those working for it … is treated as fact … however unsubstantiated or whatever the source … and whatever the consequential distress to victims.
>
> Let me be clear. …They currently focus disproportionately on cases where the State was involved or alleged to be involved … leaving families in other cases feeling overlooked and disregarded.[85]

CAJ and three other human rights NGOs wrote to the then Secretary of State in relation to concerns that the speech implied that allegations of human rights violations were vexatious but also that they are being made, not in furtherance of human rights goals such as realising victims' rights and the right to truth and non-recurrence, but with the intention of displacing responsibility from paramilitary organisations.[86] In our correspondence we drew attention to international standards requiring the State not to stigmatise human rights defenders. In response the Secretary of State did not indicate to whom she was attributing the allegation of a 'pernicious counter narrative', but she 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.'[87] We read this statement as evidence of UK government alarm at the prospect of reputational damage from fully independent legacy investigations being conducted by the Package of Measures or under the proposed HIU under Stormont House, particularly in relation to patterns of human rights violations linked to police and security force informants.[88]

Lord Jonathan Caine – Special Advisor and later NI Minister in Lords

Lord Caine has been a central figure in driving forward the Northern Ireland legacy proposals – first as the Special Advisor to Theresa Villers and numerous other Conservative Secretaries of State and later as the public face of the Legacy Bill in the House of Lords where, as a Northern Ireland Minister, he steered its lengthy passage. [89]

During his maiden speech in the Lords in 2018, Lord Caine promoted, as a 'possible way forward' on Northern Ireland legacy cases, a proposal that there should be a new veto, possibly vested in a legacy commissioner, over criminal investigations, prosecutorial proceedings, or inquests, *in relation to the use of force by the security forces* prior to the

---

[85] Full text of speech from Secretary of State Theresa Villiers (newsletter.co.uk)

[86] 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.

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

[88] 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 Sinn Féin, umbilically linked to the 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.' Quoted 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).

[89] https://www.belfasttelegraph.co.uk/life/features/profile-jonathan-caine-theresa-villiers-right-hand-man/30654571.html

GFA.[90] Such a veto would have had the purpose and effect of preventing effective investigation of state involvement cases under the Package of Measures.

In a 2022 debate on Operation Kenova, Lord Caine himself repeated the 'pernicious counternarrative' framing, raising concerns there was an 'attempt by some to rewrite history', and that recent years had seen 'a pernicious counternarrative of the Troubles, which tries to place the state at the heart of every atrocity, denigrates the contribution of the police and our Armed Forces, and seeks to legitimise terrorism. We should strongly resist that.'[91]

The 'Witch-hunt' narrative and allegations of bias behind the NI justice system

Alongside a tabloid campaign alleging a 'witch-hunt' against military veterans in legacy cases statements made by senior politicians, including members of the government, falsely alleged bias against the security forces by the justice system in Northern Ireland.[92]

This includes in 2018 the UK Prime Minister Theresa May incorrectly telling the UK Parliament *twice* that police legacy investigations were *only* focusing on the security forces, despite this being flatly contradicted by PSNI figures.[93]

Earlier on the 13 December 2016 in a debate on legacy cases in Northern Ireland, former Foreign Office Minister and Conservative MP, Sir Henry Bellingham, during a Westminster Hall debate, in addition to suggesting that investigations would 'imperil' the whole peace process and speaking about a live case currently before the courts, directly criticised the then Director of Public Prosecutions (DPP), Barra McGrory QC. Mr Bellingham alleged the DPP was making political rather than evidence-based decisions on the grounds that he was a former defence solicitor who had previously represented republicans.[94]

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*

[90] House of Lords Debate, 9th September 2019, Vol 799, Col. 1369. A version of the proposal was set out by former Attorney General NI John Larkin in a speech to Policy Exchange 'The ECHR and the future of Northern Ireland's past' Keynote Speech by John Larkin QC, published 20 March 2020. See also The Times, March 13th, 2020 'Attorney-General Calls for law Change to Shield Army Veterans.' For analysis see p28-29 Prosecutions, Imprisonment and The Stormont House Agreement: A Critical Analysis of Proposals on Dealing With the Past in Northern Ireland (Kieran McEvoy, Daniel Holder, Louise Mallinder, Anna Bryson, Brian Gormally & Gemma McKeown, April 2020).

[91] https://hansard.parliament.uk/lords/2022-07-14/debates/3B4EDA33-A1EE-49C2-817E-C59FE5A45FBB/NorthernIrelandOperationKenova#contribution-E28EF1B0-8E5D-4956-9DF0-C24D1A83EC00

[92] For a full critique of the 'witch-hunt narrative' see PROSECUTIONS, IMPRISONMENT AND THE STORMONT HOUSE AGREEMENT A Critical Analysis of Proposals On Dealing With the Past in Northern Ireland (Kieran McEvoy, Daniel Holder, Louise Mallinder, Anna Bryson, Brian Gormally & Gemma McKeown, April 2020).

[93] 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.

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

and balanced and allows victims and survivors to see better outcomes than the current piecemeal approach.'[95]

In a further debate in the UK Parliament on the 17 January 2017, former Defence Minister Conservative MP Gerald Howarth also argued that the 'interests of former British soldiers' should be protected against the DPP.[96] The then 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.[97] 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*.'[98]

Secretary of State Karen Bradley MP

In November 2018 the then Secretary of State for Northern Ireland Karen Bradley MP, whilst being questioned in relation to calls for a Statute of Limitations on prosecutions before a Committee at the UK Parliament replied that the problem is that a Statute of Limitations would not stop investigations and inquests which were 'much of the problem' which she really wanted to 'stop'. She also described legal due process as 'harassment in the courts':

> [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.[99]

Boris Johnson's Queen's Speech December 2019

The language of 'vexatious' claims within the witch-hunt narrative even found its way into the Queen's Speech in December 2019, which alleges that former members of the security forces are the victims of 'unfair and vexatious claims' stating that:

---

[95] As above.

[96] https://hansard.parliament.uk/commons/2017-01-17/debates/58D7C09F-47A1-49C7-A347-A38703C7C6FF/NorthernIrelandAssemblyElection

[97] British soldiers are being failed by Troubles inquiry, Northern Ireland Secretary concedes *The Telegraph* 28 January 2017 https://www.telegraph.co.uk/news/2017/01/28/soldiers-failed-troubles-inquiry/

[98] https://www.irishnews.com/news/2017/01/31/news/brokenshire-under-fire-over-legacy-and-anthem-snub--912913/

[99] 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.[100]

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.[101] In essence the allegation is that police and prosecutors were engaged in some sort of gross misconduct against military veterans. Whilst this is simply not intellectually credible it appears to have underpinned the motivation to close the Package of Measures and replace them with the ICRIR.

Sir Declan Morgan – Chief Commissioner of the ICRIR

Whilst there is no suggestion that Sir Declan Morgan, now Chief Commissioner of the ICRIR shares the view that prosecutors, courts, and other public bodies are engaged in some type of 'vexatious' misconduct, there is some indication he may sympathise with some elements at least of the 'imbalance' narrative.

A *Belfast Telegraph* platform piece by Sir Declan penned shortly after taking up his ICRIR role was headlined, that the 'current system for dealing with the past is defective and unfair.'[102]

In testimony to a Westminster Parliament Committee the former Lord Chief Justice claimed there was a:

> …disparity between the opportunities of those whose relatives have been killed or those who have been injured as a result of state activity and those many hundreds or thousands of people who have lost their lives as a result of terrorist activity, who seem not to have had, either from this Government or the local parties, any proposal put forward that addresses their needs.[103]

Such an assertion is of course highly contestable. The statistics on legacy cases demonstrate that cases dealing with non-state actors formed most of the legacy caseload. The extent to which state-involvement cases have been more prominent in legacy caseloads is largely reflective of the fact that such cases were never properly investigated in the first place in a context of widespread impunity. What was novel was that for the first time, the Package of Measures was also beginning to deal with state involvement cases that had not previously been subject to effective investigations.

---

[100] 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.

[101] 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* 55 [2000] 1 FLR 759 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.' 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.' (D. Young et al (2014) Abuse of Process in Criminal Proceedings (4th edition).

[102] https://www.belfasttelegraph.co.uk/opinion/comment/current-system-for-dealing-with-the-past-is-defective-and-unfair/2122015429.html

[103] https://committees.parliament.uk/oralevidence/10446/html/

The latter assertion from Sir Declan also appears to misconstrue the Stormont House Agreement, under which an independent police unit was to be established to deal with all unsolved Troubles-related deaths, not just those involving the state. Regardless it is significant that the now head of the ICRIR articulated this view.

2.5 Written Ministerial Statement (WMS) March 2020, the move away from the SHA to the development of the Legacy Act and ICRIR

A commitment to honour the Stormont House Agreement (and legislate for it within 100 days) was repeated in the UK-Ireland *New Decade New Approach* Deal of January 2020 negotiated by then Secretary of State Julian Smith MP.

However, by this time, Boris Johnson had become Prime Minister, and subsequently removed Julian Smith as Secretary of State and replaced him with Brandon Lewis who signalled, in a Written Ministerial Statement (WMS) on the 18 March 2020, the abandonment of the SHA for the approach that ultimately resulted in the Legacy Act.[104]

According to the Minister for Veterans' Affairs Johnny Mercer MP, the genesis of the Legacy Act centred on ending proceedings against members of the military. In his leadership campaign, Boris Johnson had signed a 'veterans pledge' as part of a campaign by Mr Mercer with military contacts and *The Sun* Newspaper, which included 'an end to the vexatious pursuit of those who served in the military in Northern Ireland.'[105]

Speaking at a US University in October 2023, the ICRIR Commissioner for Investigations, Peter Sheridan, alluded to this campaign and explained that the Legacy Act was established under a thinly disguised agenda to protect military veterans:

> The reason why there is so much opposition to it [The Legacy Act] is the British Government decided on this because they want to protect the veterans… ...there was a big lobby group, pressure group, in the UK and Boris Johnson, when he was the Prime Minister, said they were going to bring in this legacy act and the focus was, everybody knew it even though the Government didn't say it that way, but everybody knew it was about the veterans, soldiers.[106]

The WMS coincided with the introduction into the UK Parliament of what became the Overseas Operations (Service Personnel and Veterans) Act 2021, which limits the ability to prosecute British soldiers for war crimes abroad. Noting the introduction of that Bill, the WMS made clear that the intent of the policy changes away from the SHA towards what would become the Legacy Act was 'to ensure equal treatment of Northern Ireland veterans and those who served overseas.'[107]

Whilst vague, the WMS proposed 'one independent body' to oversee and manage the information recovery and investigative aspects of the legacy system.

---

[104] https://www.gov.uk/government/news/addressing-northern-ireland-legacy-issues

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

[106] https://www.irishnews.com/news/northernirelandnews/2023/11/28/news/peter_sheridan_legacy_law_designed_to_protect_british_soldiers-3795547/

[107] 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/

No further detail was set out until May 2021 when media leaks, coinciding 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.[108]

Provision for a NI Legacy Bill was referenced in the Queen's Speech[109] with a section stating that the Bill, in addition to claiming better outcomes for victims, was aimed at ending the 'cycle of investigations'…'in line with our commitments to veterans'.[110] Tory MPs, including the former Veterans' Minister, claimed that they had been given assurances that the Legacy Act was aimed at protecting veterans from proceedings.[111]

2.6 Towards the Legacy Act and ICRIR – the Command Paper, July 2021,

A Command Paper was ultimately produced in July 2021 to set out the new legacy policy.

The Command Paper proposed an amnesty broader in scope than that introduced by General Pinochet in Chile. It also provided for legislating to close the 'Package of Measures' – including all prosecutions in legacy cases (including stopping ongoing cases already before the courts), ending PSNI and Ombudsman investigations, inquests and civil court proceedings. To justify this, the Command Paper made unsubstantiated claims that that civil, coronial processes relating to the Troubles, like criminal processes, 'involve an approach that can create obstacles to achieving wider reconciliation.'[112]

In relation to the ICRIR, the Command Paper proposed the establishment of a single legacy mechanism which was then called the Information Recovery Body (IRB). The IRB was only to conduct light-touch desktop reviews and rely on voluntary testimony. It was clearly not designed to conduct ECHR-compliant investigations.

These proposals evolved into the Legacy Act and ICRIR. Whilst a name change was presumably prompted by a belated realisation the same acronym had historical significance in Ireland,[113] the addition of word 'reconciliation' to the title of the ICRIR, is likely to have been by way of presenting legal cover for the amnesty scheme. The addition of further powers to the ICRIR is likely to have been in light that the 'IRB' would have floundered easily in court regarding any ability to meet the legal requirements of conducting an investigation.

---

[108] CAJ Submission to Council of Europe Committee of Ministers, December 2021.

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

[110] https://www.gov.uk/government/publications/queens-speech-2021-background-briefing-notes 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."

[111] See comments of Mark Francois MP Hansard 14 July 2021, column 401 and Johnny Mercer: https://www.standard.co.uk/news/uk/johnny-mercer-northern-ireland-londonderry-conservative-british-b943939.html.

[112] Command Paper, paragraph 37 & 380. It should also be noted that whilst the IRB was reliant on voluntary testimony – the SOSNI had no expectation that non-state actors would cooperate with the IRB: 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.

[113] The 'IRB' is the same acronym as that used by the Irish Republican Brotherhood, the predecessor organisation to the IRA.

Nevertheless, the IRB powers (or lack thereof) do reflect the type of light-touch review mechanism the architects of the Legacy Act clearly had in mind.

The CAJ-QUB Model Bill team also criticised the Command Paper for containing deeply misleading information to seek to justify the proposals, for example, that it:

> Deliberately misrepresents both the existing 'Package of Measures' and the [Stormont House] 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.'
>
> …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.

Notably the current Commissioner of Investigations of the ICRIR has also implied that before the ICRIR was established 'there was one process, a criminal justice route.'[114] This contention does not accurately reflect the previous system and Package of Measures which contained mechanisms (inquests, civil proceedings, public inquiries) which were not criminal justice mechanisms at all, as well as Ombudsman, HET and 'called in' investigation which whilst could involve a criminal investigation were also largely grounded in information-recovery reports.

Model Bill team analysis also noted deeply misleading comparisons in the Command Paper with the South African Truth and Reconciliation Commission (TRC), despite the IRB proposal bearing no resemblance to the South African TRC.[115]

Some assertions in the Command Paper arguably lay bare the 'official truths' and narrative that the architects of the Legacy Act wished to maintain. Particularly criticised by human rights and victims groups was the following claim in the Command Paper:

> Security Forces were responsible for around 10% of Troubles-related deaths - the vast majority of which were lawful - and loyalist and republican paramilitaries for around 90% of all deaths.

The reference to 10%, which relates to those directly killed by the army and RUC, excludes any cases of security force collusion, which would increase the state responsibility significantly with what is known to date from the Package of Measures.

Whilst the 10% figure had been the routine language of Ministers, the claim that the vast majority' of killings by the security forces were 'lawful' proved more controversial.

Firstly, it implies many if not most victims of the state were 'guilty' of a serious offence at the time they were killed. 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

[114] ICRIR Commissioner for Investigations, oral evidence to Committee for the Executive Office, 18 September 2024, response to Claire Sugden MLA.

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

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.)[116]

The claim in the Command Paper is not backed by any evidence, and Freedom of Information requests revealed the NIO had not conducted any assessment at all to reach this conclusion.[117] To the contrary, there is evidence that the majority of people killed by the security forces were in fact undisputedly unarmed at the time of their deaths.[118] The International Expert Panel on State Impunity and the Northern Ireland conflict examined the quality of investigations into state killings during the conflict. Its report records that:

> The Panel found that the State failed to comply with its obligations under Article 2 ECHR to investigate killings fairly and effectively. Investigations during the conflict conducted prior to 1974 were subject to an agreement between the RUC and military, which replaced police investigations into military killings with inquiries conducted by the Royal Military Police (RMP). In these 'presentational' or 'tea and sandwiches' arrangements, interviews were informal and interviewees were not cautioned, which means that their statements have no legal evidential value. The Panel found that cases after 1974 and into the 1980s were generally characterised by omission or poor execution of key investigative steps where important lines of enquiry were not followed up.[119]

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. 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 otherwise by the Package of Measures legacy investigations.

Should the Package of Measures have continued their investigation into deaths at the hands of the security forces and similar patterns had continued to emerge, the maintenance of the aforementioned 'official truth' would become further untenable. This would appear to be one of the motivations behind the Legacy Act replacing the Package of Measures with the ICRIR.

2.7 Who designed the Legacy Act and ICRIR?

Following the WMS, the Legacy Act legislation was developed behind closed doors.

Duties around public consultation were sidelined, as were requests from the Northern Ireland Affairs Committee for testimony from Ministers. Victims' groups also raised concerns

---

[116] In accordance with Article 2 (right to life) of the ECHR, for further 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.'

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

[118] 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. Prof Kieran McEvoy, evidence to Defence Select Committee of UK Parliament, 7 March 2017) citing research by Professor Fionnuala Ní Aoláin.

[119] https://www.jus.uio.no/smr/english/about/id/law/nipanel.html Page 14.

that they had not been consulted. The Equality Commission for Northern Ireland twice investigated the Northern Ireland Office (NIO) finding that on both occasions it had breached procedural duties on policy development its statutory Equality Scheme.[120]

The 'Legacy Investigations Senior Working Group'

Following the WMS, the NIO established a 'Legacy Investigations Senior Working Group' to take forward the development of legacy policy. The existence of this group was only publicly known when it was referred to by the then PSNI Chief Constable Simon Byrne before a Westminster Committee to explain that the PSNI had declined to take part in this group due to their fear that their impartiality would be tainted by association with it.[121]

The Terms of Reference and Membership of the Legacy Investigations Senior Working Group were released to CAJ following to a Freedom of Information request.[122] The Group's role was to 'enable expert consideration of operational issues in relation to the development of policy proposals for dealing with the legacy of the past in Northern Ireland' and provide 'advisory recommendations' on the detailed outworkings of the WMS. The named members were:

- The Northern Ireland Office (NIO) and 'NIOLA'
- The Home Office (Whitehall department which oversees MI5 and policing)
- MET Police's Counter Terrorism (CT) Team (leads London CT operations but also has national and international CT functions)
- National Crime Agency (NCA) (UK-wide policing agency)

The Chair of the Working Group was the new Permanent Secretary of the NIO who had taken up post in January 2020, just before the change of policy and WMS. The new Permanent Secretary had previously been the UK Deputy National Security Advisor and held other national security roles in the UK and overseas prior to her appointment to the NIO. She remained Permanent Secretary of the NIO until the Legacy Act was completing its Parliamentary passage, when she departed to take up the position of Chair of the Joint Intelligence Committee (JIC), which supports the Prime Minister and National Security Council.[123]

The advised legacy policy proposals appear therefore to have been developed with extensive involvement of those with policing and 'national security' backgrounds and roles.

