



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**NIHRC Response to the Department of Justice
Consultation on Charlotte's Law**

February 2022

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Summary of Recommendations

- 2.12 The Commission recommends that the Department gives full consideration to its human rights obligations, including under Protocol Article 2, in ensuring that victims have timely and accessible information regarding their case and are supported to meaningfully participate within the criminal justice proceedings, particularly with reference to the impact of non-disclosure.
- 2.16 The Commission advises that the prevention of burial rites and/or payment of respects at the grave of a loved one should be considered in the context of its impact on the right to respect for family and private life, which is protected by Article 8 ECHR.
- 3.3 The Commission recommends that judicial independence be the primary consideration so any statutory duty should be no more than to have regard to sentencing guidelines.
- 3.7 The Commission recommends that the Department retains and highlights non-disclosure as an aggravating factor in tariff setting instead of placing it automatically into the very serious category.
- 4.7 The Commission recommends that the Department takes a human rights based approach when considering legislative options which encourage a timely disclosure, including screening for compatibility with the ECHR.
- 5.10 The Commission recommends that the Department ensure that any proposed legislative change complies with the Article 3 ECHR requirement that there must be a prospect of release.
- 5.11 The Commission recommends that the Department ensure that the distinct roles of tariff setting and assessing risk are maintained by the Courts and Parole Commissioners.
- 6.3 The Commission recommends that the Department conduct a Human Rights Impact Assessment before developing any new legislation, policies or practices, which takes account of all international human rights obligations.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the Commission), pursuant to section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. Further, the Commission, pursuant to section 78A(1), must monitor the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU Withdrawal Agreement (rights of individuals). In accordance with these functions, the following advice is submitted to the Department of Justice in response to its consultation on Charlotte's Law.
- 1.2 The Commission further advises on the UK Government commitment in Protocol Article 2(1) to ensure there is no diminution of rights, safeguards and equality of opportunity in the relevant section of the Belfast (Good Friday) Agreement as a result of the UK's withdrawal from the EU. This is given effect in UK law by section 7A of the EU (Withdrawal) Act 2018. In addition, Section 6 of the Northern Ireland Act 1998 provides that the NI Assembly is prohibited from making any law which is incompatible with Protocol Article 2. Section 24 of the 1998 Act also provides that all acts of the Department should be compatible with Protocol Article 2.
- 1.3 The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:
- The European Convention on Human Rights (ECHR)¹
 - UN International Covenant on Civil and Political Rights (UN ICCPR)²
- 1.4 The Northern Ireland (NI) Executive is subject to the obligations contained within these international treaties by virtue of the United Kingdom's ratification. The Commission recalls that Section 24(1) of the Northern Ireland Act 1998 requires that all acts of the Department are compatible with the ECHR. In addition, Section 26 of the Act also requires compliance with international obligations. The Commission, therefore, advises that the Department scrutinises any proposed legislative changes for full compliance

¹ UK ratification 1951. Further guidance is also taken from the body of case law from the European Court of Human Rights (ECtHR).

² Ratified by the UK in 1966.

with international human rights standards.

1.5 In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN Basic Principles on the Independence of the Judiciary³
- UN Basic Principles of Justice for Victims of Crime and Abuse of Power⁴
- UN Standard Minimum Rules for the Treatment of Prisoners⁵
- UN Human Rights Committee, General Comment No. 21⁶

1.6 The following European Union standard also applies: Directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime.

1.7 The Commission welcomes the opportunity to respond to the Department of Justice's consultation on proposals for Charlotte's Law. The Commission recognises the challenges in legislating in this area and the sensitive balance of rights required. In its response, the Commission will focus specifically on the standards that apply to the proposed changes raised within the consultation document. While many of these standards relate to the rights of offenders, the Commission recognises the importance of ensuring that victims' rights are upheld throughout criminal justice proceedings. The Commission has previously provided detailed guidance on this matter, for example in response to the consultation on improving the experiences of victims and witnesses in the criminal justice system.⁷ The Department should read the advice provided on the proposals for Charlotte's Law in this context.

2.0 Victims' Rights

2.1 Protocol Article 2 requires the UK Government and the NI Executive to ensure that no diminution of rights, safeguards and equality of opportunities

³ UN General Assembly, 'Basic Principles on the Independence of the Judiciary', 13 December 1985.

