

# Written Evidence to the Joint Committee on Human Rights on the Northern Ireland Legacy Remedial Order

January 2025

**Abstract:** proposed Remedial Order removes amnesty scheme and ban on civil proceedings but broader approach risks creating precedent of an exceptionalist regime of ‘pseudo-inquests’.

## About CAJ

1. The Committee on the Administration of Justice (CAJ) is an independent human rights NGO with cross community membership in Northern Ireland and beyond. It was established in 1981 and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its international human rights obligations. CAJ is the UK member of the International Federation of Human Rights (FIDH).
2. CAJ has a broad body of work and analysis on legacy and has regularly given oral and written evidence to Parliamentary Committees on this subject. CAJ also continues to regularly engage with the Council of Europe and UN human rights monitoring mechanisms in relation to the Northern Ireland legacy legalisation and recently published a report on reform of the legacy Commission – the Independent Commission for Reconciliation and Information Recovery (ICRIR)- set up by Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (‘the Legacy Act’).<sup>1</sup>

## The Proposed Remedial Order

3. The Northern Ireland Office published a proposal for a Remedial Order to amend the Legacy Act on the 4 December 2024 (‘the Proposed Remedial Order’).<sup>2</sup> This follows the declarations of ECHR incompatibility in challenges to the Legacy Act in the High Court in *Re Dillon and Others* [2024] NIKB 11 (February 2024) and Court of Appeal [2024] NICA 59 (September 2024). This is a response to the Joint Committee on Human Rights (JCHR) call for evidence on the proposed Remedial Order.<sup>3</sup>

## Summary

- The Proposed Remedial Order would remove the Legacy Act’s ban on Troubles-related civil cases and remove provisions relating to the ‘conditional immunities scheme’ (the Legacy Act’s amnesty provisions) the latter of which had been disapplied by the Courts and not become operational.
- The Proposed Remedial Order does not however deal with the Declaration of Incompatibility over s44 of the Legacy Act, which prohibits Troubles-related Inquests, instead Government is seeking to revive and legislate for an ICRIR proposal for

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<sup>1</sup> [What could substantive ‘root and branch’ reform of the ICRIR look like? and would it be enough? \(CAJ, 2024\)](#)

<sup>2</sup> <https://www.gov.uk/government/publications/a-proposal-for-a-remedial-order-to-amend-the-northern-ireland-troubles-legacy-and-reconciliation-act-2023>

<sup>3</sup> <https://committees.parliament.uk/work/8754/northern-ireland-legacy-remedial-order/>

pseudo-Inquests. This would set a concerning precedent for rolling back long-standing legal safeguards and procedures for inquests that have long been a cornerstone of the UK legal system. The ICIR had proposed a model of 'Enhanced Inquisitorial Proceedings' whereby the ICIR purported it could emulate inquests, although 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 redact the 'judgment'. The Court of Appeal found this to be incompatible with the ECHR. Government's approach is to appeal and seek attempt to revive the ICIR 'Enhanced Inquisitorial Proceedings' process, presumably through seeking to establish them on a legislative basis. Such a precedent could ultimately lead to the rollback of inquests and their replacement with 'pseudo-inquests' in other scenarios.

- Related to the above context of inquests were a series of findings in the Court of Appeal that the ICIR could not conduct ECHR compatible investigations in such cases. This finding related both to next of kin participation and the provisions commonly known as the Ministerial 'National Security Veto' over ICIR reports. The findings recently repeated on the 17 December 2024 in the High Court in Northern Ireland in the specific case of *Brown* [2024] NIKB 109. Rather than remedying the incompatibility through the Proposed Remedial Order, the Government is appealing these findings. This leaves a situation whereby there is at present no mechanism, bar a public inquiry, that can meet ECHR obligations in such cases.
- The Proposed Remedial Order also does not deal with the declaration of incompatibility made by the Court of Appeal Order in *Dillon* relating to provisions of Section 45 of the Legacy Act which preclude complaints of police misconduct being progressed to misconduct or criminal charges. This declaration does not form part of the Government's Appeal in *Dillon*, nor the Proposed Remedial Order.
- In relation to the impact on the *McKerr* Group of cases, the Proposed Remedial Order will address the Council of Europe Committee of Ministers (CM) concerns regarding the conditional immunities scheme. It will not address the CM concerns regarding the closure of legacy inquests, or the CM's ECHR compatibility concerns relating to the ICIR.