There is also some evidence through newspaper briefings of NIO-MOD engagement over the legacy proposals, but nothing further in the public domain.[124]

---

[120] For further detail see CAJ: The Road to the Northern Ireland Troubles (Reconciliation and Legacy) Act 2023: A narrative compendium of CAJ submissions, November 2023.

[121] NI Affairs Committee, 'Addressing the Legacy of Northern Ireland's Past: the Government's New Proposals (Interim Report) October 2020, paragraph 21.

[122] NIO FOI/23/215 – Holder 27 November 2023

[123] 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.

[124] For further detail see CAJ: The Road to the Northern Ireland Troubles (Reconciliation and Legacy) Act 2023: A narrative compendium of CAJ submissions, November 2023.

Further evidence of consideration of options prior to the WMS was revealed in the High Court Ruling in *Dillon*.[125] This revealed an official 'options paper' had been presented prior to the WMS on 9 January 2020. This presented six policy options:

- 'Option A' was to retain investigations by the Package of Measures (inquests, PSNI and the Ombudsman). However, it was considered that this would 'provide no certainty to veterans who were being exposed to multiple investigations.'[126]
- Option B was to implement the SHA. Whilst this was viewed more favourably, due to wide support and being 'victim-centred', and having additional 'Truth-seeking' mechanisms, it was cautioned against on grounds it would be unlikely to provide level of certainty which veterans are seeking.[127]
- Option C was a revised SHA whereby after initial review no investigation would be permitted without new evidence. However, the problem with this, it assessed, was that the SHA HIU could still re-investigate cases and therefore it would be unlikely to be supported by veterans and Parliament.[128]
- Option D was a revised SHA model with zero prison time, but also closure of all cases after investigation with no prospect of reopening; prohibiting any new inquests and limiting civil cases, which would remove the possibility of prosecution on a case by case basis.
- Option E would scrap the SHA mechanisms for a new Family Report Body – which would not conduct investigations, but recover information, and would also stop inquests and limit civil claims.[129]
- Option F proposed a blanket amnesty for conflict-related offences and no HIU. It was conceded that this option would involve abandoning the SHA, face opposition, and that there was no evidence that it would promote reconciliation in NI and would have to have exceptions for grave breaches of fundamental rights such as torture.[130]

It is notable that the options then taken forward by Government that developed into the Legacy Act are an amalgamation of options E & F. Under E, a body, was established to conduct 'reviews' (rather than investigations) and an amnesty was pursued (albeit without the exemptions for torture).

It is also notable that a core reason for not taking forward Options A (retain the Package of Measures) or Option B (implement the SHA) – was expressly that they would have involved continued investigations of veterans.

---

[125] Dillon [2024] NIKB 11.
[126] Dillon [2024] NIKB 11, [95]
[127] Dillon [2024] NIKB 11, [96] Option B was to implement the SHA proposals without revision. This was considered more favourably, in large part because it was "designed to be balanced and fair" and would be accepted by all main NI parties (with the exception of the UUP). Moreover, the focus on criminal justice outcomes was offset by the time limit of five years for operation of the HIU and the introduction of specific truth-seeking bodies. However, it was noted that this option, whilst more victim-centred, would be unlikely to provide the "level of certainty which veterans are seeking."
[128] Dillon [2024] NIKB 11, [97]
[129] Dillon [2024] NIKB 11, [100]
[130] Dillon [2024] NIKB 11, [101]

Colton J in the High Court ruling also made a factual finding that 'there was a policy drive pre-enactment to end (what were considered to be) vexatious claims against veterans.' This finding was appealed by the Secretary of State but upheld by the Court of Appeal.[131]

2.8 The ICRIR and the stated objectives of the Legacy Bill

The recent Court of Appeal ruling reveals that a Secretary of State for Northern Ireland (SOSNI) Policy Paper had set out the reason for the proposal, included in the Legacy Act – to curtail civil clams – as being:

> Legacy Civil cases place a considerable strain on UKG and continue to undermine public confidence in the state (as well as affecting public perception of the police and armed forces).[132]

This rationale appears to make clear that the motivation for ending civil litigation in conflict-related cases is grounded in concerns that judicially adjudicated findings of fact regarding state conduct during the Troubles would cause reputational damage to state, military and RUC.

It would seem logical that the broader provisions of the Legacy Act, including the replacement of the Package of Measures with the ICRIR, would also be consistent with this same objective.

Contradictory messaging was common from the UK authorities and Ministers regarding the purpose of the Legacy Bill. An official communication to the Council of Europe claimed that:

> 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.[133]

This position was echoed by the then SOSNI Brandon Lewis MP in a cover letter to this UK submission. However, the same SOSNI, in introducing the Legacy Bill into the UK Parliament, also expressly linked the purpose of the Bill to ending investigations against military veterans, stating that as a result of the Legacy Bill:

> 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.[134]

The SOSNI in an article for the Conservative Home publication, went further regarding the purpose of the Legacy Bill. The headline of the piece makes no reference to information

[131] Dillon [2024] NICA 59 [11]
[132] Dillon [2024] NICA 59 [245]
[133] DH-DD(2022)579 Communication from the UK May 2022
[134] Official Record (Hansard) House of Commons Tuesday 24 May 2022 Northern Ireland Troubles (Legacy and Reconciliation) Bill Volume 715: debated on Column 115 CA602DA2BB39/NorthernIrelandTroubles(LegacyAndReconciliation)Bill#256

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*.'[135]

The SOSNI 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.[136]

A similar line was taken by another NIO Minister PPS Jonathan Gullis MP, in a publication in the Parliamentary House Magazine.[137]

Similar sentiments were stressed once the Legacy Act had completed passage. The enactment of the Legacy Act was celebrated by the former Veterans' Minister Johnny Mercer MP at the Conservative Party conference in October 2023, in the following terms:

> That totemic scourge on the lives of our extraordinary people [military veterans] who served in Northern Ireland has been removed. The hounding of these special people who stood against terror and violence in Northern Ireland, on our behalf, was appalling. The sight of these men being arrested in their 80s, dragged back to Belfast, hounded literally to death. It was a totemic symptom of a nation's moral ambivalence to those who served.[138]

Whilst these statements demonstrate the motivations by the architects of the Legacy Act of replacing the Package of Measures with the ICRIR, they are further illustrated by the remit of the ICRIR being designed around 'reviews' rather than 'investigations.'

2.9 The design of ICRIR: 'reviews' rather than investigations

Command paper to ICRIR – impact of ministerial assurances

The 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**.**

The Legacy Act altered this to introduce powers to compel testimony to the ICRIR and also powers for ICRIR officers being designated to exercising police powers. 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.'[139] This should be viewed in light of the 'assurances' given to military veterans and their advocates that there would be no further 'investigations'. This included the express assurances from the SOSNI that imply police powers such as arrest and

---

[135] 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/

[136] As above.

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

[138] https://twitter.com/AmandaFBelfast/status/1709621953915498831?s=20 and https://x.com/irishagreement/status/1737520523293134999?s=20

[139] Clause 2(4) of the Bill (as introduced HC)

questioning will not be used against veterans by the ICRIR.[140] The outworking of use of such powers by the ICRIR could therefore be subject to abuse of process applications.

Reviews v Investigations in legacy cases

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, 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 involvement 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.[141]

The draft official SHA legislation 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.

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.[142]

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. These safeguards are stripped out of the Legacy Act and do not apply 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 of the Legacy Act for the ICRIR. This had been a key provision for investigations by the Police Ombudsman.

Rather than seeking to codify duties for ECHR compliant investigations, a different approach has been taken for the ICRIR. The ICRIR Commissioner for Investigations, will exercise operational control over reviews which are to 'look into' the circumstances of the death or injury in question.[143] At this early stage we have heard concerns that families approaching the ICRIR risk being 'funnelled' into light touch reviews rather than thorough investigations.

---

[140] "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/

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

[142] For example see: Loughinisland massacre: Court quashes Police Ombudsman report - BBC News

[143] Legacy Act section s13

A Labour amendment during the passage of the Bill sought to introduce some minimum standards for the ICRIR reviews based on Operation Kenova investigations. It is notable that even this minimum standard was *rejected* by the UK Government and does not form part of the framework for the ICRIR in the Legacy Act.[144]

A series of amendments were tabled by Baroness Nuala O'Loan, a former NI Police Ombudsman, to probe the investigative function of the proposed ICRIR.[145]

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.[146] The Minister Lord Caine rejected all of these amendments.[147]

It is notable that the codified approach envisaged in the SHA or sought by amendments to the Bill for the ICRIR were rejected by the architects of the ICRIR who have instead gone for a model whereby they have vested there is considerable discretion in the hands of the ICRIR Commissioner for Investigations as to the extent to which an investigation will be conducted.

This would therefore require considerable trust in the office holder and the absence of any real or perceived conflicts of interest in discharging the function. In essence a more codified approach to requiring ECHR-compatible investigations has been replaced with a 'trust us' model in the ICRIR.

A further amendment tabled by former Labour SOSNI (now Lord) Peter Hain would have required ICRIR investigations are carried out to criminal justice standards and be compliant with the investigative duties under the ECHR.[148] This was also rejected by the former Government.

There has been some indication from the current ICRIR Commissioner for Investigations and others that an approach may be taken to reviews more focused on answering victims' questions on matters such as how a person died rather than the broader circumstances and culpabilities around their death. To this end the ICRIR has put forward the model of a 'focused investigation' as among one of the three 'review' processes it will decide, at its discretion, to use. This type of 'investigation' would focus on answering questions from families, in what the Commissioner of Investigations has described as a 'very different process':

> So, some families have come, and they want the simplest of answers who was last to speak to my loved one, what did they say, did they get the last rites. Those things have been sitting in people's minds and I think that we need to create an

[144] 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

[145] HL Hansard Volume 827: 24 January 2023 Column 152-3

[146] HL Hansard Volume 827: 24 January 2023 Column 152-3

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

[148] HL Hansard Volume 827: 24 January 2023 Column 155-6 Amendment 72

> understanding to the very people that you're talking about out there that this is a very different process.[149]

It is of course the case that this may be what some families wish for. The emphasis on this approach from the ICRIR indicates that its review process, and specifically an ICRIR 'focused investigation' appear to be a very different process to Article 2 compliant investigations. Such an approach if taken across a range of cases would diverge from the broader role of legacy investigations to secure accountability and guarantees of non-recurrence.

It is also notable that the current Commissioner for Investigations, during the passage of the Legacy Act and prior to his recruitment to work for the ICRIR has stated that he gave evidence to the Council of Europe that he considered the Legacy Act breached Article 2 ECHR by not providing for 'thorough investigation and so on.'[150]

2.10 Was the ICRIR structure actually designed around the amnesty scheme?

In cases where a person had been granted immunity from prosecution under the conditional immunities scheme, ICRIR powers of criminal investigation would have likely been obsolete as the threshold for using police powers (linked to investigations of criminal offences) would likely no longer be reached once an immunity had been granted.

Whilst the Courts found the conditional immunity scheme unlawful and it has been disapplied, it is worth recalling that the whole structure of the Legacy Act and the ICRIR model was designed and predicated *around the amnesty scheme* rather than the independent investigations model that was intended for the Stormont House HIU. The Minister, Lord Caine, in the House of Lords in fact went so far as to openly state that the ICRIR model would have no 'chance' of working *without* the amnesty scheme.

The conditional immunities scheme was described in the House of Commons by the Secretary of State for Northern Ireland as 'a crucial aspect of the information recovery process.'[151] In resisting an amendment to the scheme in the House of Commons, Ministers sent the following reasoning back to the Lords (emphasis added):

> "COMMONS REASON The Commons disagree to Lords Amendments 44D, 44E, 44F, 44G, 44H and 44J for the following Reason—
>
> 44K Giving family members a role in whether immunity should be granted or not would *critically undermine the effectiveness of delivering on the principal aim of this legislation*.[152]

---

[149] ICRIR Commissioner for Investigations, oral evidence to Committee for the Executive Office, 18 September 2024, response to Claire Sugden MLA.

[150] Special Event with Peter Sheridan | Peacebuilding: A Matter of Trust, Weatherhead Center for International Affairs https://www.youtube.com/@HarvardWCFIA, 48mins

[151] [HC Hansard Vol 736 Clm 825 18th July 2023]. Resisting a Lords amendment to excise the immunities scheme, the SOSNI said, 'the Government believe it is the best mechanism by which we can generate the greatest volume of information in the quickest possible time, to pass on to families and victims who have been waiting for so long. That is why the Government cannot accept Lords amendment 44, which seeks to remove clause 18 and conditional immunity from the Bill.'

[152] Hansard UK Parliament Official Report Volume 832: Tuesday 12 September 2023.

Creating what was claimed to be this *'effective information recovery process'* with the immunities scheme at its heart was also the rationale offered for closing down existing Package of Measures.[153]

As alluded to above Ministers also resisted a further House of Lords amendment which would have required all ICRIR reviews to be compatible with the investigative duties under the ECHR. Instead, the ICRIR model of 'reviews' was predicated on information from the immunities process. In the House of Lords, the Minister Lord Caine expressly stated the ICRIR would have no chance of working without the amnesty – stating that the immunities scheme was *'*essential if the new processes which the legislation establishes are to have a chance of working.*'*[154]

Consequently, the disapplication of the conditional immunities scheme by the decision in *Dillon and others,* removes from the Legacy Act the very mechanism the former UK Government had confirmed was essential to make ICRIR work. If the statements of Ministers themselves are to be taken at their word it appears that the ICRIR model was designed around testimony into the amnesty scheme rather than ECHR-compatible investigations.

2.11 Requirements of Article 2 & 3 ECHR compliant investigations

Requirements for effective investigations

As set out in the Court of Appeal ruling on the Legacy Act, the essential purpose of an investigation compatible with ECHR Article 2 is '*to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility*.' This includes in state involvement cases an investigation '*capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible*.' There must also '*be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory*.' The Court of Appeal also highlights that the Article 2 ECHR procedural obligation to carry out an effective official investigation into the circumstances of the death involves investigating the broad circumstances by which a person came to their death.[155]

European Court of Human Rights Guidance on ECHR Article 2 sets out that whilst the procedural obligation to conduct an effective independent investigation was first formulated in relation to the use of force by state actors, since then the obligation has been held to arise in other killings 'irrespective of whether those allegedly responsible are State agents' or non state actors.[156]

Article 2 requires that such investigations be *effective* taking adequate steps, '*In particular, the investigation's conclusions must be based on a thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines to a decisive*

[153] For example, the SOSNI told the Commons that the aim of the legislation was to provide more information to more people than is possible under current mechanisms [HC Hansard Vol 736 Clm 825, 18th July 2023].
[154] Volume 832: debated on Tuesday 5 September 2023
[155] Dillon [2024] NICA 59 [202-3]
[156] ECtHR Guide on Article 2 of the European Convention on Human Rights Right to life Updated on 31 August 2023 [143][144]

extent the investigation's ability to establish the circumstances of the case and the identity of those responsible'[157]

In relation to independence, the European Court of Human Rights Guidance notes '*For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. What is at stake here is nothing less than public confidence in the State's monopoly on the use of force*.'[158]

This requirement is elaborated on in an independent review of Article 2 ECHR compliance of Operation Kenova, by Alyson Kilpatrick BL:

> The requirement under Article 2 - that investigators have independence from those potentially implicated - is well known. It is part of ensuring an effective investigation. Independence in the strict sense requires demonstration that there is nothing which undermines the capacity of the investigators to conduct an independent investigation. Absence of conflict is undoubtedly an essential element of an investigation but independence in the Article 2 sense is more than that.
>
> The ECtHR has held that it is generally regarded as necessary that the persons responsible for and carrying out the investigations to be independent from those implicated in the events. This means not only a lack of institutional connection but also a practical independence *[Jordan v United Kingdom* (2003) 37 EHRR 2] Therefore, independence must be demonstrated as a matter of institutional, hierarchical *and* practical independence. If the investigation appears to be institutionally and hierarchically independent but is not, in fact, independent there is likely be a violation of Article 2…[159]

It has also been held that the procedural obligations under ECHR Article 2 also apply in a similar fashion to investigative obligations under ECHR Article 3, on prohibition of torture.[160]

Temporal restrictions- 'getting out' of duties to undertake ECHR compatible investigations

It is notable that the UK authorities had previously responded to the success of the Package of Measures by (with a considerable degree of success) trying to 'get out' of the Article 2 ECHR obligations through arguing that they largely do not apply to legacy cases due to 'temporal restrictions.' Such an approach would enable 'light touch' reviews of legacy cases without having to meet the specific requirements of an ECHR-compliant investigation.

This is not to say that a new ECHR compatible investigation would be required in all circumstances if a previous ECHR compatible investigation has taken place, there are

[157] ECtHR Guide on Article 2 of the European Convention on Human Rights Right to life Updated on 31 August 2023 [168]
[158] ECtHR Guide on Article 2 of the European Convention on Human Rights Right to life Updated on 31 August 2023 158.
[159] Independent Review of Article 2 ECHR Compliance: Kenova and Related Matters Alyson Kilpatrick BL, 2021 paras 25-26.
[160] https://ks.echr.coe.int/documents/d/echr-ks/guide_art_3_eng paragraph 119 on.

however provisions derived from *Brecknell v the UK* whereby the investigative obligation is revived when new evidence arises capable of leading to investigative determinations.[161]

The context for the ICRIR has been set by the UK Government having consistently and largely successfully arguing on a technicality (of temporal restriction) that the duties under the Human Rights Act 1998 (HRA) *do not apply* to pre-1990 cases as a matter of domestic law (as the HRA was not brought into force until 2000, with a temporal period of 10 years argued). This in essence would mean there are no obligations *in domestic law* in relation to the vast majority of Troubles-related cases to follow the requirements of ECHR Article 2 for an effective, independent investigation inclusive of the above elements.

There was an attempt to remedy this in the SHA discussion by including in the face of the legislation provisions to ensure investigations complied with ECHR Article 2 when the investigative threshold was met. No such requirement is vested in the ICRIR, which could therefore be empowered in domestic law in pre-1990 cases to conduct 'reviews' that are neither effective nor independent.