⁴ UN General Assembly, 'Principles of Justice for Victims of Crime and Abuse of Power', 29 November 1985.

⁵ UN General Assembly, 'Standard Minimum Rules for the Treatment of Prisoners', 13 May 1977.

⁶ UN Human Rights Committee CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), 10 April 1992.

⁷ [NI Human Rights Commission, 'Response to the public consultation on Improving the experiences of victims and witnesses in the criminal justice system', July 2021.](#)

contained in the relevant part of the Belfast (Good Friday) Agreement 1998 occurs as a result of the UK's withdrawal from the EU.

- 2.2 Protocol Article 2 requires the UK Government to "keep pace" with any changes made by the EU to six equal treatment EU Directives listed Annex 1 of the Protocol which improve the minimum levels of protection available, after 1 January 2021.⁸
- 2.3 For other EU obligations which underpin the rights, safeguards and equality of opportunity in Article 2, the commitment to ensure 'no diminution' is measured by the relevant EU standards on 31 December 2020. The UK Government has committed to ensuring that there will be no diminution of protections as were contained in relevant EU law on 31 December 2020.⁹
- 2.4 The parties to the Belfast (Good Friday) Agreement affirmed their commitment to "the mutual respect, the civil rights and the religious liberties of everyone in the community" set out a non-exhaustive list of rights, safeguards and equality of opportunity. These include "the rights of victims to remember as well as to contribute to a changed society".¹⁰ The UK Government has recognised a non-exhaustive list of relevant measures which fall within scope of the commitment in Protocol Article 2, which include the Victims' Directive, which establishes minimum standards on the rights, support and protection of victims of crime.¹¹ The EU Charter on Fundamental Rights continues to have relevance in the application and interpretation of the UK-EU Withdrawal Agreement, including those provisions of EU law which are relevant to the application of Protocol Article 2.
- 2.5 The Victims' Directive, article 2(1)(a)(ii), defines a victim to include "family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death". Family members include a spouse or a partner who is living with the victim in a joint household, in a committed intimate relationship, on a stable and continuous basis. Siblings, dependents and relatives in direct line are also deemed to be family members for the purpose of the Directive.

⁸ UK Government, 'UK Government commitment to no-diminution of rights, safeguards and equality of opportunity in Northern Ireland', (NIO, 2020), at para 13.

⁹ Ibid.

¹⁰ Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity.

¹¹ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

2.6 The Victims' Directive provides a number of protections to victims. Of particular relevance to this consultation are Article 6 (the right to receive information about their case) and Article 10 (the right to be heard).¹²

2.7 Article 6 of the Victims' Directive requires States to:

- Provide information enabling the victim to know about the state of the criminal proceedings.
- Ensure that victims are offered the opportunity to be notified, without unnecessary delay, when the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from or has escaped detention.

2.8 Recital 26 of the Directive further notes that:

“When providing information, sufficient detail should be given to ensure that victims are treated in a respectful manner and to enable them to make informed decisions about their participation in proceedings. In this respect, information allowing the victim to know about the current status of any proceedings is particularly important.”

2.9 In Article 10, the Victims' Directive requires States to ensure that victims may be heard during criminal proceedings and may provide evidence. The procedural rules for this process are determined by national law. This can be fulfilled through making statements or providing explanations in writing.¹³

2.10 The right to seek and receive information is also considered to be an intrinsic part of the right of freedom of expression and has been recognised by resolution 59 of the UN General Assembly adopted in 1946, as well as by Article 19 of the Universal Declaration of Human Rights (1948).

2.11 While the legislative changes proposed in the consultation document aim to incentivise disclosure, the Commission notes the non-legislative solutions produced (as outlined in Annex 1). The Commission welcomes the non-legislative solutions that support victims in navigating the criminal justice

¹² The Victims Directive provides a number of other additional safeguards. For example, support for victims who have suffered considerable harm (Article 9 and Recital 32); safeguards for child victims (Article 24 and Recital 14) and protection against secondary/repeat victimisation and intimidation (Recital 55).