## **The Legacy Act**

4. The main impacts of the Legacy Act were to:

- To close down, on the 1 May 2024, the 'Package of Measures' -the existing mechanisms investigating Northern Ireland legacy cases established as a consequence of General Measures in the *McKerr* Group of cases. This included legacy Inquests, PSNI and independent ('called in') police investigations, and Police Ombudsman investigations. Also closed down were further civil proceedings in legacy cases.
- Introduce a broad amnesty scheme in the form of a 'conditional immunities scheme' with a conspicuously low threshold, including for acts of torture.
- Establish a new legacy body, the Independent Commission for Reconciliation and Information Recovery (ICRIR), to undertake 'reviews' of certain legacy cases and administer the amnesty scheme.

## **Extent to which the Proposed Remedial Order remedies the declarations of incompatibility in *Dillon* and others**

### *Civil Proceedings*

5. The Court of Appeal in *Dillon* made an additional HRA declaration of incompatibility in relation to the prohibitions on civil proceedings per se under the Legacy Act, in addition to the High Court ruling on the retrospective ban. The prohibition on civil claims relating to interim custody orders was also found to breach the ECHR.
6. The Proposed Remedial Order remedies these incompatibilities through the removal of s43, related schedules, and s46 and s47. There is considerable public confidence among victims in civil proceedings as a route to information recovery, reparations and historical clarification, with many hundreds of families having sought remedy through the Courts before the Legacy Act prohibition.<sup>4</sup> The repeal of this provision is very welcome.

### *The Conditional Immunity (amnesty) scheme*

7. The High Court found the ICRIR's conditional immunities scheme under the Legacy Act unlawful. This was both by virtue of incompatibility with the ECHR and victims' rights protected under the Belfast/Good Friday Agreement (GFA) and given continued legal underpinning through Article 2 of the Windsor Framework. Given the incompatibility found with the latter the relevant provisions of the Legacy Act were disapplied and the ICRIR was unable to make the amnesty scheme operational.
8. The current Government discontinued the element of the appeal which related to the finding of ECHR incompatibility for the amnesty scheme. However, it maintained the Windsor Framework appeals regarding incompatibility with victims' rights in the GFA.
9. The Proposed Remedial Order will remove provisions relating to the ICRIR's amnesty scheme from the Legacy Act. It will also make changes to the Northern Ireland (Sentences) Act 1998, in the context that the immunities scheme, if commenced, was to disapply the GFA early release scheme.

### *Other declarations of Incompatibility – Legacy Inquests and Police misconduct investigations*

10. In a recent stakeholder communication the ICRIR stated that the Proposed Remedial Order would “*remedy all of the human rights deficiencies in the Act identified by the Northern Ireland High Court in the case of *Dillon and Others* and the Court of Appeal judgment in September.*”<sup>5</sup> As JCHR will be aware this is inaccurate, nor was this claimed by the Secretary of State who made clear the Proposed Remedial Order “*will remedy all of the human rights deficiencies in the legacy Act identified by the Northern Ireland High Court in February in the case of *Dillon and others*, and one issue from the Court of Appeal judgment in September.*”<sup>6</sup>

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<sup>4</sup> For examples and details see [What could substantive ‘root and branch’ reform of the ICRIR look like? and would it be enough?](#) CAJ, 2024, pages 28-29

<sup>5</sup> ICRIR Stakeholder Engagement Email, ‘Update-December 2024’, 20 December 2024 15:56 (emphasis added)

<sup>6</sup> [WMS, Northern Ireland: Legacy of the Troubles, HC Volume 758: debated on Wednesday 4 December 2024.](#)

11. The one additional declaration of incompatibility at the Court of Appeal dealt with by the Proposed Remedial Order relates to civil proceedings. There are other declarations of incompatibility not dealt with by the Proposed Remedial Order, notably:

- The Court of Appeal made a HRA declaration of incompatibility with ECHR Article 2 in relation to s44 of the Legacy Act, the provision which prohibits further Legacy Inquests. This was in the context of findings that the ICRIR was incapable of discharging duties to hold ECHR compatible investigations through its pseudo-inquests ('Enhanced Inquisitorial Proceedings') model.<sup>7</sup>
- The Court of Appeal also made a HRA declaration of incompatibility with ECHR Article 2 & 3 in relation to s45 of the Legacy Act, insofar as it prevents complaints of police misconduct being progressed to misconduct or criminal charges (as was the case with grave and exceptional misconduct in Police Ombudsman legacy investigations, before the Legacy Act prohibition).