During the passage of the Legacy Act opposition amendments, supported by Labour raised this point and sought to amend the legislation to require ICRIR 'reviews' to comply with the ECHR. Lord Peter Hain, a former SOSNI, stated:

> … the current legislation refers throughout to a "review" [by the ICRIR]. What many fear—and there are good grounds for that fear, as the noble Baroness, Lady O'Loan, touched on earlier—is that all that will happen will be a superficial look at existing police files, and no more than that, which will reveal very little. There is nothing in the legislation as currently drafted or in the government amendments that sets out the minimum standard that any family can expect from a review.
>
> …Proposed new Section (3A)(a) in Amendment 72 seeks to establish 'minimum standards for a 'review' conducted by the ICRIR'—… Families who engage with this process must have confidence that investigations into their legacy cases will be effective. Proposed new Section (3A)(b) requires that the ICRIR 'complies fully with obligations under the European Convention on Human Rights.'[162]

Ministers successfully resisted this amendment which would have expressly required the ICRIR to carry out its reviews in a manner compliant with the investigative duties under the ECHR. Instead, Ministers amended the legislation to require the ICRIR to comply with the HRA knowing that due to the temporal restrictions, this would not impose obligations on the ICRIR to conduct ECHR-compatible investigations in pre 1990 cases. The ICRIR was in any case already bound to comply with the HRA by virtue of being a public authority subject to the HRA, therefore the amendment can only be seen as window-dressing rather than an attempt to secure greater ECHR-compliance in ICRIR reviews.

---

[161] Guide on Article 2 of the European Convention on Human Rights Right to life Updated on 31 August 2023 [195]"To that end, the Court has held that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures (Brecknell v. the United Kingdom, 2007, § 71)"

[162] HL Hansard Volume 827: 24 January 2023 Column 155-6 Amendment 72

2.12 ECHR Independence requirements, NI legacy mechanisms and the ICRIR

The implications of the ECHR independence obligations in state involvement cases (whether through direct security force killings or cases where informants / state agents are implicated, or there are alleged failings in previous investigations) has led to a practice of exclusion of former RUC officers from NI legacy investigations to date in most mechanisms, and findings of ECHR incompatibility when this has not occurred.

In *Jordan v the UK* the ECtHR had found a breach of ECHR obligations as the investigation into the RUC shooting, even when carried out under the supervision of the then Independent Commission for Police Complaints (the ICPC), had involved RUC officers. It has subsequently been the practice, both in legacy investigations by the Police Ombudsman and the independent police investigations undertaken by Operation Kenova, to preclude the involvement of former RUC or military officers in their investigative teams.

During the controversial term of the second Police Ombudsman (Al Hutchinson) where the Criminal Justice Inspector found that Ombudsman legacy investigations had been altered or re-written to remove criticism of the RUC, and the legacy role of the Ombudsman's Office was suspended due to the 'lowering of independence', Mr Hutchinson resigned and reforms led to the reinstatement of this function with a renewed commitment to independence from the PSNI.[163]

As discussed above the fate of the PSNI Historical Enquiries Team (HET) also turned on the question of independence in state involvement cases and the involvement of former RUC officers, particularly those with a Special Branch/intelligence role. The HET had been set up as an independent unit of the PSNI, reporting directly to the Chief Constable. However, concerns were raised that in practice, the HET was working to the ACC Crime Operations, who also covers Special Branch (officially renamed C3). The HET was closed down following a damning Her Majesty's Inspectorate of Constabulary (HMIC) report finding the HET's approach incompatible with the ECHR due to independence issues and in particular the involvement of former RUC/PSNI officers managing information from C3 intelligence branch. The HMIC held that *'the independence necessary to satisfy Article 2 can only be guaranteed if former RUC officers are not involved in investigating state involvement cases.'*[164]

The Legacy Act departs from the practice of Kenova and the Police Ombudsman of precluding the employment of former RUC or military officers as investigators. Instead, the legislation requires a proportion of ICRIR officers to have prior NI policing experience. The appointed ICRIR Commissioner for Investigations (Peter Sheridan) is himself a former senior RUC & PSNI officer who ultimately served as ACC Crime Operations presiding over the successor PSNI unit to Special Branch (C3) overseeing intelligence and special operations.[165]

The domestic courts rulings on ICRIR independence

The official response from the UK authorities and ICRIR to the *Dillon* High Court ruling was to claim that it has given a green light to the ICRIR meeting ECHR independence requirements.[166]

---

[163] For detail see the CAJ/Queens University 'Apparatus of Impunity' report 2015, chapter 6.

[164] HMIC 'Inspection of the Police Service of Northern Ireland Historical Enquiries Team' 2013, p92.

[165] Lessons learned in counter-terrorism in Northern Ireland: an interview with Peter Sheridan: Critical Studies on Terrorism: Vol 1, No 1 -

[166] The UK states in its communication to the CM that a key finding of the High Court was that "the ICRIR is operationally independent of the UK Government, and is capable of carrying out ECHR compliant (Article 2 and

However, this is an overstatement of what the Court held.

The Court alluded to the proceedings not dealing with a 'specific case' and 'at a remove' could conclude that ICRIR was 'structurally' independent to an Article 2/3 standard taking into account the statutory arrangements and policy documents.[167] The Court went on to state that at a remove it could not conclude that the ICRIR could *de facto* never provide an Article 2/3 investigation, conceding that whilst undesirable for such matters having to be dealt with on numerous cases this would ultimately occur. Alluding to fully understanding the opposition to the new scheme and the reasons for it the Court stated that:

> That said, I cannot at this remove say that the system established under the Act cannot provide an article 2/3 compliant investigation. The Commission is obliged to do so. It has wide powers and a wide range of discretion/flexibility to carry out its reviews. Should it fall short of its obligations under article 2/3 then I have no doubt that they will be subject to the scrutiny of the court, as were the coroners and PSNI in the cases of *Middleton*, *Jordan*, *McQuillan* and *Dalton*. As [the barrister for an applicant] Ms Quinlivan pointed out this may be a highly undesirable consequence, in circumstances where article 2/3 compliant investigations and inquests are being conducted. [367]

As noted, in effect the Court had parked the question of practical independence of the ICRIR to consideration in the specific circumstances of individual cases. The Court of Appeal did not reopen this question, which therefore will be tested with individual cases, although as noted earlier the Court of Appeal did find that the ICRIR's lacked independence to produce its own findings due to the national security veto.

It should be noted that the High Courts' assertion that the ICRIR is obliged to conduct reviews to a standard compatible with ECHR procedural obligations, is only limited to post 1990 cases. The test cases in the *Dillon* challenge all related to post 1990 incidents.

The High Court did briefly explore the question of the ICRIR Commissioner for Investigations being a former senior RUC officer and independence requirements. The Court states this would have to be dealt with on a case-by-case basis stating '*Self-evidently, he must recuse himself from any review involving an incident in which he was involved as a former RUC/PSNI officer, or in respect of which there is a personal conflict of interest*.'[168]

The ICRIR has claimed that prior to the appointment of the Commissioner for Investigations, in light of his past in policing role 'a thorough assessment of this was made', 'including checking the previous roles that he had undertaken to confirm that he had not worked in roles or departments that could potentially be subject to investigation by the Commission.'[169]

Article 3) investigations into deaths and serious injuries DH-DD(2024)364 (02/04/2024). The ICRIR has also stated that "Court has confirmed that the Commission is independent", ICRIR Engagement Team email 1 March 2024.

[167] Dillon [2024] NIKB 11, para 284. [284] Whilst the court is not dealing with a "specific case" it concludes that the proposed statutory arrangements, taken together with the policy documents published by the Commission, inject the necessary and structural independence into the ICRIR. At this remove the court concludes that the ICRIR is sufficiently independent to comply with the requirement for independence to meet the procedural obligations under articles 2/3 ECHR.

[168] Dillon [2024] NIKB 11, para 273

[169] DH-DD(2024)364

However, when CAJ issued a Freedom of Information request to the NIO on information held regarding the consideration given to the past police role of the appointed Commissioner for Investigations, they only held one paragraph of information, which reads as follows:

> In coming to this recommendation, the panel considered carefully his past role as a police officer of the Royal Ulster Constabulary. This is not an automatic bar to appointment. The panel asked the candidate to consider if he had involvement in cases that might fall within the Commission's remit. The candidate confirmed that he did not consider this to be the case due to the roles he had been in, and, while he would have no problem robustly scrutinising officers of the RUC, considered that he would want to build teams and mechanisms with sufficient distance from the RUC to be able to make judgements without any risk to perceptions of independence.[170]

This information would indicate that the consideration by the assessment panel was limited to whether the candidate *himself* declared involvement in particular cases. It is worth recalling that this type of 'self-declaration' model was heavily criticised by HM Inspector of Constabulary (HMIC) in relation to the PSNI Historical Enquires Team. The HMIC report into the HET stated:

> We are aware of one instance in which a former RUC officer led the HET's enquiry into a state involvement case, in breach of: the HET's policy; undertakings given to NGOs and solicitors; and an express wish of the family in question. In addition, we understand that the officer in question actually knew the SIO [Senior Investigating Officer] originally in charge of the case.
>
> Through our examination of the process used to exclude PSNI and RUC officers from state involved cases, we found that the HET adopted a 'self-declaration' process. HET staff are required to declare their previous involvement or prior knowledge in cases. We did not find any evidence that these declarations were subject to any formal checks and validation. We consider that, without a policy that requires the thorough vetting of the HET staff involved in each case, this situation could be repeated. This is of grave concern. We consider that the independence necessary to satisfy Article 2 can only be guaranteed if former RUC officers are not involved in investigating state involvement cases, and if processes designed to ensure this are, in fact, effective.[171]

The risk of repetition of the flaws of the HET by the ICRIR is compounded by the approach the ICRIR has taken in relation to state involvement cases. The ICRIR stated the following in response to a question from CAJ as to the number of requests for ICRIR review (if any) that relate to direct state involvement cases:

> We do not hold that information. The ICRIR will not make determinations about whether 'a death or serious injury was at the hands of the security forces' (your definition)[172] until the investigation has concluded and the Chief Commissioner has arrived at his findings.[173]

---

[170] NIO Freedom of Information request - FOI/23/190, the NIO also provided a copy of a line given for a press Q&A which alluded to this position.

[171] HMIC 'Inspection of the Police Service of Northern Ireland Historical Enquiries Team' 2013, p91-92.

[172] Here 'your definition' refers to the way 'direct state involvement case' was defined in the CAJ Freedom of Information request.

[173] ICRIR FOI response to CAJ FOI/2024/014, 4 November 2024.

This ICRIR response implies that the ICRIR will not decide if the case is a state involvement case *until the ICRIR investigation is completed* and at the findings stage. It is not clear how a process to prevent conflicts of interest of ICRIR officers who have a NI policing or military background being involved in investigations into state involvement cases would operate if a determination as to whether a case is state involvement case or not is not considered as such until they have concluded their work. This approach is being taken by the ICRIR in that the question related to *direct* state involvement cases – i.e. a person killed directly by a solider or RUC officer. In most such cases this is undisputed and evident from the outset. This question is of course more complex in state involvement relating to collusion, where the involvement of a state agent may only become apparent *during an investigation*. The general exclusion of former RUC and military personnel from all legacy investigations – as has been the practice of Kenova and the Ombudsman – is the only sure way of retaining independence.

Furthermore, in the case of the ICRIR Commissioner for Investigations, it is not clear how a case-by-case assessment would work when dealing with a former officer whose career was not restricted to junior roles but rather was also a senior officer. It would be inevitable that the Commissioner for Investigations would therefore be overseeing reviews which engage the actions of former colleagues, including subordinates for whom he was ultimately responsible. The extent of this is heightened by his ultimate role within the PSNI hierarchy over the 'Special Branch' (renamed C3) or any previous roles in this unit responsible for paramilitary informants and covert operations, where there are most concerns regarding past unlawful practices and agent involvement in human rights violations.

There are three Assistant Commissioners for Investigations. The name of one is in the public domain – Lesley Carrol, a civil service commissioner and Presbyterian Minister.[174] The names of the other two Assistant Commissioners are not on the ICRIR website and do not appear to be in the public domain. The ICRIR, in response to a Freedom of Information request from CAJ, did confirm that the two Assistant Commissioners had criminal investigations experience in Northern Ireland. One with Operation Kenova, Metropolitan Police Service and National Counter Terrorism, and one OPONI, NI Environment Agency and the NI Department of Justice.[175]

Independence and the HET – will history repeat itself?

It is notable that there was considerable contestation over the independence of the PSNI HET in relation to who this team reported to within the PSNI in practice. NGOs CAJ and the Pat Finucane Centre had raised concerns that in practice the HET was reporting to the ACC for Crime Operations, who presided over Special Branch (C3).

Notably the PSNI felt it necessary to deny this in arguing the HET met ECHR independence requirements, arguing that the HET was an operationally independent unit reporting directly to the Chief Constable. This matter remained contested until the 2013 HMIC report, which alluding to the role of the ACC, stated:

> This is a contentious issue; in February 2012, a joint submission was presented to the [Committee of Ministers] CM by NGOs suggesting a significant alteration to the

[174] https://www.nicscommissioners.org/board-members/dr-lesley-carroll#:~:text=Lesley%20is%20currently%20an%20Assistant,for%20a%20five%20year%20period.
[175] ICRIR FOI response to CAJ FOI/2024/014, 4 November 2024.

> structural relationship between the HET and the PSNI. The NGOs stated that the HET no longer reports directly to the Chief Constable but to the ACC – Crime Operations. However, the most recent organisational structure for the PSNI … clearly shows that the line of accountability is between the Chief Constable and the Director of the HET.[176]

The HMIC in examining the issue of HET independence found:

> The HET has clearly endeavoured to ensure that its processes reflect the necessary independence…The Director of the HET stated that cases of state involvement are assigned to the red and white teams, which are in principle staffed by people not previously associated with the RUC or the PSNI. Also, the only connection between the two has been the reporting line between the Director of the HET and the Chief Constable.
>
> However, a number of NGOs state that the line of accountability was, in fact, between the ACC Crime Operations and the Director of the HET. Furthermore, the HET is a unit of the PSNI and is located in police premises.
>
> In our view the NGO's found and produced credible evidence that the line of accountability is with ACC crime operations.[177]

The HMIC noted that the Committee of Ministers in 2008 had only considered that the HET (set up in 2004) could meet ECHR independence requirements on the basis of it being an independent unit reporting to the Chief Constable, rather than it being under the direction of ACC Crime Operations. The PSNI had also sought to downplay the role of ACC Crime Operations in the HET. By implication, the UK and PSNI had conceded that the ACC for Crime Operations overseeing HET would compromise its independence. The ACC for Crime Operations from 2003-2008 within the PSNI was Peter Sheridan, now ICRIR Commissioner for Investigations.[178]

Mr Sheridan himself gave the following views regarding independence and his appointment as ICRIR Commissioner for investigations at a seminar Harvard University in October 2023:

> Some individuals have, but, in some ways, what I find strange in people who are opposing me being the Chief Commissioner [for Investigations], because they say, how can a former police officer investigate these things?
>
> And I keep pointing back, well, under the Good Friday Agreement, we had this thing called parity of esteem. So, parity of esteem meant that I was willing to embrace Gerry Kelly, who was in Downing Street at that time with me, who was convicted of the bombing at the Old Bailey in London and the attempted murder of a prison officer in Belfast [and had] been able to sit on the Policing Board and pick the next Chief Constable. I was willing to embrace that Martin McGuinness, whatever his background, could sit as a deputy First Minister or, before that, the Minister of Education and make decisions. But somehow, it's not OK for an ex-police officer to sit and be appointed as a Commissioner [for Investigations]. And I don't get it. To say

[176] HMIC 'Inspection of the Police Service of Northern Ireland Historical Enquiries Team' 2013, p49.
[177] HMIC 'Inspection of the Police Service of Northern Ireland Historical Enquiries Team' 2013 p90-91.
[178] https://icrir.independent-inquiry.uk/news/commissioner-for-investigations-identified-to-lead-icrir-work/

> the parity of esteem for everybody and not for one section or other, and I don't think people have thought this through enough yet.[179]

In essence Mr Sheridan is arguing that as Martin McGuiness and Gerry Kelly, given their IRA backgrounds, were both permitted to be elected to hold Ministerial and Policing Board offices respectively, out of GFA 'parity of esteem' a former RUC officer should not be precluded from holding the office of ICRIR Commissioner for Investigations. Setting aside this novel interpretation of the concept of Parity of Esteem in the GFA (in the GFA the concept refers to equality of treatment for the identity and ethos of unionist and nationalist communities) this position indicates a limited understanding of the application of ECHR Article 2/3 independence requirements. Neither Ministerial posts in the Stormont Executive nor the Policing Board are mandated with *carrying out investigations* to an Article 2/3 standard, and hence subject to such independence requirements. A more relevant comparator would be the contention Martin McGuinness or Gerry Kelly were sufficiently independent persons to lead investigations into the activities of the IRA, plainly they would not be.

As alluded to above, the Court of Appeal did not deal with the issue of practical independence. This issue will therefore not be fully considered until there is a challenge relating to a specific case. Concerns have been raised regarding the structural independence of the ICRIR, in particular the role of the SOSNI, by Council of Europe bodies, Parliamentarians, the Irish Government, the Human Rights Commission and many others. The Court of Appeal did reiterate the finding of the High Court that it considered the ICRIR had met the 'structural' independence requirements of the ECHR. However, the Court was not holding that such concerns were unwarranted, rather in its view they did not breach the minimum legal requirements of the ECHR. Indeed, as noted (and discussed further below) the Court of Appeal ruled that the ICRIR lacked independence to control the content of its reports to families due to the 'national security veto' vested in the Secretary of State.

Most notably, independence concerns have centred on the broader powers of the SOSNI in the legislation which include the appointments of all ICRIR commissioners; 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; providing all oversight of the ICRIR. To this end, the Decisions of the Council of Europe Committee of Ministers to seek ECHR-compatibility, regularly urged the UK during parliamentary passage to amend the legislation 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.*' No UK Government amendments were forthcoming to this end, and Government resisted opposition amendments aimed at addressing these concerns.