¹³ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012 at Recital 41.

process and would encourage the Department to ensure that all options for supporting victims in engaging with the complexities of the criminal justice system are fully explored in line with the rights contained within the Victims' Directive.

2.12 The Commission recommends that the Department gives full consideration to its human rights obligations, including under Protocol Article 2, in ensuring that victims have timely and accessible information regarding their case and are supported to meaningfully participate within the criminal justice proceedings, particularly with reference to the impact of non-disclosure.

2.13 While the ECHR does not expressly refer to victims, many of the rights protected apply directly to victims of crime. The European Court of Human Rights (ECtHR) for example has held that close relatives of persons who have died as a result of a criminal offence can invoke Article 2 ECHR.¹⁴ The ECtHR has also found that Article 2 ECHR places procedural obligations on States including an obligation to carry out an effective investigation into unlawful killings. The Department should be aware that the procedural obligations under Article 2 have been found to extend to investigating and cooperating with investigations in a cross-border context.¹⁵

2.14 The ECtHR has also considered the rights of relatives under Article 3 ECHR (prohibition of torture and inhuman or degrading treatment)¹⁶ and has held that relatives of disappeared persons can themselves be victims of a violation of Article 3. The cases examined by the ECtHR have related specifically to the families of victims of enforced disappearances and the breach of Article 3 has primarily resulted from the indifference and callousness on the part of the State when the situation is brought to their attention.¹⁷ However, the willingness of the ECtHR to find a violation of Article 3 in these instances indicates the seriousness with which the ECtHR views the issue.

2.15 The ECtHR has further considered the rights of relatives under Article 8 ECHR (the right to respect for family or private life). It has found it engaged in the treatment of the body of a deceased relative and in issues affecting attendance at a burial. Moreover, the right to pay respects at the grave of a

¹⁴ *McCann and Others v United Kingdom*, Application no. 18984/91, 27 September 1995.

¹⁵ *Güzelyurtlu v. Cyprus and Turkey*, Application no. 36925/07, 29 January 2019 at para 233.

¹⁶ *Kurt v. Turkey*, Application No. 15/1997/799/1002, 25 May 1998.

¹⁷ *Cakici v. Turkey*, Application no. 23657/94, 08 July 1999 at para 98.

relative is within the scope of Article 8.¹⁸ While it is relatively rare for a murder to be committed in circumstances where the body of the deceased is not recovered, it is still too common. The impact of non-disclosure on the deceased's loved ones is devastating and must be taken into account, not least in the context of Article 8 ECHR and the right to respect for private and family life.

2.16 The Commission advises that the prevention of burial rites and/or payment of respects at the grave of a loved one should be considered in the context of its impact on the right to respect for family and private life, which is protected by Article 8 ECHR.

3.0 Starting Point of Tariff Calculation

- 3.1 The NIHRC recognises the complexity of sentencing and the multiple factors that must be considered by sentencing judges, including proportionality.
- 3.2 The independence of the judiciary is critically important and must be protected. This is for example stressed within the UN Basic Principles on the Independence of the Judiciary, which state:

“1. the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”¹⁹

3.3 The Commission recommends that judicial independence be the primary consideration so any statutory duty should be no more than to have regard to sentencing guidelines.

- 3.4 The right to a fair trial – which includes the presumption of innocence - is a

¹⁸ *Solska and Rybicka v Poland*, Application nos. 30491/17 and 31083/17, 20 September 2018, at para 104-108.

¹⁹ UN General Assembly, 'Basic Principles on the Independence of the Judiciary', 13 December 1985.

basic but fundamental right, protected by Article 6(2) ECHR. It extends to sentencing procedures.²⁰ A person's right to be presumed innocent means the burden remains on the prosecution to prove all elements of criminal allegations. The ECtHR has found that the right to be presumed innocent is closely linked to the right not to incriminate oneself.²¹ While it is not specifically defined in Article 6, the right to not incriminate oneself is generally recognised as an international standard which is central to the notion of a fair trial under Article 6.

3.5 The ECtHR has found a breach when the burden of proof is shifted from the prosecution to the defence.²² However, the ECtHR has also held that the defence may be expected to provide a response after the prosecution has made a prima facie case against an accused.²³ That means for example that negative inferences may be drawn from a statement made by an accused, which is later found to be untrue.²⁴ The Commission notes that non-disclosure can already be considered in sentencing as an aggravating factor, allowing for judicial discretion. Further attention could be given to use of non-disclosure as an aggravating factor.