12. As further explored below the declaration of incompatibility in relation to the ban on Legacy Inquests forms part of the Government's appeal. The incompatibility found in relation to police misconduct complaints is neither dealt with by the Proposed Remedial Order nor the Governments' Appeal and JCHR may wish to seek clarity as to the Government's intentions.

#### *Legacy inquests – precedent for ICRIR pseudo-inquests*

13. The Legacy Act shut down 38 legacy inquests on the 1 May 2024, 14 of which had not reached findings stage and 24 that had not been assigned to a coroner.<sup>8</sup> Many families had waited decades for their legacy inquest. Many legacy inquests that had taken place prior to this had proved effective and hence were increasingly popular with victims' families, strengthening confidence in the rule of law.<sup>9</sup>

14. In the context of the Legacy Act the ICRIR had argued it could emulate inquests within its framework putting forward an 'Enhanced Inquisitorial Proceedings' model.<sup>10</sup>

15. CAJ and others had considerable scepticism over the viability and ECHR compatibility of this ICRIR 'pseudo-inquests' model. We pointed out that:

- There would be no independent judge.
- There would be no court.
- Families would not have their own lawyers.
- Families would not have the same rights to receive disclosure
- The Executive branch of Government would be able to re-write the 'judgment' through provisions in the Legacy Act empowering ministers to redact 'sensitive' information out of ICRIR reports to families (the 'national security veto'.)

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<sup>7</sup> Order of the Court of Appeal, Dillon and Others, paragraph 7(c).

<sup>8</sup> [The Troubles: 'Legacy Act denies victims like me closure' - BBC News](https://www.bbc.co.uk/news/uk-northern-ireland-68930602) <<https://www.bbc.co.uk/news/uk-northern-ireland-68930602> >

<sup>9</sup> For examples see see [What could substantive 'root and branch' reform of the ICRIR look like? and would it be enough?](#) CAJ, 2024, pages 27-28.

<sup>10</sup> [Enhanced Inquisitorial Proceedings: A brief explanation - Independent Commission for Reconciliation & Information Recovery \(icrir.independent-inquiry.uk\)](https://www.independent-inquiry.uk/)

16. The Court of Appeal in *Dillon* ruled that the ICRIR was not capable of conducting ECHR compliant investigations in several respects relating to emulating inquests.<sup>11</sup> This reasoning was recently upheld when the Courts considered a specific case in *Brown*. In the inquest into the murder of Sean Brown the Coroner had recommended a Public Inquiry be the appropriate mechanism, not the ICRIR, to conclude an Article 2 ECHR compliant investigation.<sup>12</sup> The SOSNI however instead directed the family to the ICRIR. In *Brown* the High Court noted it was “bound by the Court of Appeal decision in Dillon” would “determine this application on the basis that ICRIR is not fit for purpose insofar as article 2 investigations are concerned”.<sup>13</sup> The High Court ruled the SOSNI decision unlawful and an SOSNI appeal to this ruling has been expedited to the 16 January 2024.
17. The Order in *Dillon* sets out that in circumstances where the ICRIR purports to replace inquests as a means of compliance to meet ECHR Article 2 requirements, the ICRIR is not capable of acting compatible the ECHR on two main grounds. The first relates to the effective participation of the Next of Kin, and the second relates to the ICRIR not being sufficiently independent to disclose sensitive information to the Next of Kin or public.
18. Further to this the Court of Appeal issued a declaration of incompatibility, in relation to a range of provisions of the Legacy Act<sup>14</sup> which collectively relate to what is colloquially termed to be the powers of ministerial ‘national security veto’ over onward disclosure. The Court of Appeal issued the aforementioned declaration of incompatibility over s44 of the Legacy Act (the prohibition on legacy inquests) in the dual context of the ICRIR not being capable of ECHR compatible investigations and the absence of any other mechanism which can deliver an ECHR-compatible investigation in cases where an inquest is required due to the Legacy Act.<sup>15</sup>
19. In summary, from what can be determined to date from Ministerial Statements and the Government’s intended appeal to the *Dillon* ruling, the approach of Government, rather than remedying the incompatibilities through the Proposed Remedial Order, is to:
  - Argue in appeal that victims’ families should only be entitled to a *lower standard* of investigative provision that would be presently provided for by ECHR-compliant inquests, including in relation to the rights of victims’ families.
  - Legislate to set up the ICRIR’s ‘Enhanced Inquisitorial Proceedings’ model on a statutory basis.
20. The above apparent approach risks creating an unprecedented exceptionalist regime for ‘pseudo inquests’ across the UK in relation to legacy cases linked to the Northern Ireland conflict. If established, there is a further risk that in future such an exceptionalist regime could be extended to other types of inquest. This would risk rollback of long standing legal precedent and standards in relation to inquests and have implications for the separation of powers, given the ICRIR or any equivalent body, is not a court.