Despite these broader findings of the domestic courts and the above context, the response of the ICRIR Chief Commissioner to the Court of Appeal was to issue a statement claiming that the ruling had 'clearly and unequivocally' endorsed the independence of the ICRIR and called for an end to what he called 'unwarranted attacks' on the ICRIR's independence.[180]

---

[179] https://www.youtube.com/watch?v=7F1qW3YCx9w [at 48 minutes]

[180] Troubles commission chief urges end to 'unwarranted attacks' on its independence | The Independent

2.13 Views of UN and Council of Europe human rights mechanisms on the ICRIR

The concerns of the Council of Europe and UN human rights mechanisms regarding the Legacy Act have been consistent.[181]

The ICRIR have sought to present the position of the Council of Europe towards the ICRIR as positive by quoting in ICRIR statements and documents a line attributed to a senior official who met Sir Declan Morgan who had complimented the 'efforts' the ICRIR were making towards ECHR compliance. ICRIR statements quoted only this line and made no reference to the contrary views of Council of Europe or UN mandate holders; quasi-judicial bodies or the Parliamentary Assembly regarding the ICRIR and Legacy Act which are set out below.

This quote attributed to a Council of Europe official was first reproduced in an ICRIR press release and then formed part of an ICRIR leaflet describing concerns about the ICRIR as 'myths.'[182] The quote was included under what the ICRIR argued was:

> Myth 8: The Commission [ICRIR] cannot comply with Articles 2 and 3 of the European Convention of Human Rights because of how the Legacy Act is written.[183]

At the time of writing, this ICRIR 'myths' leaflet remains on their website despite the findings of the Court of Appeal that the ICRIR cannot comply with Articles 2 & 3 ECHR due to provisions of the Legacy Act.

In relation to the position of Council of Europe bodies, the Commissioner for Human Rights, Dunja Mijatović, raised concerns that adopting the Legacy Act would 'undermine justice for victims, truth seeking and reconciliation', and that the UK was ignoring 'the many warnings that this legislation would violate the UK's international obligations and put victims' rights at risk.' Stressing that she had 'repeatedly warned' the Legacy Act would undermine the human rights of victims, she also noted that:

> Serious concerns have also been expressed by the Council of Europe's Committee of Ministers, the Parliamentary Assembly of the Council of Europe, the UN High Commissioner for Human Rights, UN Special Rapporteurs, national human rights institutions, parliamentary committees and civil society organisations, including victims' groups.

In relation to the Council of Europe Committee of Ministers, interventions have included:

- On 25 April 2023, following the anniversary of the Good Friday Agreement, the Chair of the Committee of Ministers (CM) addressing the Parliamentary Assembly of the Council of Europe, stated that the CM *'has expressed serious concerns that this*

[181] See CoE commissioner statement cross referencing positions of others: https://www.coe.int/en/web/commissioner/-/united-kingdom-adopting-northern-ireland-legacy-bill-will-undermine-justice-for-victims-truth-seeking-and-reconciliation

[182] https://icrir.independent-inquiry.uk/news/icrir-chief-commissioner-commits-to-human-rights-laws/ and Myth-busting commonly held misconceptions about the ICRIR - Independent Commission for Reconciliation & Information Recovery [last accessed 11 October 2024]

[183] https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/16/2024/06/Myth-busting-commonly-held-misconceptions-about-the-ICRIR.pdf [last accessed 25 November 2024]

legislation is not in compliance with the European Convention and will not enable restitution for victims.'[184]

- On 7 June 2023, the CM issued an Interim Resolution on the execution of judgments in the *McKerr* group of cases. It expressed serious concerns about the absence of progress to advance amendments to the legislation which would address the Legacy Act's incompatibility with the ECHR, the immunities scheme, the closure of pending inquests, and ICRIR's lack of powers and independence.[185]
- In September 2023, the CM issued a Decision on the execution of the *McKerr* group of cases, that raised serious concerns about the ICRIR's lack of support and independence, the deeply regretting the termination of pending inquests and the immunities scheme.[186] The CM sought to advance its concerns by the unusual step of inviting the CM Chair to correspond with the UK authorities before resuming its examination at a June 2024 meeting.[187] This intervention marked a significant diplomatic escalation in the context of the final Legacy Act.

Despite these clear concerns from competent Council of Europe mechanisms, the ICRIR told the Executive Office Committee of the Northern Ireland Assembly in September 2024 that the Council of Europe had given a 'clear endorsement' of the ICRIR, and that an MLA was 'wrong' to suggest Europe had concerns.[188]

In relation to the UN human rights machinery in March 2024, the periodic UK dialogue with the UN Human Rights Committee took place in Geneva to assess the UK's compliance with treaty-based obligations under the International Covenant on Civil and Political Rights (ICCPR). One of the key areas of concern raised by the Committee was the Legacy Act.[189] In its Concluding Observations, under the heading 'Accountability for Past Human Rights Violations' the Committee stated:

> The Committee is concerned by the adoption of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, which occurred despite the warnings expressed by domestic and international actors that it would be in breach of the Belfast Good Friday Agreement and would violate the State party's international human rights obligations, including under the Covenant.[190]

The Committee expressed concerns about the conditional immunity scheme, as well as:

> …the weakness of the 'review' function of the Independent Commission for Reconciliation and Information Recovery, the allegations on its lack of independence, the absence of the power of investigation to guarantee the right to truth for victims, and the procedural barriers and obstacles to criminal investigations, civil suits, and other remedies, effectively stifling any criminal or civil proceedings connected to the

---

[184] https://pace.coe.int/en/verbatim/2023-04-25/pm/en#speech-23130

[185] Interim Resolution CM/ResDH(2023)148 June 2023

[186] https://search.coe.int/cm#{%22CoEIdentifier%22:[%220900001680ac9e8e%22],%22sort%22:[%22CoEValidationDate%20Descending%22]}

[187] CM/Del/Dec(2023)1475/H46-44

[188] ICRIR Chief Commissioner TEO Committee 18 September 2024.

[189] https://www.ohchr.org/en/news/2024/03/examen-du-royaume-uni-devant-le-comite-des-droits-de-lhomme-les-experts-se-penchent

[190] CCPR/C/GBR/CO/8, ICCPR Concluding Observations on the UK, 2024 Paragraph 10.

> troubles. The Committee is also concerned about the increased use of closed material proceedings for legacy cases.[191]

The UN Human Rights Committee urged the UK to take the following action:

> The Committee calls on the State party to repeal or reform the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and to adopt proper mechanisms with guarantees of independence, transparency, and genuine investigation power that discharge the State party's human rights obligations and deliver truth, justice and effective remedies, including reparations to victims of the Northern Ireland conflict.[192]

This followed repeated concerns raised by UN experts in the form of UN Special Rapporteurs and the High Commissioner for Human Rights. Notably during the dialogue in Geneva with the UK authorities, in which CAJ participated, UK officials sought to argue and focus on the High Court ruling as a vindication of the ICRIR's independence and ability to carry out investigations, barely mentioning the amnesty scheme. Whilst the Committee clearly did not buy this line, calling out the weakness of the 'review' function of the ICRIR, urging instead the UK to adopt proper mechanisms with guarantees of independence, transparency, and genuine investigation power'[193]it was nevertheless a notable switch in emphasis from the UK. In this context, it was an indication that the then UK Government, despite its appeal in *Dillon,* was willing to settle for having succeeded in closing the Package of Measures and replacing them with the ICRIR, rather than seeking to defend the amnesty scheme.

It is worth noting that similar concerns to the Council of Europe and UN mechanisms were also echoed by the Joint Committee on Human Rights (JCHR) of the UK Parliament who considered that the Legacy Bill 'risks widespread breaches of human rights law.'[194] The JCHR Report concurs with the concerns of other stakeholders regarding the lack of ECHR compatibility of the Legacy Bill; and puts forward amendments which were to 'fundamentally alter the entire approach of the Bill' whilst urging 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. [195]

The then Government ignored the JCHR recommendations. There was also a pattern of apparent bad faith by the then Government in engagement with the Council of Europe and UN. This included Ministers withholding the detail of what they had claimed were 'game-changing' amendments from the Committee of Ministers until

---

[191] CCPR/C/GBR/CO/8, ICCPR Concluding Observations on the UK, 2024 Paragraph 10.
[192] CCPR/C/GBR/CO/8, ICCPR Concluding Observations on the UK, 2024 Paragraph 11.
[193] CCPR/C/GBR/CO/8, ICCPR Concluding Observations on the UK March 2024, paras 10 & 11. CAJ's submission to the Committee is here
[194] https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/173874/northern-ireland-troubles-bill-risks-widespread-breaches-of-human-rights-law/
[195] https://committees.parliament.uk/publications/30491/documents/175903/default/

after their deliberations.[196] As set out below this in turn drew criticism from the Council of Europe Human Rights Commissioner.

This followed criticism at an earlier stage of the Bill by the UN High Commissioner for Human Rights Volker Türk, who was critical of the then last-minute publication of amendments, to avoid meaningful scrutiny of their content.[197]

On this latter occasion, the Council of Europe Commissioner issued a statement in advance of the House of Lords Report Stage debate raising concerns that the amendments did not address the fundamental problems with the Legacy Act:

> 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.
>
> ... 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.[198]

The UK also snubbed UN experts and failed to respond to concerns raised through formal channels. In a statement in December 2022, UN Special Rapporteurs, Fabián Salvioli and Morris Tidball-Binz raised concerns that 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'* and also stated that they regretted the lack of response from the UK authorities to a formal representation from their mandates on the Bill of July 2022.[199] The UN Experts further set out their position that the:

---

[196] 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.' 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. HC Official Report, 10 May 2023, Volume 732, column 322. The commitment 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. On this occasion, 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 CM Meeting. 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 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

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

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

[199] https://www.ohchr.org/en/press-releases/2022/12/uk-flawed-northern-ireland-troubles-bill-flagrantly-contravenes-rights

> …Bill bans and, in some cases, unduly restricts Troubles-related criminal investigations and enforcement actions, civil actions, coronial inquests, and police complaints into deaths and other harmful conduct related to the Troubles, such as acts of torture. The Bill effectively replaces them with reviews to be undertaken by a foreseen Independent Commission for Reconciliation and Information Recovery (ICRIR), whose truth-seeking powers are severely limited by restrictions in its timeframe, scope of work and caseload under its purview.
>
> 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.[200]

In January 2023, in response to questions in the UK Parliament from the Labour opposition as to why there had been no response to the UN, the then Secretary of State for Northern Ireland attributed a delay to an 'administrative error' and that a formal UK response would be 'issued shortly' along with an apology for the delay.[201] However in July 2023, the UK authorities had still not responded to the UN, with the OHCHR confirming that it had '*not received any response officially or has been otherwise contacted by the UK Government to discuss the concerns*.'[202] The UK authorities would not respond to media questions as to why no response had been sent. The then Labour Shadow Secretary of State 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*.'[203]

As noted above, given its clear concerns that the Legacy Act was not compatible with the ECHR, the Irish Government initiated an inter-State case in the European Court of Human Rights in January 2024.[204] In addition to other provisions this interstate challenge contended that the ICRIR did not meet ECHR compatibility requirements.

2.14 The advent of the ICRIR: caseload and appointments

Closing the Package of Measures leaves hundreds of cases outstanding

As alluded to in the section on the Package of Measures, many hundreds of outstanding legacy cases were awaiting investigation as a result of active requests by families choosing these mechanisms or official determinations that a re-investigation was required due to there not having been subject to an ECHR compatible investigation previously. In summary:

- The PSNI LIB had been working through hundreds of cases. These included over 200 cases of military shootings that the former Chief Constable had determined required re-investigation, as previous inquiries had not met ECHR Article 2 standards.

---

[200] https://www.ohchr.org/en/press-releases/2022/12/uk-flawed-northern-ireland-troubles-bill-flagrantly-contravenes-rights

[201] https://questions-statements.parliament.uk/written-questions/detail/2023-01-19/127845

[202] 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/

[203] UK government fails to respond to UN on legacy bill that 'flagrantly contravenes' human rights conventions *Irish News* 19 July 2023

[204] "New inter-State application brought by Ireland against the United Kingdom," European Court of Human Rights, Press Release, accessed 20 July 2024.

- Investigations into over 300 complaints that victims and their families had lodged with the Police Ombudsman's office also remained outstanding.
- Inquests – 38 legacy inquests concerning over 70 deaths, including those granted following an assessment by the Attorney General that a new inquest was advisable, remained outstanding at the time of the ban introduced by the Legacy Act.
- Families had also chosen to lodge many hundreds of civil court cases.

The Stormont House Agreement legislation in an agreed process with significant buy-in, involved a transitional process whereby the Ombudsman and PSNI LIB would conclude cases at an advanced stage and their broader outstanding caseload, including cases requiring outstanding ECHR-compatible investigations, would be transferred to the SHA Historical Investigations Unit. Inquests and civil proceedings would also continue under the SHA.

By contrast, the replacement of the Package of Measures with the ICRIR under the Legacy Act 'wiped the slate clean' of outstanding cases, closing down all of the above mechanisms without any transfer process. Above all, this succeeded in removing the outstanding military killings and police complaints cases which had not previously had an ECHR compatible investigation from the pending legacy caseload.

With some exceptions,[205] in theory this did not stop families from formally requesting that the ICRIR take up the same cases that families had actively chosen to take to the Package of Measures. If families had had confidence in the ICRIR, it would be expected that hundreds of referrals would have been made on the day it opened for reviews in order to get into the system (for example, once it had become clear that the Legacy Bill had a cut off date for civil claims, a surge of cases followed).

However, following the passage of the Legacy Act, the Council of Europe Committee of Ministers for its part noted that (despite efforts from the then UK Government to promote it) support for the ICRIR remained 'minimal.' The Committee of Ministers raised issues relating to the ICRIR's independence, disclosure and initiation of reviews. This included issues regarding the independence of the ICRIR appointment process. The Committee of Ministers urged the UK authorities to take steps to gain the confidence of victims and families.[206]

The UK authorities and the ICRIR, which was then established in shadow form, engaged in efforts to encourage families to come to it both prior and after its formal powers to take on cases had come into force on the 1 May 2024.

For months after this date the ICRIR however declined to respond to requests for statistics about its caseload. In the context of deadlines for Freedom of Information requests from CAJ, it ultimately did so in September 2024, revealing that it only had a caseload of up to eight cases.[207]

---

[205] The Police Ombudsman previously dealt with deaths that occurred in the Republic but for whom there were allegations of grave police misconduct in NI. These cases are outside the remit of the ICRIR.

[206] https://search.coe.int/cm#{%22CoEIdentifier%22:[%220900001680ac9e8e%22],%22sort%22:[%22CoEValidationDate%20Descending%22]}

[207] https://www.irishnews.com/news/northern-ireland/troubles-legacy-body-icrir-takes-on-just-eight-cases-in-first-four-months-ZBJBITC2J5AINPLEJ7X3I4S7MU/

The ICRIR apparently sought to distract from this by instead seeking to present the number of *enquiries* (a higher figure of 85) it had received rather than the number of cases for which families had formally requested ICRIR Reviews.

At this time the public section of the ICRIR website only listed one live investigation, namely the Gilford pub bombings. In the following weeks this led to questions as to whether the ICRIR did in fact have eight individual investigations or fewer and was essentially presenting requests from different persons in relation to the same incident as separate cases. The ICRIR declined to answer media questions to this end.[208] The figures were released ultimately in November in response to a freedom of information request from CAJ. This set out that four of the requests for an ICRIR review related to the Gilford investigation. The ICRIR also stated that one other ICRIR investigation had resulted from more than one request. Therefore by the 31 August 2024 the ICRIR in practice was only conducting between 2-4 investigations.[209] By November 2024 five live investigations were listed on the ICRIR website, on the basis of 14 individual requests.

Essentially the Legacy Act and advent of the ICRIR had succeeded in grounding the multiple legacy investigations that had been taking place under the Package of Measures to a halt.

Opposition and support to the ICRIR

There have been sustained levels of opposition and concern regarding the ICIRIR following the passage of the Legacy Act. This was perhaps most evident at a Belfast Law Society conference in September 2023, where the ICRIR Chief Commissioner was scheduled as the keynote speaker. The event had to be cancelled after other speakers withdrew and victims' groups mobilised for widespread protests at the venue.[210]

The ICRIR itself ran a controversial 'have your say' survey which further alienated victims who had had no input into its establishment. Speaking to the BBC, Paul Gallagher (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.'* [211]

The ICRIR was also criticised for producing the aforementioned 'myths' leaflet (dismissing legitimate concerns about the ICRIR as 'myths' and providing selective information regarding the framework in which the ICRIR operates.[212]

As discussed above the *Sean Brown* Inquest, which could not be completed, the Coroner stated that the ICRIR was not the appropriate mechanism to investigate the murder and instead requested that the Secretary of State establish a public inquiry to ensure effective investigation.[213] The then Secretary of State responded, not by opening a public inquiry, but

[208] https://www.irishnews.com/news/northern-ireland/questions-raised-does-icrir-have-eight-individual-investigations-OM35IR4GRZCZ7N53H6P464KPI4/
[209] ICRIR FOI response to CAJ FOI/2024/014, 4 November 2024.
[210] https://www.belfasttelegraph.co.uk/news/politics/conference-on-new-legacy-act-organised-by-law-society-cancelled-after-call-from-victims-groups/a1063962361.html
[211] https://www.bbc.co.uk/news/uk-northern-ireland-66310756
[212] https://www.irishnews.com/news/northern-ireland/legacy-commission-set-up-by-british-government-accused-of-propaganda-NALLKUKIDFEH5FFJF2GYTPHF34/
[213] https://www.irishnews.com/news/northern-ireland/high-court-judge-believes-legacy-body-not-appropriate-mechanism-to-investigate-sean-brown-murder-E6NQLSUB65DRJC4DIUWCNCZ4AI/

by launching a judicial review against the coroner for revealing state agents were among the suspects in the murder.[214]

The concerns of the coroner that the ICRIR was not the appropriate mechanism to pick up an inquest were subsequently further vindicated by the Court of Appeal ruling of September 2024. The ICRIR itself maintained it could 'emulate' inquests and comply with the ECHR, through what it called an Enhanced Inquisitorial Proceedings.[215] Theis model had been criticised by NGOs including CAJ. We pointed to the way in which ICRIR 'inquests' would differ from actual inquests by: not having an independent judge; by families not having an independent lawyer; by families being without legal aid; by families not having the same rights to receive disclosure; being without a court and with Ministers having powers to re-write the 'judgement' (through the national security veto over ICRIR family reports). Ultimately the Court of Appeal found that the ICRIR could not emulate victim-participation rights in inquests and this, along with the 'national security' veto would be incompatible with ECHR requirements.

2.15 ICRIR appointments and independence

A fundamental principle of the obligations upon states to investigate deaths or torture is that such investigations must be independent from Government. CAJ's experience of having worked in 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 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 abandonment of the SHA by the UK. There had also been broader international involvement in peace process mechanisms.