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<sup>11</sup> Brown's (Bridie) Application [2024] NIKB 109 | Judiciary NI

<sup>12</sup> <https://www.irishnews.com/news/northern-ireland/high-court-judge-believes-legacy-body-not-appropriate-mechanism-to-investigate-sean-brown-murder-E6NQLSUB65DRJC4DIUWCNCZ4AI/>

<sup>13</sup> Brown [2024] NIKB 109 [72]

<sup>14</sup> Namely sections 4(1)(a) and (4), 30(2), (4)-(7), (10) and (11) of, and Part 1, paras 3-5, and Part 2, paras 9-13 of Schedule 6 to, the 2023 Act. See paragraph 7 Order, Dillon.

<sup>15</sup> Court of Appeal Order, Dillon, 18 October 2024. Order, Dillon, paragraph 7.

21. Labour in opposition had committed to repealing the Legacy Act and given specific commitments to reinstate inquests to families. The latter however has since been qualified to a commitment to reopening inquests that were ‘prematurely halted’ by the Legacy Act. This is likely to refer to around eight inquests which were stopped midway by the 1 May 2024 prohibition on future legacy inquests. There is a much broader cohort of outstanding inquests encompassing those already in the legacy inquest plan along with new legacy Inquests opened by the Attorney General). The Ministerial Statement of 7 October 2024 which followed the Court of Appeal ruling reiterated an intention to re-open inquests which were ‘halted’ but implies that the broader intention is to amend the Legacy Act to reinstate the ICRIR pseudo-inquest model.<sup>16</sup>
22. It should be noted that whilst most legacy inquests functioned effectively, a small number (five) involved ‘sensitive’ information. In relation to such cases the Secretary of State challenged (unsuccessfully to date) coroner’s decisions to issue a gist of sensitive information.<sup>17</sup> An earlier WMS had indicated consideration of an alternative way forward for inquests involving sensitive information.<sup>18</sup> Notwithstanding the general undesirability of the ICRIR pseudo-inquest model, it is notable that the present apparent proposals to legislate for ICRIR pseudo-inquests in lieu of reinstating inquests, go significantly beyond the cohort of inquests involving sensitive information.

### **Impact of Proposed Remedial Order on McKerr Group of cases**

23. The JCHR asks ‘what impact, if any, would the Proposed Remedial Order have on the UK’s implementation of the ECtHR judgments in the McKerr group of cases?’
24. The Council of Europe Committee of Ministers (CM) which supervises the implementation of the McKerr group of cases has regularly pronounced on General Measures relating to the Package of Measures and Northern Ireland legacy legislation.
25. The CM had long urged the UK to implement its commitments under the bilateral 2014 Stormont House Agreement (SHA), for example in 2019, expressing serious concern at the delay in legislating for the Stormont House Historical Investigations Unit and urging its establishment in an ECHR-compliant manner.<sup>19</sup> Instead the then UK Government reneged on the SHA (and a 2015 implementation treaty) and introduced the Legacy Act.
26. As JCHR will be aware the Legacy Act, in addition to being opposed by victims and political parties in NI, and the subject of an inter-State application to the ECtHR by Ireland, has prompted significant concerns among the UN and Council of Europe human rights mechanisms including the CM.
27. For example, in a statement in December 2022, UN Special Rapporteurs, Fabián Salvioli

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<sup>16</sup> <https://www.gov.uk/government/speeches/written-ministerial-statement-legacy-northern-ireland> “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.”

<sup>17</sup> For further detail on the Brown, Thompson (in which CAJ acts) and McCusker inquests see: [What could substantive ‘root and branch’ reform of the ICRIR look like? and would it be enough?](#) CAJ, 2024, page 79-80.