For example, the Independent International Commission on Decommissioning which oversaw the destruction of paramilitary weapons. was composed of Commissioners from Canada, Finland and the US, appointed by the British and Irish Governments, with additional appointments for inspections of former Finnish President Martti Ahtisaari and (the current South African President) Cyril Ramaphosa.

In addition, 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 were therefore not undertaken unilaterally by the UK, given the bilateral role of the Irish Government, and involved international figures.

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

[214] https://krw-law.ie/sean-brown-statement/

[215] Enhanced Inquisitorial Proceedings: A brief explanation - Independent Commission for Reconciliation & Information Recovery (icrir.independent-inquiry.uk)

legacy directorate during the mandate of the second Ombudsman Al Hutchinson 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 the HMIC investigation finding 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. The HIU was described as a 'new independent body' reporting to the 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.[216]

The SHA Independent Commission for Information Retrieval was to be established by the 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.[217]

In stark contrast, the Legacy Act belies a determination on the part of the then Conservative Government to maximise control over its proposed mechanisms for dealing with the past and minimise their independence. The Legacy Act stipulates that the appointment of the Chief Commissioner, and all other Commissioners, of the ICRIR would be, undertaken by the Secretary of State alone and this is what occurred.

With regard to Part 4 of the Act which deals with 'Memorialising the Troubles', it is notable that the SOSNI will designate persons to take forward a programme of work comprising a major oral history initiative, a memorialisation strategy and academic research on the patterns and themes of the conflict. This research must include statistical analysis of all ICRIR reports. In appointing the 'designated persons', the Secretary of State is to decide whether or not are supported by 'different communities in Northern Ireland'. The overall programme of work is to be carried out in a way that 'promotes (i) reconciliation, (ii) anti-sectarianism and (iii) non-recurrence of political and sectarian hostility between people in Northern Ireland.' [218] In short, the Legacy Act suggests a mindset that is at best oblivious in different to the need to command public confidence in Northern Ireland on such sensitive matters.

The Legacy Act also removed for the ICRIR the role of the NI Department of Justice and the oversight role that the Policing Board would have had over the Stormont House Agreement's HIU. Instead, all 'oversight' of the ICRIR is provided for by the SOSNI alone.

The Labour opposition sought to amend the Legacy Act to transfer the role of the SOSNI in the appointment of the ICRIR Chief Commissioner to the independent NI Commission for Judicial Appointments. Former NIO Minister Lord Des Browne tabled an amendment to address the lack of independence in the appointments to the ICRIR.[219] The Judicial Appointments Commission is an independent public body established because of the NI

[216] Draft Northern Ireland (Stormont House Agreement) Bill 2018, Schedule 2, Part 1.
[217] https://www.gov.uk/government/publications/the-stormont-house-agreement
[218] Para 54, part 4.
[219] HL Hansard Volume 827: 31 January 2023 Column 572 Amendment 12

Criminal Justice Review that flowed from the Good Friday Agreement making appointments to judicial posts in Northern Ireland.[220] Despite the Bill providing for the ICRIR Chief Commissioner to be a person who holds, or has held, high judicial office, the then Conservative Ministers rejected the amendments.[221]

The recruitment of Sir Declan Morgan as ICRIR Chief Commissioner was undertaken without an open process. The process was not made public until after he had been announced as the Chief Commissioner Designate. The UK was required to issue a report to the Council of Europe on the 4 May 2023 which focused on the Legacy Bill. This report made no reference the recruitment of a Chief Commissioner of the ICRIR being at an advanced stage.[222] A week later, 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.[223]

Subsequent questions in the UK Parliament confirmed that the process for recruitment had not been regulated by the UK Commissioner for Public Appointments[224] and that the Northern Ireland Judicial Appointments Commission (NIJAC) had also had no role.[225]

Parliamentary questions highlighted that at the ICRIR was initially staffed by government officials. By the 25 July 2023, Ministers stated ICRIR had 25 staff, 46% of whom had come from the NIO, 42% from other UK Central Government Departments and 12% from other public sector bodies.[226]

On September 2024 the ICRIR issued an 'Accountability Update' covering the period from 1 May to 31 August 2024 which gives some information on staffing.[227]

This set out that the three Assistant Commissioners had been recruited to support the Commissioner for Investigations, and that recruitment had been initiated for Senior Investigative Officers and Case Support workers, then Investigative officers and other roles to support ICRIR reviews. These reviews aimed to build 'an investigative staff of around 70, not including the Findings Team to support the Chief Commissioner in producing reports…Recruitment for a further 50 posts, including a Findings Team is underway.'

The report states that the ICRIR employed 86 staff, with 35 in the 'operational' team, 17 of whom had previous NI police investigation experience and 13 of whom had their experience outside NI. The ICRIR expresses the view that it is important to draw on RUC or PSNI

---

[220] https://www.nijac.gov.uk/about-nijac
[221] HL Hansard Volume 827: 31 January 2023 Column 584
[222] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680ab245c
[223] Hansard House of Commons 11 May 2023, vol 829 column 1968 There was a concurrent Written Ministerial Statement 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. HCWS767 WMS Secretary of State for NI, ICRIR Implementation, Hansard Vol 732: 11 May 2023 Deposited paper DEP2023-0341 - Deposited papers - UK Parliament
[224] https://questions-statements.parliament.uk/written-questions/detail/2023-06-02/187237
[225] https://questions-statements.parliament.uk/written-questions/detail/2023-06-02/187238
[226] 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
[227] https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/16/2024/09/ICRIR-Accountability-Update-1-May-31-August-2024.pdf

experience of NI investigations. The accountability update states the ICRIR staff with NI criminal investigation experience includes officers previously with Operation Kenova, the Police Ombudsman and PSNI, but makes no reference to former RUC officers. In response to an FoI from CAJ the ICRIR stated that as 31 August there were two former RUC officers working in the ICRIR, one of which was the Commissioner for Investigations, the ICRIR however declined to state what role the other former RUC officer had in case it would lead to their identification and that the number of RUC officers in operational roles in the ICRIR was therefore exempt personal information.[228]

Regarding equality monitoring, data is given for gender, disability and ethnicity but data for community background is not provided.

For operational staff, the gender figures are an impressive 50-50; for disability the numbers of persons with disabilities are too low to be stated under standard statistical rules.

In relation to community background in response to a Freedom of Information request from CAJ, issued in light of the accountability update not containing such data, the ICRIR responded that it has not been 'specified' under Fair Employment legislation (where a Department will designate a public authority for fair employment monitoring).[229] It is unclear both why the ICRIR has not been specified but also why it had not undertaken fair employment monitoring regardless from the outset. The ICRIR response indicates that they are now taking 'proactive steps to capture this data'.

The ethnicity data in the accountability update is limited to 'white English/ Scottish/ Welsh/ NI', 'white Irish' and 'other'. Of these categories, 53% fall into the first category of British/NI, 7% into other, the 'white Irish' figure is too low to be stated, and 40% preferred not to answer. Whilst comparators are complex this does seem to indicate a lower percentage of persons identifying as Irish compared to the combined British/NI identities.[230]

2.16 Calls to scrap and retain the ICRIR

A number of victims and human rights NGOs have called on the ICRIR to be scrapped and replaced as has the former Police Ombudsman Baroness Nuala O'Loan, who indicated that a fundamentally different body was required, given problems of distrust.[231] These calls were echoed following the Court of Appeal ruling.[232]

---

[228] ICRIR FOI response to CAJ FOI/2024/014, 4 November 2024.

[229] ICRIR FOI response to CAJ FOI/2024/014, 4 November 2024.

[230] In relation to national identity the 2021 census in Northern Ireland produced figures that 29% of persons identified as 'Irish only'; 32% as 'British only' and 19% as 'Northern Irish only', and 19% as 'other' (which included combinations of the former categories). Comparators between these figures and the ICRIR figures are quite complex. 'Northern Irish' is both a national identity and a regional identity; 'white Irish' does not include other Irish. There is also the context that some ICRIR staff are London, not Northern Ireland based and 40% did not disclose data.

[231] Human rights groups call for ICRIR to be scrapped (msn.com) and https://www.bbc.co.uk/news/articles/c2v085q86l1o https://hansard.parliament.uk/lords/2024-07-23/debates/BA3B6797-249F-4F6A-A114-F68AA814C745/King%E2%80%99SSpeech#contribution-C2CB46AA-9BE4-4ED0-ABA1-90BB8FACB07C

[232] https://www.bbc.co.uk/news/articles/crl8xp7yxego?at_ptr_name=twitter&at_campaign=Social_Flow&at_campaign_type=owned&at_format=link&at_medium=social&at_link_type=web_link&at_bbc_team=editorial&at_link_origin=BBCNewsNI&at_link_id=9BF36266-79BA-11EF-B79E-8C07BC194711

Victims campaigner Raymond McCord also called for the whole Act to be repealed, stating he had spoken alongside ICRIR Chief Commissioner Sir Declan Morgan at an Ulster University event and that the 'whole audience' had 'rejected the ICRIR'. [233]

These concerns have been expressed in the context of concerns regarding the ICRIR and the broader Legacy Act from the UN and Council of Europe mechanisms; the NI Human Rights Commission; the Irish Government, and political parties in Ireland both north and south.

It should be noted the ICRIR does have some supporters.

In response to the King's Speech, a Member of the House of Lords, Baroness Kate Hoey, did 'very much welcome' the retention of the ICRIR.[234] Baroness Hoey had previously advocated for the extension of a de facto amnesty (in a statute of limitations) to cover military veterans in Northern Ireland, and raised concerns about what she called 'vexatious prosecutions and unending re-investigations' under the Package of Measures, claiming this was due to 'over-interpretation' of ECHR Article 2 obligations.[235]

Following the Court of Appeal Ruling, the Shadow Secretary of State Alex Burghart MP tweeted that 'the ICRIR and Sir Declan Morgan deserve our confidence' and welcomed the decision by Hilary Benn to affirm he would retain the ICRIR following further calls from victims for it to be scrapped. The Shadow SOS also urged the Government to appeal the Court of Appeal ruling 'which damages the ICRIR' citing national security disclosure issues.[236]

Lord Caine, the former Minister most associated with the Legacy Act, responding to the decision to open a Public Inquiry into the death of Pat Finucane, spoke positively about the ICRIR and its powers and retention and stated that as regards the Public Inquiry:

> In our view, a better and more appropriate way forward would have been to refer the case to the newly established Independent Commission for Reconciliation and Information Recovery, ICRIR. This body is now staffed and operational, since 1 May, under the distinguished leadership of the former Lord Chief Justice of Northern Ireland, Sir Declan Morgan KC.[237]

It is notable that political actors championing the retention and use of the ICRIR as a sole mechanism, are those who have previously advocated and worked for the closing down of other NI legacy investigations. In essence these key actors were opposed to legacy investigations under the Package of Measures and the SHA, but are content for the same cases to be dealt with by the ICRIR. What follows is that the architects of the ICRIR must therefore consider it to be a very different vehicle which will they hope will deliver on their agenda. This itself creates understandable concerns regarding the purpose of the ICRIR.

---

[233] https://www.belfasttelegraph.co.uk/news/northern-ireland/troubles-victim-urges-labour-party-to-go-further-by-scrapping-whole-legacy-act/a1175933944.html

[234] https://hansard.parliament.uk/lords/2024-07-23/debates/BC575765-AF33-429A-A8AD-CF3D72B504B5/King%E2%80%99SSpeech#contribution-5B97CE6D-3A7C-4A54-9554-310163EF9D36

[235] https://www.newsletter.co.uk/news/opinion/columnists/baroness-hoey-protection-for-veterans-should-apply-to-those-who-served-in-northern-ireland-3200366

[236] https://x.com/alexburghart/status/1838264907785216202

[237] https://hansard.parliament.uk/Lords/2024-09-12/debates/F099ECBB-0730-4171-97A6-9DFE666CD97A/PatrickFinucaneMurder#contribution-5A1A8DBE-3858-4F64-85DE-62D64304930F

2.17 Is the ICRIR legal framework designed to conceal human rights violations by state agents?

One of the most controversial elements of the ICRIR legal framework are the provisions known as the 'national security veto'. These provisions refer to a codified set of powers where any information relating to intelligence matters must be predesignated and then Ministers have power to veto its inclusion in ICRIR reports to families.

As detailed above, the insertion of this 'national security' veto into the draft SHA legislation led to the then collapse of the SHA implementation process. The power would enable ministers to conceal practices of state agents being involved in human rights violations, and practices where there was a failure to protect lives (whether of civilians, paramilitaries or members of the security forces) to conceal informant infiltration, as well as information that was politically embarrassing or caused reputational damage.

In this context Pablo de Greiff, then UN Special Rapporteur on Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence referred to the 'over-use of national security exemptions to avoid disclosure' by the UK Government in Northern Ireland and that 'appeals to the ambiguous concept of national security invoked as a blanket term becoming a means to shield individuals or practices against open scrutiny, fuel mistrust and suspicion' – a perception which is aggravated by 'the fact that national security has no statutory definition in British law' and by the fear that national security will be used to redact information that is politically embarrassing.[238]

Whilst victims' groups focusing their casework primarily on victims of the state will regularly deal with collusion cases involving concerns of violations by agents of the state, victims' groups representing former members of the security forces or other victims of non state actors are also engaged in seeking investigation in such cases.

For example, the *Centre for Military Justice* which 'provides free, independent, expert legal services to serving or former members of the Armed Forces or their bereaved families' took a judicial review against the Legacy Act. The Centre have supported a judicial review against the Legacy Act by the family of Private Tony Harrison, who 'Aged 21, was killed on 19 June 1991 by the IRA while on leave and visiting his fiancée's home in East Belfast. He was off duty.' It is publicly known the killing involved an IRA-RUC state agent however, the family's experience is that:

> A very brief inquest was held at which our family was not able to ask questions. We have always been horrified at the lack of any attempt at a meaningful investigation and prosecution and fear that the double-agent's involvement may explain it. The state that Tony swore an oath to protect continues to protect one of the men involved in his killing and has made no real effort to secure justice for Tony. [239]

A 2015 statement by the Armed Forces Minister cited the SHA HIU as a vehicle which could 'make progress on this and many other unsolved murders of British troops.' The family had

---

[238] UN Human Rights Council, 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) UN Doc A/HRC/34/62/Add.1 http://www.refworld.org/docid/58b9583b4.html

[239] No impunity for murder - the Government's proposals for Northern Ireland betray my brother's legacy - Centre for Military Justice

also pursued a complaint with the Police Ombudsman's office, but this has now been curtailed down by the Legacy Act.[240]

A further example is provided by Ulster Human Rights Watch (UHRW) an advocacy service for families 'bereaved or have had members physically and/or mentally injured as a result of terrorism.' UHRW have raised with the Police Ombudsman and ICRIR, the 1992 IRA Teebane killings of eight civilian construction staff working on an army base, which injured another six. UHRW notes No one has ever been charged or convicted for carrying out the outrage' and querying the failures to arrest and question key suspects, states that:

> The view is that RUC Special Branch protected its sources and may have covered one of several State agents who may have been involved … Essential information, that could have led to the prosecution of those involved, may have been withheld by RUC Special Branch.[241]

As alluded to earlier no such analogous ministerial 'national security veto' powers as are now vested in the ICRIR to conceal the actions of state agents existed previously over the Package of Measures investigatory bodies. (Similar issues do exist with Ministerial powers under the Inquiries Act 2005.) The Package of Measures bodies been had become increasingly effective at establishing patterns and practices of human rights violations involving state agents in their reports before they were shut down.

As discussed above there had been similar efforts by the then UK Government to insert a national security veto into the draft SHA legislation, something that was not agreed during the SHA negotiations. As we noted at the time if enacted the national security veto would have meant that the contents of reports such as the Police Ombudsman's investigation into the Loughinisland massacre or the Operation Ballast report into the circumstances surrounding the murder of Raymond McCord Junior would have been redacted beyond recognition before publication.

By way of illustration the following two pages reproduce the opening page of the 2016 Police Ombudsman's report into the Loughinisland massacre. The first copy is the published opening page – the second copy is the same page but with material that would fall under the scope of the national security veto redacted out.

[240] As above.

[241] https://www.uhrw.org.uk/uhrw-calls-for-icrir-to-take-up-teebane-investigation-case/ Ulster Human Rights Watch are separate to and not connected to the NGO Human Right Watch.

police Ombudsman FOR NORTHERN IRELAND

THE MURDERS AT THE HEIGHTS BAR, LOUGHINISLAND, 18 JUNE 1994

Background to the attack

Intelligence suggests that the attack at Loughinisland was carried out by a UVF (Ulster Volunteer Force) unit in reprisal for the killings on the Shankill Road of senior UVF figures on 16 June 1994. An order came from the top of the UVF for there to be "blood on the streets" as a response to the killings. A UVF unit, under the command of a senior UVF figure reporting to the top echelons of the UVF, was dispatched to undertake the murders. I have not been able to determine with any certainty why the Heights Bar at Loughinisland was chosen. We do know that the claim made by the UVF at the time that it was an attack on active republicans, was completely false. The attack on Loughinisland was sectarian as the targets were members of the Catholic community.

Importation of weapons in 1988

However, an understanding of what happened at Loughinisland begins with the importation of arms by loyalist paramilitaries in late 1987/early 1988. My investigation has found that the VZ58 rifle which was used in the Loughinisland attack was part of the shipment which entered Northern Ireland at that time. I examined intelligence which showed the passage of a VZ58 into the hands of those, who were suspected of undertaking the murders.

Events leading up to the Loughinisland attack

My investigation into the Loughinisland killings examined the events leading up to the murders. It found that Special Branch had reliable intelligence that there was to be an arms importation in 1987/1988. Moreover, reliable intelligence indicates that police informants were involved in the procurement, importation and distribution of these arms. The failure to stop or retrieve all the weapons, despite the involvement of informants in the arms importation was a significant intelligence failure.

This is particularly the case in relation to the failure to retrieve imported weapons from a farm owned by James Mitchell. The outcome of this failure was that not all the weapons were recovered by the police and many, including the VZ58 rifle used in Loughinisland, were subsequently used in a wide range of murders.

Incidents prior to Loughinisland murders

Prior to the Loughinisland murders there were a number of terrorist incidents, going back a number of years, which I believe are of relevance to the events at the Heights Bar on 18 June 1994. Available intelligence on these murders reflected the existence of an active UVF unit in the South Down area. There exists a clear linkage between those incidents in terms of suspects and method of operation. Intelligence suggests that this unit was involved in a number of murders and attempted murders prior to the Loughinisland attack, one of which was of a very similar nature involving the indiscriminate use of a weapon in a public bar. This UVF unit reported to an individual with connections to some of the men killed on the Shankill Road. The key individuals in the unit were suspects in the Loughinisland investigation.