<sup>18</sup> <https://questions-statements.parliament.uk/written-statements/detail/2024-07-29/hcws30> July 2024 WMS 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.’

<sup>19</sup> See for example CM decision of March 2019 [CM/Del/Dec\(2019\)1340/H46-30](#)

and Morris Tidball-Binz raised concerns that the legislation 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’*.<sup>20</sup> The then Council of Europe Commissioner for Human Rights, Dunja Mijatović, raised concerns that 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.’*<sup>21</sup>

28. The CM in 7 June 2023 issued an Interim Resolution in the *McKerr* group of cases, which set out a range of concerns regarding ECHR-incompatibility of the legacy bill, including:

- The Conditional Immunities Scheme –the CM ‘STRONGLY REITERATED its calls upon the authorities to reconsider the conditional immunity scheme.’
- The curtailing of Legacy Inquests- the CM ‘STRONGLY REITERATED its serious concern about the proposal to terminate pending inquests that have not reached substantive hearings and call on the authorities to reconsider this proposal and allow the limited number of pending legacy inquests to conclude, to avoid further delay for families.’
- A range of concerns regarding the ICIR’s powers and independence from the Secretary of State, including issues of ‘participation of victims and families, transparency and public scrutiny.’<sup>22</sup>

29. The CM Interim Resolution also underlined the importance of ‘any new investigative body’ gaining ‘the confidence of victims, families of victims and potential witnesses.’<sup>23</sup> The CM, in further Decisions in September 2023, observed that ‘support for the ICIR remains minimal’, reiterated serious concern about the immunity scheme and expressed ‘profound concern’ regarding the closure of legacy inquests which ‘may lead to further delay and distress for individuals’.<sup>24</sup> The CM sought to advance its concerns by the unusual step of inviting the CM Chair to correspond with the UK authorities.<sup>25</sup> This intervention marked a significant diplomatic escalation in the context of the final Legacy Act. The CM has delayed further substantive scrutiny of the Legacy Act in the context of the inter-State case but is scheduled to resume this year.

30. It should also be noted that the CM has previously extolled the ‘vital role played by the inquest system’ as well as the Police Ombudsman in NI legacy cases.<sup>26</sup>

31. The Proposed Remedial Order will therefore:

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<sup>20</sup> <https://www.ohchr.org/en/press-releases/2022/12/uk-flawed-northern-ireland-troubles-bill-flagrantly-contravenes-rights>

<sup>21</sup> <https://www.coe.int/en/web/commissioner/-/united-kingdom-adopting-northern-ireland-legacy-bill-will-undermine-justice-for-victims-truth-seeking-and-reconciliation>

<sup>22</sup> [Interim Resolution CM/ResDH\(2023\)148 June 2023](#) emphasis in original.

<sup>23</sup> [Interim Resolution CM/ResDH\(2023\)148 June 2023](#)

<sup>24</sup> CM/Del/Dec(2023)1475/H46-44

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

<sup>25</sup> [CM/Del/Dec\(2023\)1475/H46-44](#)

<sup>26</sup> Paragraph 8, Committee of Ministers’ Decision in the *McKerr* Group of Cases v UK, 1428<sup>th</sup> meeting, 8-9 March 2022, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680a5c3e2](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5c3e2)

- Address the concerns of the CM in relation to the conditional immunity scheme.
  - Not address the concerns of the CM in relation to the closure of Legacy Inquests, which were subject to the declaration of incompatibility in the Court of Appeal.
  - Not address issue of the declaration of incompatibility in relation to powers to investigate police misconduct, relevant to the CM's views on the Police Ombudsman in Legacy Cases.
  - Not address the multiple concerns that the CM has raised relating to the ICRIR, some of which are subject to declarations of incompatibility.
32. The CM on resuming scrutiny of *McKerr* is also likely to take into account the concern raised by the UN Human Rights Committee in May 2024, who expressed concerns about the *'the weakness of the 'review' function of the' ICRIR and 'the absence of any 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 Troubles'* and urged 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 and deliver truth, justice and effective remedies'*.<sup>27</sup> Of these UN concerns the Proposed Remedial Order addresses that relating to civil proceedings.

**CAJ, January 2025**

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<sup>27</sup> [CCPR/C/GBR/CO/8, Concluding Observations on the UK, May 2024](#), paras 10 & 11