A limited amount of this intelligence was passed to the investigators of the individual incidents. The UVF unit was not the subject of a policing response sufficient to disrupt their attacks. The failure to disseminate information to investigators was, in my view, an attempt to protect the sources of that information. This clearly undermined the investigations.

Extract from actual Ombudsman Report.

police ombudsman FOR NORTHERN IRELAND

THE MURDERS AT THE HEIGHTS BAR, LOUGHINISLAND, 18 JUNE 1994

Background to the attack

Intelligence suggests that the attack at Loughinisland was carried out by a UVF (Ulster Volunteer Force) unit in reprisal for the killings on the Shankill Road of senior UVF figures on 16 June 1994. An order came from the top of the UVF for there to be "blood on the streets" as a response to the killings. A UVF unit, under the command of a senior UVF figure reporting to the top echelons of the UVF, was dispatched to undertake the murders. I have not been able to determine with any certainty why the Heights Bar at Loughinisland was chosen. We do know that the claim made by the UVF at the time that it was an attack on active republicans, was completely false. The attack on Loughinisland was sectarian as the targets were members of the Catholic community.

Importation of weapons in 1988

[redacted]

Events leading up to the Loughinisland attack

[redacted]

Incidents prior to Loughinisland murders

[redacted]

Same page of Ombudsman report with redactions within remit of national security veto.

Scope of National Security veto over ICRIR reports

The veto operates with a concept of 'sensitive information'. Sensitive information is defined under s60 of the Legacy Act as either any information which would risk prejudicing UK 'national security interests' or any information supplied by the security and intelligence services or police/military intelligence branches.

Schedule 6 restricts ICRIR disclosure of 'sensitive information'. Outside disclosure to the Secretary of State and a number of listed justice and policing bodies, such onward disclosure is restricted under paragraph 4 of the Schedule. This limits onward disclosure of such information to circumstances whereby the ICRIR has sought and been granted permission from the Secretary of State, who has a power to prohibit such disclosure. Paragraph 4 states:

> 4(1) A disclosure of sensitive information by the ICRIR is permitted if—
>
> (a) the Commissioner for Investigations notifies the Secretary of State of the proposed disclosure, and
>
> (b) the Secretary of State notifies the Commissioner for Investigations that the proposed disclosure is permitted.
>
> (2) The Secretary of State must respond to a notification by the Commissioner for Investigations under this paragraph within the relevant decision period, by notifying that Commissioner that the proposed disclosure either—
>
> (a)is permitted, or
>
> (b)is prohibited.

Part II of Schedule 6 then provides a limited appeal mechanism where Ministers have prohibited disclosure contained in 'Final Reports' of the ICRIR.

Schedule 7 of the Act then provides that any unauthorised disclosure by an ICRIR member of staff of such information which is subject to a Ministerial prohibition will be an offence punishable by up to two years imprisonment.

Separate to the ministerial powers under s30(7) there is also a general blanket prohibition on the ICRIR making onward disclosure if it contravenes the duty under s4(1) not to do 'anything' which would risk prejudicing the UK's 'national security interests.' Under s33(3) of the Legacy Act the Secretary of State may give guidance to the ICRIR on the scope of national security in this context.

It should be noted that at times there have been attempts to downplay the national security veto. The ICRIR 'myths' leaflet for example does not set out what the veto is but states that it can ask for material to be declassified and can be appealed and claims this is similar to public inquiries (but does not mention that there is no such national security veto over the work of comparable investigative bodies under the Package of Measures).[242] During a BBC Spotlight documentary, when experienced reporter Mandy McAuley directly addresses the

[242] "The Chief Commissioner always has to be a senior judge and is currently the former Lord Chief Justice of Northern Ireland, meaning that there is judicial oversight and scrutiny of the information obtained. The Commission can determine, in line with its legal duties, what goes into its reports, and can request that information is declassified. Any refusal by the Secretary of State can be challenged in court. This takes a similar approach to public inquiries that can also consider sensitive information in private." ICRIR Myths Leaflet.

impact of this provision, Minister Lord Caine implied that Declan Morgan had assured him that the provision did not exist. Ms McAuley asks: 'Will Ministers be able to veto information the Commission can release to families?' The Minister Lord Caine responds by stating: 'Declan Morgan was very clear that is not the case.'[243] This assertion appears at odds with the provision of the legislation which the Minister steered through the House of Lords. CAJ wrote to the ICRIR Chief Commissioner to clarify if he had said this but did not receive a response.[244]

Package of Measures findings regarding lawfulness of agent-handling - Kenova

The Operation Kenova investigation, conducted under the Package of Measures, lays bare that the system of facilitating, tolerating or even directing state agent involvement in serious crime and giving assurances agents would be shielded from the justice system, was unlawful:

> It is undoubtedly the case that some FRU [Army intelligence] and RUC Special Branch agents disclosed their involvement in criminality to their handlers (both before and after the event) and were assured that their anonymity and status would always be protected and they would never stand trial or spend time in jail. In some cases, the commission of offences by agents was not only condoned by their handlers, it was impliedly and even expressly encouraged. An agent who exposed himself to serious risk by providing information to the security forces could easily have been led to believe that their conduct was authorised and could not lead to prosecution.
>
> **However, the simple fact is that the security forces had no power to authorise the commission of crimes or confer prospective or retrospective immunity on offenders and any assurances given to the contrary were themselves unlawful.**
>
> Indeed, the abuse of process jurisdiction exists to protect the integrity of the legal system and the rule of law and it would make little sense if it operated to immunise breaches of the law and deny justice to victims and families.[245]

The Kenova interim report also refuted the official line that the operation of informant 'Stakeknife' whose actions had been at the centre of the Kenova investigation- had saved many lives finding such claims 'inherently implausible' and that the agent had probably cost more lives than the small number that were saved.[246]

In CAJ's submission to the Committee of Ministers following Kenova we stated:

> The unlawful nature of the system of authorising informant criminality and immunity goes a long way to explaining why such relentless efforts are being undertaken by the UK authorities and agencies to obstruct legacy investigations under the Package of Measures. The existing mechanism have been increasingly revealing the involvement of state agents in human rights violations. This also provides an insight as to why the UK wishes to replace the Package of Measures with the ICRIR where, through provisions in the Legacy Act, Minsters will have a 'national security' veto to prevent any information regarding intelligence and state agents being included in

[243] BBC Spotlight documentary 'Killer Secrets' broadcast 21 May 24, at 29 mins.
[244] A number of holding responses were received but at the time of writing no substantive response.
[245] Operation Kenova Interim Report, paragraph 68.9. Emphasis added.
[246] Operation Kenova Interim Report, page 36 and https://www.independent.co.uk/news/uk/home-news/operation-kenova-stakeknife-report-freddie-scappaticci-b2509430.html

ICRIR family reports. Ministers do not currently have this power over the judiciary and independent investitive bodies such as Kenova or the Police Ombudsman.

It is notable the use of the term 'dirty war', synonymous with the involvement of state agents in torture and murder, has now become more mainstream in Northern Ireland discourse regarding the Troubles (for example in the title of the flagship BBC documentary about Kenova).[247]

It has also become apparent in the attempts by Secretaries of State to close down legacy inquests and the revelation from the Chief Constable that the previous practice in applying the 'Neither Confirm nor Deny' (NCND) principle in legacy investigations had inhibited investigations when state agents were involved. The Chief Constable has sought the approach be reviewed and recodified in legacy cases as on the grounds that '*Nobody who commits murders should be protected by the policy of NCND.'*[248]

Prior to the 1 May 2024, several instances of very public interventions by Ministers seeking to prevent coroners revealing 'national security' information also occurred. This 'national security' information is understood, and on occasions confirmed, to often relate to the suspected involvement of state agents in human rights violations (as was the case with the Sean Brown inquest).

Similarly, in inquest into the death of Liam Paul Thompson, the Secretary of State, sought to prevent the coroner from publishing a gist of national security information by initiating two unsuccessful judicial review application and an unsuccessful appeal to the Court of Appeal. This is despite the PSNI Chief Constable agreeing that the information should be disclosed following the first set of Judicial Review proceedings, The Secretary of State argued that the courts should implement the Government policy of 'neither confirm nor deny' (NCND) regarding sensitive material. However, the Courts have confirmed that the Government NCND policy is precisely that, policy, not law. It is notable by contrast that a power to redact information, which the Secretary of State does not have over the independent judiciary, would be in place to prevent the publication of such material in ICRIR reports.

In the Sean Brown inquest, the Secretary of State subsequently launched a judicial review against the coroner for revealing that state agents were among the suspects in the murder.[249]

Lawyers for the family in the Fergal McCusker inquest raised concerns of *'*an unprecedented political intervention'*,* revealing that the Secretary of State had written to the Chief Constable (who is operationally independent) to complain that it was 'unwelcome' decisions had been taken without reference to him. The Chief Constable reportedly replied in 'fairly robust terms' pointing out that 'I am independent of the executive and not subject to the direction or the control of government ministers, department or agencies*.'* Again, it is notable that there *will* be such Ministerial direction and control over the content of ICRIR reports if the national security veto is retained.[250]

---

[247] 'Our Dirty War: The British State and the IRA': https://www.bbc.co.uk/iplayer/episode/m001x24x/spotlight-our-dirty-war-the-british-state-and-the-ira?seriesId=more-like-this

[248] https://committees.parliament.uk/event/21199/formal-meeting-oral-evidence-session/ Q25.

[249] https://krw-law.ie/sean-brown-statement/

[250] https://www.irishnews.com/news/northern-ireland/exclusive-chris-heaton-harris-accused-of-unprecedented-political-intervention-in-legacy-inquest-G5HBSNUMQ5EUNFRFXVI7577Y4Y/

In April 2024, the PSNI Chief Constable addressed the application of the NCND policy in preventing investigations into state agents and granting de facto immunity before a UK Parliamentary Committee in the following terms:

> I am probably bringing a new challenge now, because this is the way it has always been done. Of course, when you go into a new role and somebody says: 'Well, this is the way we do things,' because of my background and experience I question it— 'Well, is that right?'— and question what NCND cannot do. There is no immunity process. … Saying that you cannot investigate a crime any further because there is an agent involved is poppycock. That is not right.
>
> I think there has been an application of NCND in Northern Ireland that has restricted previous Chief Constables and investigators. Through the narrative that I described— from these incredibly impressive people who have dealt with legacy in the past— that has created a position that has inhibited us freeing ourselves from some of this legacy. It is like an anchor that holds us back. I think the NCND provisions are part of that. That is why all I am asking is for them to be reviewed and re-codified in the context of the Northern Ireland troubles. Nobody who commits murders should be protected by the policy of NCND. I do not think anybody could disagree with that.[251]

In this context it has become increasingly apparent that those who would wish to conceal human rights violations by state agents could not rely on official investigations under the Package of Measures to do so in a context where office holders were asserting their independence and overcoming limitations to produce accountability reports.

The 'national security' veto within the ICRIR (along with the earlier attempt to insert same within the SHA HIU) appears to be at the centre of Ministers 'taking back control' to conceal patterns and practices of human rights violations involving state agents.

The Court of Appeal has now found that the national security veto in relation to ICRIR functions is unlawful by virtue of ECHR incompatibility. It remains to be seen how the new Labour Government responds by either removing the national security veto, seeking to reframe it, or appealing the ruling to seek to retain it.

[251] https://committees.parliament.uk/event/21199/formal-meeting-oral-evidence-session/ Q25. In response to Q23 Mr Boucher stated: "since arriving as the Chief Constable and because of the experiences I have had, I have taken quite a forensic view of how we were dealing with the remaining inquests that were to take place before such inquests had to finish for the commencement of the commission on 1 May. That included my looking at the process that has been adopted on public interest immunity applications… With my background as head of covert policing, undercover policing, I have done a considerable amount of public interest immunity applications and dealt with every type of sensitive information that is available to intelligence agencies and law enforcement. I have taken a very clear position that this totemic approach in Northern Ireland, and I describe it in those terms in the report, is not correct and is often driven by lawyers. What it leads to, as the Chief Constable of PSNI, is a perception in communities in Northern Ireland that there is a cover-up— […] that the authorities are deliberately preventing information from coming out."

3. What would 'substantive root and branch' reform of the ICRIR look like?

3.1 Introduction – a question of political will?

Having established the background context, personnel and legal framework of the ICRIR this concluding section considers what steps could now be taken, to deliver 'substantive root and branch' reform of the ICRIR and whether this could create a viable institution.

It is important to say at the outset that there is no legally viable 'do nothing' given that the domestic courts have held that the ICRIR legal framework is incompatible with the ECHR and GFA rights protected by Article 2 of the Windsor Framework.

Both the ICRIR Chief Commissioner and the Commissioner for Investigations reportedly committed to resigning if the ICRIR's legal framework was found incompatible with the ECHR, and the legislation is not amended accordingly.[252]

We consider it would be a mistake to limit reforms to the 'minimal' and elements of the Legacy Act that are so egregious that they have already been held to meet the threshold of being unlawful under the ECHR. Rather reforms should take on and address the much broader legitimate concerns expressed by the UN, Council of Europe, the Irish Government, the states own Human Rights Commission, human rights groups, victims and survivors, parliamentarians and others. Otherwise, there is little chance of gaining public confidence in a new institution and it being able to function effectively.

Retaining the existing ICRIR with only minor or cosmetic changes is likely to be a recipe for ongoing litigation across multiple specific cases over ECHR compatibility. In the medium to long term this is likely to be the option that will ultimately create the biggest headache for the UK Government and not be sustainable.

We would also strongly caution against any gaslighting of victims and survivors by seeking to present cosmetic or minor changes as proper reform of the ICRIR. As noted earlier there were occasions when the previous Conservative Government committed to significant 'game-changing' amendments to the Legacy Bill that when presented amounted to little more than cosmetic changes or even made the legislation worse.

The insistence of breaking with existing practices to involve former RUC officers in key positions in legacy investigations is likely to ultimately lead to a replication of the failures of the former HET.

The main finding of this report is that only a substantive and meaningful reform process to produce an entirely distinct institution to the ICRIR, with a different name, framework and composition unrecognisable to what is presently in place could render a legacy institution viable.

[252] 'We're going to help Troubles survivors have a better understanding of what happened to their loved ones' – The Irish Times "Sheridan is clear that, if the courts find the legislation is in breach of the convention, it must be amended, or he will quit." But he emphasises that if a court rules against the UK government, "it'll have to be amended, because if it's not amended [the Chief Commissioner] Sir Declan Morgan and myself are not going to be part of a piece of legislation that the courts have said is not compliant with human rights standards."

Legislative reform to 'fix' the ICRIR on paper is clearly going to be insufficient given a major problem the institution faces is an understandable lack of confidence and trust due to the circumstances and purpose for which the ICRIR was created. In our view this trust deficit has also been exacerbated by certain actions by the ICRIR since its establishment, examples of which are included in this report.

There needs to be a replacement and re-appointment of Commissioners to a legacy body in a process that is independent from UK Government and the previous Governments agenda. We contend that an internationalisation of office holders would significantly help to build confidence and impartiality.

In order to win the confidence and trust of victims and families, it is vital that the new Labour Government to credibly demonstrate that it has broken with the impunity agenda of its predecessor and has an unwavering commitment to the rule of law; that it will be a British Government that does not operate unilaterally and honours the commitments it has made in good faith, including those in its manifesto regarding the Legacy Act. These commitments range from the reopening of all inquests and civil cases to delivering an ECHR-compliant Pat Finucane public inquiry, and repealing and replacing the Legacy Act per se. Government should not continue its appeal the Court of Appeal ruling in *Dillon*, the implications of which would imply a desire to retain a national security veto and not to reopen legacy inquests per se.

As the failure to implement the SHA and the obstruction of the Package of Measures shows, the barrier has long been the political will in London to implement international obligations and what had originally been agreed. In the present circumstances, there is already a building, and potentially IT system and other systems set up for the ICRIR that could be retained in a reformed body, making the task more straight forward. In addition, seeking to invoke costs as a rationale for not resourcing legacy mechanisms should not legitimately be a barrier as the ICRIR has been offered up to £250 million to undertake its work.[253] This resource can be reallocated to a new institution and complimentary mechanisms, including legacy inquests and the SHA ICIR.

It is also a fact that there remains an existing Agreement between the UK and Ireland, negotiated with the NI parties, in the UK-Ireland Stormont House Agreement and its 2015 bilateral implementation treaty. The SHA was unilaterally reneged on by the Government of Boris Johnson in early 2020 but remains in existence and should be the starting framework by which to measure reform of the ICRIR. As set out elsewhere, it is not credible to suggest that the ICRIR combines the functions of the HIU and ICIR committed to under this agreement. Labour has recently moved to begin to honour the commitment in the 2001 UK-Ireland Weston Park Agreement to hold a Public Inquiry into the death of Pat Finucane. This commitment had not been discharged by successive Governments for around 20 years, yet the new Government rightly recognised that the commitments under this bilateral agreement remained.

In essence, a substantive root and branch reform process of the ICRIR would involve turning it into the HIU envisaged by the SHA, but with the benefit of additional learning and provisions from the Operation Kenova model and process. Only a managed change process

[253] Correspondence from the Secretary of State to the ICRIR, 14 December 2023 https://icrir.independent-inquiry.uk/document/icrir-funding-letter/

producing something unrecognisable to what is presently in place is likely to be viable. We do not consider this a difficult task as such a framework for independent robust legacy institutions has already been subject to intense discussion and political scrutiny over many years.

A reformed investigatory institution can also be part of a 'Stormont House +' model that could build on and address many of the gaps in the Stormont House model. To this end, in line with the recommendations of the International Expert Panel on Impunity and the Northern Ireland Conflict, we would recommend this includes the extension of the remit of the SHA HIU to cover Article 3 as well as Article 2 violations (to cover torture and serious injuries, which are already in the ICRIR remit); and that a counterpart HIU mechanism is established by the Irish Government in its jurisdiction.[254] We would also recommend taking forward the recommendation of the International Expert Panel that the two Governments: *seek to establish, with the assistance of the United Nations and Council of Europe human rights mechanisms, an independent international commission to thematically examine patterns of human rights violations and impunity during the Northern Ireland conflict, including torture and collusion, with legislation to provide full powers of disclosure.*

The following section sets out some immediate measures that we consider should be taken forward to honour manifesto commitments and to remedy the ECHR incompatibility issues already identified in the domestic courts. Following this, distinct sections examine the key areas for substantive root and branch reform that could transform the present institution into a viable ECHR-compliant legacy body capable of commanding support.

In doing so, these sections draw on a matrix table, included as an appendix to this report, setting out the differences between the ICRIR legislative framework and that provided for the HIU under both the official SHA draft legislation and the unofficial SHA 'Model Bill' produced by CAJ and academic colleagues.[255]

[254] A separate report by CAJ with the Irish Council for Civil Liberties (ICCL) explores this question. [ICCL-CAJ September 2024 Seminar Report, Policing for Peace and the Commitment To 'Repeal And Replace' The Northern Ireland Legacy Act: How should the Irish government deal with legacy investigations in its jurisdiction? (forthcoming).

[255] Stormont House Agreement - Model Implementation Bill and Explanatory Notes - Committee on the Administration of Justice (caj.org.uk)

3.2 Interim Measures that should be taken regarding the broader Legacy Act

Whilst 'root and branch' reform of the ICRIR will require detailed primary legislation, we consider that the following immediate steps should be taken to build trust and ensure compliance with the international law obligations of the UK. These include Remedial Orders under the Human Rights Act (secondary instruments to remedy the ECHR incompatibility of primary legislation).

We would also urge the Labour Government, whose predecessors were the architects of the GFA, to discontinue the intention to appeal the Court of Appeal ruling in *Dillon,* including provisions relating to the breaches of GFA rights protected by Article 2 of the Windsor Framework/ Protocol, or any elements of ECHR incompatibility. To appeal and seek to reinstate such provisions in the Legacy Act at this stage would send out a message the current Government has not moved away from the agenda of the administration it replaced.

Reinstating Civil Proceedings

- **Take the fastest legislative route, including using Remedial Orders under the HRA, to repeal entirely the ECHR-incompatible ban on civil litigation** and reinstate civil proceedings in relation to Troubles-related cases contained in the Legacy Act.

We also recommend Government avoid any fast-track scheme to be offered as an alternative to civil proceedings. Any such move would be viewed as designed to hamper the vital information recovery and historical clarification that have occurred to date through narrative verdicts and findings in civil proceedings. Any such a move would understandably be understood as Government trying to again close down findings of wrongdoing via an alternative different route.

We recommend there should be adequate resourcing of the judicial system to deal with civil claims. The UK Government should be responsible for reparations resulting for troubles-related civil actions.

Reopening Legacy Inquests

- **Take the fastest legislative route, including using Remedial Orders under the HRA, to repeal entirely the ban on existing and new legacy inquests**, to allow those in the LCJ five-year plan to complete and new inquests opened by the Attorney General to be put into the system and heard. The power to open new legacy inquests should also be returned to the Attorney General.
- **Avoid trying to revive the contention that the ICRIR can run a form of pseudo-inquest** and instead honour commitments which allow families to have the choice of mechanism.
- **Drop appeals brought by the previous Conservative Government in relation to the powers of coroners to disclose sensitive information.**
- **In inquests involving sensitive material** desist from taking a regressive approach to seeking to exclude sensitive material from inquests, and explore options to further evolve the ECHR compatibility of this small cohort of inquests in such cases.
- **Adequately resource inquests** through the reallocation of resources from the £250m offered to the ICRIR to ensure Inquests can take place expeditiously.

These recommendations would be consistent with Labour's manifesto and commitments made to families, as well as a return to the principles of Stormont House which retained inquests.

Whilst most legacy inquests have been running very well and no changes would be required to the legislative framework to complete them, there are a small number of inquests whereby coroners have run into difficulties being able to complete the inquest due to 'sensitive' material. In recent judicial reviews, the Courts have helpfully clarified that the scope for the use of sensitive material in inquests is much broader than the previous Government had wished, meaning inquests may be able to proceed in a cohort of cases involving sensitive material. In cases where this is not possible, other alternatives should be explored for this small cohort of inquests including ECHR-compliant public inquiries. This should also involve continuing to evolve the legal framework for inquests, as has previously been the case to ensure Article 2 compliance, to make further provisions for inquests to be able to adjudicate on sensitive material in legacy cases. A separate academic paper is currently examining these questions in further detail.[256]

Repeal the amnesty provisions in their entirety

- **The disapplied immunity scheme and related provisions of the Legacy Act should be repealed and not revived.**

Finucane Public Inquiry

- Deliver the commitment to hold an **independent public inquiry into the death of Pat Finucane** in a manner compatible manner with the ECHR and broader human rights standards.

Other measures

- Halt the controversial memorialisation provisions started by the previous Government in tandem and linked with the Legacy Act. (see 3.9 below).
- Honour the commitment in the SHA and its associated bilateral treaty to establish the Independent Commission on Information Retrieval (ICIR).
- Urgent consideration should be given to whether relevant ICRIR functions can continue in the findings of ECHR incompatibility of the legislation and broader concerns.

[256] Professor Kieran McEvoy, 'Making Legacy Inquests fit for Purpose in Northern Ireland' forthcoming.

3.3 Powers of Disclosure and the 'National Security Veto'

Powers of disclosure to the reformed legacy body

- **In replacement legislation for the Legacy Act do not replicate the qualification on powers of disclosure to the ICRIR.**
- **Ensure a reformed legacy body has a robust and unambiguous power of disclosure, including relevant sanctions, in line with recommendations in the SHA Model Bill.**

This provision refers to the provision of documents, records and other materials to the legacy body by relevant public authorities. (Rather than onward disclosure *from* the legacy body to families and others).

To date, the domestic courts have held that the powers of the ICRIR to obtain disclosure are sufficient to meet the *minimum requirements of ECHR compatibility*. However, this standard is not the only measure and it does not mean there are no legitimate concerns about their limitations based on experience of operating similarly formulated powers of disclosure in NI legacy cases.

The Legacy Act 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.'[257]

There is no sanction for failure to provide such information and 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.

Persons of experience of operating similar powers in the context of NI legacy investigations have raised such concerns. There have been numerous difficulties by Package of Measures legacy mechanisms obtaining disclosure with similar powers, to the extreme of the Ombudsman having to judicially review the PSNI to obtain disclosure.

The then head of Operation Kenova, Jon Boucher, now PSNI Chief Constable, when giving evidence to a Westminster Committee on the Legacy Bill 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.'[258]

Former Police Ombudsman Nuala O'Loan, now Baroness O'Loan, tabled an amendment to the Legacy Bill to remove this qualification to ICRIR disclosure powers (i.e. that the ICRIR must 'reasonably' require the information requested). The then UK Government however resisted the amendment and retained the qualification to powers.

---

[257] 5 Full disclosure to the ICRIR: (1) A relevant authority must make available to the ICRIR such—(a) information, (b) documents, and (c) other material, as the Commissioner for Investigations may reasonably require for the purposes of, or in connection with, the exercise of the review function or the immunity function.

[258] 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/

Back in September 2022, holding similar concerns, the Council of Europe Committee of Ministers had urged the UK Government to amend the Legacy Bill and to ensure 'that the disclosure provisions unambiguously require full disclosure to be given to the ICRIR.' Ministers did not propose any amendments to address this issue.

The unofficial SHA Model Bill sought to address this problem with model clauses which would have unambiguously required full disclosure to the HIU. The Model Bill provides an unqualified duty to comply with requests for disclosure for the purposes of an HIU investigation. There is provision overriding other considerations (e.g. Official Secrets Act) to ensure disclosure. The model clauses also grant the HIU powers to issue binding directions on public authorities not to destroy, damage or alter specified classes of documents in their possession. The Model Bill would also make it an offence not to provide requested disclosure to the HIU or to 'conceal, alter or destroy information where the person knows or ought to have known that the information was or might have been relevant to an investigation that the HIU was conducting or might wish to conduct.' The offence is punishable by a fine. The Model Bill also provides for transfer of files from the PSNI and Ombudsman.[259]

If there is a genuine commitment to now ensure that the legacy body has full powers to compel disclosure, there could be no reasonable objection to it removing the qualifications over disclosure powers in the manner they are presently framed for the ICRIR, and instead adopting the robust and unambiguous model clauses to build confidence and remove ambiguities over disclosure powers.

Powers of disclosure <u>by</u> the ICRIR – the national security veto

- **Do not retain any sort of 'national security veto' in a reformed legacy body, as a necessary requirement for human rights compliance and to gain public confidence.**
- **This includes repeal and non-replication of any part of the national security veto and all of its associated duties.**
- **Avoid any approach of seeking to retain the national security veto in another guise, such as seeking to codify the same limits, or previous regressive interpretations of the NDNA policy, into the legislative framework of the investigative body. In particular by vesting a 'national security' veto in alternative office holders.**

As detailed in section 2.17 of this paper the ICRIR's national security veto codifies a complex system of pre-marking of information as 'sensitive' if it engages UK 'national security' issues or originates from the security and intelligence services, RUC Special Branch or army intelligence. Ministers are then granted powers to prohibit the ICRIR from including any such information in their reports that engages UK national security interests. In essence, ministers can redact reports of a supposedly independent body and the provision can be used (and is undoubtedly designed) to conceal improper and unlawful conduct by state agents including involvement in serious human rights violations.

The breath of the national security powers is remarkable. Beyond the restrictions on disclosure in Family Reports, the ICRIR cannot disclose 'sensitive' information to the police or

[259] Stormont House Agreement - Model Implementation Bill and Explanatory Notes - Committee on the Administration of Justice (caj.org.uk)

DPP without notifying the Secretary of State *ten days in advance of doing so*. This is a remarkable interference in the justice system.

There is no such ministerial national security veto over disclosure by investigative bodies under the Package of Measures, including called in police investigations like Operation Kenova, PSNI LIB, the Police Ombudsman and inquests. Such investigative bodies which have functioned successfully without one. There are some similar problems with public inquiries given the breath of ministerial powers of interference under the Inquiries Act 2005, with the human rights compliance of Inquires under the Inquiries Act, such as the Baha Mousa Inquiry, only guaranteed if ministers undertake to not use their discretionary powers of interference.

In scrutinising the ICRIR's contention, it could emulate inquests the Court of Appeal unsurprisingly found that the ministerial national security veto fettered the independence of the ICRIR and was therefore not compatible with the ECHR. The Court of Appeal held:

> The SOSNI can prohibit the ICRIR from sharing sensitive information – which, as we have said, is defined in terms which could and would go much wider than material over which PII [Public Interest Immunity] is asserted – with the next of kin and others in a final report. The SOSNI can prohibit disclosure even without giving reasons to the ICRIR, let alone others, in certain instances. There is also no provision for a merits-based appeal (although there is review akin to judicial review); and it appears that the court cannot itself permit disclosure of any sensitive material where the SOSNI's permission has been withheld. Overall, we find that this regime has the potential to offend the proper aim of the ICRIR expressed in its written submissions that "the organisation is made up of personnel that are able to conduct their work free of State interference" and could give rise to an unhelpful perception which could hinder progress in this area. [234]

Duties on legacy bodies should be limited at the most to a duty on the body itself to ensure redactions to published or family reports where they are in the interests of justice (i.e. not to prejudice legal proceedings), to protect lives or not to reveal operational policing and intelligence methodologies that are lawful and currently used. There is the benefit of learning from the publication protocols in Operation Kenova and the broader Package of Measures. Agents of state and their handlers are not above the law and no duty to redact reports should provide for a concealment of human rights violations by state actors.

3.4 Provisions to conduct ECHR compatible investigations and caseload remit

- **The legislative framework for the investigative body must be codified to ensure that when the investigative threshold is met and powers of investigation are used, then the legacy body should be legally obliged to ensure that its *investigations* meet the requirements of ECHR Articles 2/3 once they commence, as can be the case with inquests**. This would not preclude the retention of a 'review' then 'investigation' model once a threshold is met, linked to the *Brecknell* test.
- **Ensure powers of the legacy body to investigate cover the grave and exceptional officer misconduct across agencies.**

Key learning would point to it not being sufficient for a reformed legacy body to merely be 'capable' of carrying out ECHR-compatible investigations at its discretion. Such a limitation allows scope for bodies like the ICRIR to conduct light touch reviews at their discretion and not conduct investigations or report to an ECHR Article 2 compliant standard. The ICRIR itself sets out that 'The legislation which established the Commission provides our powers and duties but does not prescribe the manner in which we discharge them.'[260]

This discretion without binding duties to follow ECHR standards departs from the SHA framework of greater codification and in context is a cause for concern given the agenda under which the ICRIR was established. This is particularly the case in the context Government has successfully pursued temporal restrictions for duties under the HRA, meaning that the duty to comply with the HRA is limited in its impact for most conflict related cases.

The framework for the ICRIR in the Legacy Act appears intentionally weak and grounded in the light touch review model. It is clearly intentional that the word 'investigation' was repeatedly stripped out from the previous iteration of the SHA legislation and replaced with 'review' in the legislation to enact the Legacy Act. There is significant discretion vested in the Commissioner for Investigations as to how to conduct the review and whether to include a criminal investigation regardless of whether 'new evidence' thresholds are met. Also stripped out of the legislative framework for ICRIR reviews is express provision that would examine grave and serious official misconduct relating to a death, a provision in the existing Police Ombudsman's powers that had been replicated in the official SHA legislation.

ICRIR policy documents which summarise Article 2/3 good practice for investigations do not reference Article 2 ECHR duties to determine whether the use of force in state involvement cases was justified.[261] Ministers had given guarantees to veterans that the advent of the ICRIR would mean they were no longer subject to the risk of arrest and questioning in legacy investigations, which may be the source of abuse of process applications if the ICRIR is not replaced.

The ICRIR policy documents set out three types of investigations it may follow and make clear it is at the ICRIR's discretion which one will be followed – namely focused, liability or culpability investigations, with the former limited to answering questions from families. Liability investigations are the category that may seek to identify and lead to the prosecution of a suspect. Police powers can also only be used in liability investigations.'[262]

As referenced earlier in this paper, according to the Ministerial architects of the Legacy Act, the original whole structure of ICRIR was designed around obtaining information through the amnesty scheme. Ministers themselves stated that the ICRIR would have no 'chance' of working without the immunities scheme in place. This further adds to the contention that the ICRIR structure was not designed, as its legislative framework belies, with through and effective investigations in mind.

The Northern Ireland Human Rights Commission raised concerns in evidence to the UK Parliament from the outset of the Bill that 'A light-touch review or historical record by the

[260] ICRIR The Operational Design Framework, page 5.
[261] ICRIR The Operational Design Framework, page 26.
[262] ICRIR The Operational Design Framework, page 5.

ICRIR do not equate to thorough and effective investigations.'[263] These concerns remain and reform of this provision should be central to root and branch reform.

The structures developed for the ICRIR essentially reverse the safeguards that were built into the SHA framework to seek to ensure ECHR compatible investigations took place when required. This process should be reversed and safeguards re-introduced.

The official SHA Bill included provisions for investigations to include investigation of any criminal offences and any grave or exceptional RUC misconduct relating to a death (the latter replicates powers in the Police Ombudsman.) The HIU Director must also issue a Statement which sets out the manner in which the HIU is to exercise its investigatory function as to secure compliance with ECHR Article 2 and other human rights obligations. There is then operational control over the investigation by the Director. There is a trigger to ensure an investigation takes place where there is either new evidence or evidence of either a criminal offence or grave and exceptional misconduct linked to a death which is the *Brecknell* test.

The unofficial SHA Model Bill goes further in codifying binding duties for ECHR compliant investigations in order to build confidence so that effective investigations can take place. Clause 10 of the Model Bill codifies the purpose of the investigation to the elements required by an ECHR compliant investigation: (*a) establish as many as possible of the relevant facts; (b) identify, or facilitate the identification of, the perpetrators; (c) establish whether any relevant action or omission by a public authority was lawful (including, in particular, whether any deliberate use of force was justified in the circumstances); (d) establish whether any action or omission of a perpetrator was carried out with the knowledge or encouragement of, or in collusion with, a public authority; (e) obtain and preserve evidence; (f) identify material which is or may be relevant to motive (including, in particular, racial, religious or other sectarian motive); (g) identify acts (including omissions; and including decisions taken by previous investigators or other public authorities) that may have prevented the death from being investigated or a perpetrator being identified or charged; and (h) take any other action that the HIU thinks appropriate.*

- **Ensure powers of compulsion by the legacy body are subject to the established safeguards around police powers.**

Whilst the ICRIR and HIU would have police powers, which will be subject to the usual safeguards in their exercise within criminal law, by contrast the powers under section 14 of the Act risk arbitrary and discriminatory application. The powers allow the Commissioner for Investigations to in essence summon any person to provide any documents or other items they have or produce any written statement. It is not clear what safeguards individuals will have against 'fishing' expeditions where persons are summoned to testify before the ICRIR without individual reasonable suspicion, and without support for legal representation or similar safeguards that are provided for in criminal justice processes. The only explicit exemption for an individual is outlined in a procedure allowing security and policing bodies or Ministers to make representations that an individual should not attend proceedings on the grounds that it would compromise the UK's national security interests. In such cases, an alternative procedure must be implemented. This is not limited to employees of agencies so could also include state agents.

[263] https://committees.parliament.uk/writtenevidence/109473/html

Initial caseload and remit

- **We recommend that a reformed legacy body with the capacity to conduct ECHR compatible investigations picks up the outstanding cases that were agreed for transfer under Stormont House and also extends its remit to cover ECHR Article 3 violations.**

In relation to caseload, the Stormont House HIU was to pick up the outstanding legacy caseload of the HET, and Police Ombudsman, as well as other outstanding conflict related deaths up to 2004 (the relevance of 2004 related to the PSNI not being able to stand over murder investigations prior to that point.) This includes hundreds of deaths dealt with by the HET in Royal Military Police cases which the HMIC found had not met investigatory standards.

The ICRIR starts with a blank caseload and the Legacy Act simultaneously shut down investigations into all other outstanding cases that had been within the Package of Measures– including those with outstanding Article 2 ECHR requirements

The significant limitation of the SHA model was that it was restricted to deaths. The unofficial SHA Model Bill proposed an extension to Article 3 violations given the parallel ECHR duties of independent effective investigation. The ICRIR has an extension beyond this to serious injuries to other conflict related harms when referred by the SOSNI.

3.5 Findings and Products of a new legacy mechanism

- **The reformed legacy body should follow the SHA Model Bill in codifying maximum permissible disclosure into its reports for families and others.**

Past experience dictates that a 'Trust Us' and discretionary model for what findings will be made available to families will be insufficient to garner confidence and support. Rather this is an area that will need codification and underpinning duties that the legacy body will provide maximum permissible disclosure to families (in addition to removing the aforementioned 'national security' veto over disclosure to families).

Under the official SHA legislation, the HIU was obliged to provide 'comprehensive family reports' with the legislation stipulating that they must be 'as comprehensive as possible'. There is also specific provision for investigation reports and provision of reports to injured persons. Family or interim reports were also to include a statement of disclosure and a statement regarding cooperation given by the Irish authorities to the HIU (relevant in cross-border cases).

The unofficial SHA Model Bill further codified this approach providing for family reports that must 'include as much information about the investigation and its findings as the HIU believe can be made public without prejudicing the administration of justice,' including matters required to ensure ECHR compliance.

In relation to the ICRIR, by contrast there are no provisions to require maximum permissible disclosure in the legislative framework. The SHA provision that family reports must be as 'comprehensive as possible' has been removed from the Legacy Act. The ICRIR Chief Commissioner is to produce a final report into the findings of an ICRIR review. Its mandatory contents are limited to a statement setting out how the review was conducted and, where practicable, responses to questions asked when the review was requested.

3.6 ICRIR model v HIU and ICIR in Stormont House

- **We recommend that the Stormont House ICIR is established separately to a reformed HIU-type investigative body.**

To recap, the SHA would have established an investigatory body and separate information recovery body as follows:

- *Historical Investigations Unit (HIU)*–independent body operating in NI to conduct ECHR-compliant investigations and produce information-recovery reports for families.
- *Independent Commission on Information Retrieval (ICIR)* -a cross-border body established by treaty with international immunities to receive information in confidence in form of Protected Statements, that cannot be used in criminal or any other legal proceedings. These protected statements would provide information to families.

The current SOSNI has stated that, following a meeting with the ICRIR Chief Commissioner, he considers that the ICRIR in effect combines the HIU and ICIR.[264] However, this is plainly not the case. The ICRIR does not have the functions of the SHA ICIR. It was not agreed with the Irish Government, it is not established as an international cross-border entity, it has no jurisdiction in the Republic, and above all, it has no provisions for Protected Statements, the central ICIR provision for securing information.

The model for the ICIR was premised on the learning from the Independent Commission for the Location of Victims' Remains (ICLVR). The ICIR had the power to seek information from intermediaries or other individuals with knowledge of past crimes following a victim request. It would receive this information confidentially and it could not be used in any legal proceedings (criminal, civil, coronial inquests etc). This was broader than protections against self-incrimination and much broader than what is in the Location of Victims' Remains Act, which only covered criminal proceedings plus the limits on forensic testing. The information could be credibility tested and then shared with families in a ICIR report (which is again different to the ICLVR – which provided for no information at all to be disclosed save for the recovery of the remains).

This protected statement mechanism was intended to remove barriers to people coming forward and disclosing information. These could be barriers from criminal liability, but it also could also be fear of having one's actions during the conflict becoming public or facing recriminations for providing information. This was viewed as important as it had the potential to yield information that would be unavailable from other sources and urgent in the sense that those with memories of these actions would not be around forever. Thus, it could substantially enrich the information provided to families. The ICRIR has no mechanism to uncover these types of testimonies, and it is not clear that interviewing suspects under caution will encourage them to be as open in disclosing the truth.

[264] "…the Government have decided that we will retain [the ICRIR]. That is because the Stormont House agreement—we want to return to the principles that it set out—envisages both information recovery and continued investigation. Those two functions are in effect combined in the independent commission. I met Sir Declan Morgan yesterday to talk about how that work can be taken forward."

Notwithstanding its core weaknesses, the ICRIR could be said to have similar *functions* to the HIU as both were to produce information-recovery reports for families on back of investigations. In this sense, the ICRIR can be said to have similar, albeit much weaker, information recovery functions. However, under Stormont House, information retrieval referred to the work of the ICIR, not the HIU. The ICRIR has none of the provisions for Protected Statements on which the Stormont House ICIR was based. The ICIR took a similar model to the ICLVR. There was no provision for this model in any part of the Legacy Act.

There were protracted Stormont House discussions regarding the importance of firewalling of the HIU and ICIR functions from each other, an even more complicated proposition if they were ultimately combined in the same body. The ICIR framework provided that this could be undertaken through intermediaries or directly.[265]

Not to take forward the ICIR, in addition to unilaterally dispensing with a treaty and core element of the SHA, would disregard a key mechanism for information-recovery for families, particularly from non-state actors.

3.7 ICRIR Commissioners and Personnel

- **We recommend a process of internationalisation of a reformed legacy body to build impartiality, confidence and draw on the numerous persons with international experience in transitional justice.**
- **Commissioners running a reformed legacy body should all be re-recruited following an independent and international process, along with refreshing senior staff, to build confidence in the institution and augment its skills set and independence.**
- **The reformed legacy body should follow the independence requirements for investigators adopted by Operation Kenova and Police Ombudsman legacy cases**.

The issue of who runs and controls a reformed legacy body is going to be as significant for building confidence across victims, survivors and families as the issue of the legislative framework in which it operates. Fixing the 'ICRIR' on paper is clearly not going to be sufficient to build trust and making a legacy body viable.

It is impossible to escape the contention that all of the present ICRIR Commissioners were appointed by Conservative Government Ministers who were in pursuit of a particular agenda highlighted in this report.

It is well known that even with the significant remuneration on offer, many well qualified persons who would be an asset to a legacy body, would not contemplate employment in the ICRIR due to the toxicity of the Legacy Act. Such persons, their skills and ability to build trust in the institution, will therefore be missing from the present set up.

We would strongly advocate an approach of internationalising the legacy body to build impartiality, confidence and draw on the numerous persons with international experience in transitional justice. We would consequently advocate that Commissioners running a

[265] The Annex to the Treaty sets out "Following receipt of an eligible family request for information about a death within the remit of the Commission, the Commission shall seek information about the death: (a) through intermediaries appointed for this purpose; *and (b) directly from other persons (including witnesses to, or those involved in, the events concerned)*"

reformed legacy body must all be re-recruited following an independent and international process to build confidence in the institution and augment its skills set and independence.

The issue of conflicts of interest of some investigative staff must also be addressed. Lessons from other NI legacy bodies make it evident all investigators should be able to demonstrate practical independence across the full range of cases. This is not least as it is not possible to determine which cases engage state involvement or failings until they are investigated.

The internationalisation approach would be consistent with the approach of previous Labour Governments' post the GFA, where in addition to a bilateral approach with the Irish Government, there was considerable international involvement in and appointments to the various post GFA mechanisms.

3.8 Oversight of legacy mechanisms and financial autonomy

- **A reformed legacy body should have continued measures for financial autonomy and a return to the oversight structures envisaged under the SHA.**

The unofficial SHA Model Bill contained detailed provisions to ensure the HIU was accountable to the Policing Board, Criminal Justice Inspector and the Police Ombudsman; and that the consolidated fund would resource these bodies accordingly for their HIU work to ensure their oversight functions were effective. HIU Officers were also to be bound by a Code of Ethics, issued by the Policing Board which would include rights and obligations arising out of the ECHR and other obligations.

The Official SHA Bill also required the HIU to be accountable to the Policing Board, inspection and the Police Ombudsman and for the issuing by the Policing Board of a binding Code of Ethics on HIU Officers concerning conduct and human rights obligations. This would ensure the HIU meets the policing accountability standards put in place as part of the architecture of the peace process and agreements.

These accountability arrangements are stripped out of the Legacy Act, save that regarding complaints the SOSNI may make the ICRIR amenable to the Ombudsman. The only 'oversight' per se is provided for by the SOSNI rather than independent bodies. The SOSNI also has the power to wind up the ICRIR at any point, after which there will be a de facto blanket amnesty for all conflict-related crimes that would have fallen within its remit.

3.9 Role of 'reconciliation' in reformed legacy body and link to memorialisation

- **Given the interlinking nature of reconciliation being the 'primary objective' of the ICRIR we would recommend that as part of the repeal and replace commitment of the Act, the role of reconciliation in the process is brought in line with international standards and conceptualisation in the transitional justice context.**
- **The initiatives on memorialisation and an 'official/public history' taken forward under the previous Government's agenda should be discontinued.**

Between the Command Paper and the Legacy Act, the name of the legacy body desired by the previous Conservative Government changed from the IRB (Information Recovery Body) to the ICRIR (Independent Commission for Reconciliation and Information Recovery). Whilst in part this may have been the belated realisation of the historic significance of the IRB acronym there was also clearly a proactive decision to add the concept of 'reconciliation'

into the title. Notably the Legacy Act also makes promoting reconciliation the 'principal objective' of the ICRIR, without defining the concept.

This contrasts with the SHA which had a broader set of founding principles that included promoting reconciliation (linked to a better understanding of the past) but also: upholding the rule of law; addressing suffering of victims and survivors; right to justice and information recovery; protection fundamental rights; and balance and fairness in legacy. The official SHA Bill reproduced the SHA Principles and required the HIU to comply with them.

The addition of the concept of 'reconciliation' into the Legacy Act and title of the ICRIR appears to have been primarily driven by an agenda of seeking to provide some legal basis to argue that the conditional immunities scheme in the Act was lawful. Whilst the ECtHR case law on amnesties is limited, one key element is the possibility of legal space for an amnesty in some circumstances where it is necessary for reconciliation.[266] This context is alluded to in the official ECHR Memorandum published with the Bill which states that the 'conditional immunity scheme' under the Bill '*can be justified as an exception to the requirement to punish those identified as being responsible for a death or life-threatening injury, as a proportionate means of achieving and facilitating truth recovery and reconciliation in Northern Ireland, taking into account current ECtHR case-law in relation to amnesties*.' Citing the Margus case, it continues the *'ECtHR has countenanced the possibility of an amnesty being compatible with Article 2 in some particular circumstances, including where a reconciliation process is in existence.'*[267]

Notwithstanding the relevance of the applicability of this test in the NI context, the Legacy Act was always going to face an uphill struggle to make the case that it was actually going to contribute to reconciliation, not least as all those the Act was supposed to reconcile were firmly opposed to it.

Furthermore, the genesis of Legacy Act was grounded in furthering impunity and closing off remedies and accountability sought by families. This is the antithesis of a reconciliation. To this end, UN Experts Mr. Fabián Salvioli, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; Mr. Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions raised concerns that:

> …the Bill appears to conflate reconciliation with impunity, as well as oppose legal accountability, an essential pillar of transitional justice processes, to truth, information recovery and reconciliation.[268]

Professors Anna Bryson and Louise Mallinder, further noted that:

> …the weakness of the truth recovery functions of the Independent Commission on Reconciliation and Information Recovery inhibits its ability to contribute to

[266] Dillon and others [2024] NIKB 11 [183] "From an extensive review of the authorities, it is clear that the ECtHR has articulated strong opposition to the granting of amnesties in the context of articles 2/3. True it is, that the Grand Chamber contemplates the possibility of exceptions although the scope and limits of any such exceptions have not been defined in the case law. The reticence to endorse the concept of amnesties in this context can be seen from the judgment in *Margus* where the Grand Chamber says at para [39]: "Even if it were to be accepted that amnesties are possible, (emphasis added) where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims …"

[267] ECHR Memorandum Legacy Act, paragraphs 22 and 47. See also paras 38, 43

[268] https://www.ohchr.org/en/press-releases/2022/12/uk-flawed-northern-ireland-troubles-bill-flagrantly-contravenes-rights

reconciliation; the Legacy Act is opposed by victims; and the proposed memorialisation work is deliberately designed to privilege a particular narrative of the conflict.'[269]

It was of little surprise that the High Court consequently found the conditional immunities scheme to be unlawful. It dealt with the question as to whether the scheme could be justified by the contention it promoted reconciliation holding simply that '*there is no evidence that the granting of immunity under the 2023 Act will in any way contribute to reconciliation in Northern Ireland, indeed, the evidence is to the contrary*.'[270]

This ruling and the consequent disapplication of the 'conditional immunities scheme' from the Legacy Act therefore removes the primary reason why reconciliation was included as the primary objective of the ICRIR. As this objective remains in the legislation, it is open to debate whether it should be retained for a reformed legacy body and if so, how it should be defined and operationalised.

Whilst the ICRIR has put reconciliation at the forefront of its work notably at an early stage of the ICRIR's development following the passage of the Bill, in a CAJ meeting with the ICRIR it became clear that at that stage there was no working definition of what 'reconciliation' would entail or theory of change explaining how the ICRIR's work would contribute to reconciliation. In September 2024 in response to a question from Claire Sugden MLA at a Stormont Committee as to how the ICRIR was defining and conceptualising reconciliation in a transitional justice context, the ICRIR Chief Commissioner made clear that the ICRIR was 'not going to try and define it' as it 'means different things to different people.' He elaborated however that the ICRIR recognised that there were elements of reconciliation directly related to their work, adding 'I mean in reconciliation one to one as it were to arise because somebody had done something that perhaps they shouldn't have done which harms somebody, that person acknowledges what they've done and the two people then decide how to conduct a relationship thereafter.' Another Assistant Commissioner added that it was an evolving piece of work for the ICRIR adding: 'One of the things we do in case support is ask what does reconciliation mean to you? and have a dialogue about that and then we feed that back into the Commission and then to its processes. So that does inform our work.'[271]

Professors Bryson and Mallinder recently produced two expert blogs on the Oxford University Human Rights Hub that explore this subject matter. The first blog interrogates how academic and international courts and tribunals have interpreted the concept of 'reconciliation' and sets out minimum standards for reconciliation.[272] The second blog then uses these legal and theoretical understandings to explore how the Legacy Act poses a threat to reconciliation in Northern Ireland.[273]

---

[269] https://ohrh.law.ox.ac.uk/reconciliation-and-the-northern-ireland-legacy-act-a-human-rights-perspective-part-2/

[270] Dillon and others [2024] NIKB 11 [187]

[271] ICRIR Chief Commissioner and Assistant Commissioner, TEO Committee 18 September 2024.

[272] https://ohrh.law.ox.ac.uk/reconciliation-and-the-northern-ireland-legacy-act-a-human-rights-perspective-part-1/

[273] https://ohrh.law.ox.ac.uk/reconciliation-and-the-northern-ireland-legacy-act-a-human-rights-perspective-part-2/

These blogs also drew attention beyond the ICRIR to other linking elements of the Legacy Act which provide for the setting up a programme of work to include oral history, memorialisation and academic research on the patterns and themes of the conflict. The persons designated to take forward this work will be appointed by the SOSNI. Amendments to the Act very deliberately conjoined this 'Troubles-related work Programme' with an outdated and binary conceptualisation of reconciliation that focuses on animosity between two sectarian communities in Northern Ireland.

Developing the related ambition of former SOSNI, Brandon Lewis, to 'halt the rewriting of history' by promoting an official history initiative, the previous Government also pushed ahead with the appointment of a panel of carefully selected academics to oversee what is now called a 'public history' of the Troubles. At a meeting with Minister Lord Caine with reference to the objectives of this project (then termed an 'official history') he stated that the British Government was entitled to put forward its version of history.[274]

Professors Bryson and Mallinder recall that reconciliation has frequently been referenced by international human rights institutions and criminal tribunals and that it is possible to pinpoint key elements of a human rights compliant approach to reconciliation which closely align with core transitional justice principles concerning victim-centricity; inclusivity and gender sensitivity; and the need to address the root causes of mass violence. They highlight that for international human right bodies and tribunals, reconciliation is associated with repairing harms experienced by victims and rebuilding relationships between antagonistic groups and between citizens and the state, as well as stressing that international jurisprudence on reconciliation requires a range of narratives to be heard and acknowledged. In the context of the 'resounding local and international opposition' to the Legacy Act, 'alongside the fact that the legislation was introduced unilaterally, [it makes] it impossible to see how the Legacy Act can be framed as resulting from the type of dialogic and victim-centred process that international courts argue is essential for reconciliation.'

The blogs reference the articulated desire of Conservative Ministers to 'halt the re-writing of history' through the Legacy Act provisions, and note the framing of the memorialisation provisions inserted into the Act as follows:

> The Act does not define reconciliation, but Government amendments emphasized that the 'Troubles-related work programme' should promote 'reconciliation, anti-sectarianism and non-recurrence of political and sectarian hostility between people in Northern Ireland'. This coupling of reconciliation and anti-sectarianism was highlighted by Cillian McGrattan as a victory for the Malone House Group – who 'pushed for the inclusion of anti-sectarianism as a robust way of promoting the recalibration of the story told about the past, which republicans have long dominated.' We agree that these amendments speak to a desire to resurrect a 'two sectarian tribes' version of the Troubles that shifts public attention away from state culpability. It is difficult to square such an approach with the international case law that underlines that reconciliation requires all narratives to be heard and respected – including those that are critical of the state.[275]

[274] https://www.irishnews.com/news/northern-ireland/critics-question-british-governments-public-history-of-the-troubles-project-YMETU7GZ2ZGANOK5GJSI2WRYVY/

[275] https://ohrh.law.ox.ac.uk/reconciliation-and-the-northern-ireland-legacy-act-a-human-rights-perspective-part-2/

The blogs conclude that 'In the Northern Ireland context, we have grave concerns that the provisions for oral history, memorialisation and academic research are designed to promote a flawed conception of reconciliation in a cynical attempt to whitewash impunity and control the narrative of the past.'[276]

In this context and given the interlinking nature of reconciliation being the 'primary objective' of the ICRIR we would recommend that as part of the repeal and replace commitment of the Act, the role of reconciliation in the process is brought in line with international standards and conceptualisation in the transitional justice context and the initiatives taken forward under the previous Government's agenda are discontinued. This is in keeping with the recent Appeal Court judgment which noted that advancing peace and reconciliation is an entirely legitimate aim but 'the aim can realistically only be achieved upon consultation and with a degree of buy-in from all those affected.'[277]

© Committee on the Administration of Justice November 2024

The material may be reproduced, free of charge, in any format or medium without specific permission, provided the reproduction is not for financial or material gain. The material must be reproduced accurately and not used in a misleading context. If the material is to be republished or issued to others, acknowledgement must be given to its source, copyright status, and date of publication.

This publication is available on our website. www.caj.org.uk

ISBN 978-1-873285-36-7 EAN 9781873285367

[276] https://ohrh.law.ox.ac.uk/reconciliation-and-the-northern-ireland-legacy-act-a-human-rights-perspective-part-2/

[277] Dillon [2024] NICA 59 [270]