3.6 In light of the above, the Commission considers that the automatic (and without exception) placement of 'no-body murders' into the very serious category will engage issues under Article 6 ECHR. That being the case, further consideration is required to permit judges to take all relevant circumstances into account. Further is required on how guilt "beyond reasonable doubt" will be satisfied when determining the reason for a failure to disclose the whereabouts of a body.

3.7 The Commission recommends that the Department retains and highlights non-disclosure as an aggravating factor in tariff setting instead of placing it automatically into the very serious category.

4.0 Post-Sentence Disclosure

4.1 The consultation document seeks views on the desirability of post-sentence

²⁰ *Telfner v Austria*, Application no. 33501/96, 20 March 2001 at paras 39- 40; *Grayson and Barnham v the United Kingdom*, Application nos. 19955/05 and 15085/06, 23 September 2008, at paras 37 and 39.

²¹ *Heaney and McGuinness v. Ireland*, Application no. 34720/97, 01 January 1997.

²² *Telfner v Austria*, Application no. 33501/96, 20 March 2001, at para 15.

²³ *ibid.* at para 18; *Poletan and Azirovik v the former Yugoslav Republic of Macedonia*, Application no. 26711/07, 12 May 2016 at paras 63-67.

²⁴ *Kok v the Netherlands*, Application no. 43149/98, 4 July 2000.

adjustment, recognising that this could “potentially [require] the Court in future cases to specify that portion of the tariff which was attributed to the aggravation or seriousness of failing to disclose important information.”²⁵ The consultation also notes that: “To obtain the maximum benefit from any change consideration should be given to allowing applications to be made by any eligible life sentence prisoner for a specified period post commencement of the provision.”²⁶

4.2 In considering this option, the Commission advises that the Department considers Article 7 ECHR, which protects against retrospectivity and provides that:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission, which at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

4.3 The ECtHR held, in the case of *Coeme and Others v Belgium*, that:

“Article 7 embodies, inter alia, the principle that only the law can define a crime and prescribe a penalty... While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.”

²⁵ Consultation document, at p.14.

²⁶ Ibid.

- 4.4 The consultation document does not indicate how, in practice, the proposed post-sentencing adjustment would be applied to current life prisoners. For example, how the courts would retrospectively apportion a percentage of their sentence to non-disclosure if this was not communicated to the prisoner during criminal proceedings or as part of their sentencing.
- 4.5 While non-disclosure is currently considered as an aggravating factor and can contribute to an overall sentence, the Commission notes the potential Article 6 implications of apportioning a specific tariff solely to the offence of non-disclosure, particularly if this had not been subject to the same threshold for proof.
- 4.6 While the Commission is not opposed in principle to measures that incentivise an early disclosure, the Commission advises that the current proposals could engage Articles 6 and 7 ECHR.
- 4.7 The Commission recommends that the Department takes a human rights based approach when considering legislative options which encourage a timely disclosure, including screening for compatibility with the ECHR.**

5.0 Parole Hearing

- 5.1 The Commission notes the consultation's reference to the potential human rights implications in relation to a "no body means no release approach".²⁷ While the consultation does not advocate for this approach, the Department should consider whether the proposed legislative changes could result in a de facto no release situation. The NIHRC recognises that there have been mixed rulings by the ECtHR concerning whole life sentences in the context of the Article 3 ECHR (prohibition of torture). Relevant case law does not dictate that the existence of whole life sentences is incompatible with human rights standards however, in cases where a whole life sentence applies, there must be standards for reviewing sentences which clearly articulate what a prisoner must do to be considered for release.
- 5.2 In its decision in *Vinter and Others v the United Kingdom*, the ECtHR held that:

"States must... remain free to impose life sentences on adult

²⁷ Consultation document, at p.15.

offenders for especially serious crimes such as murder: the imposition of such a sentence on an adult offender is not in itself prohibited by or incompatible with Article 3 [freedom from inhuman and degrading treatment and punishment] or any other Article of the [Human Rights] Convention.”²⁸

5.3 The ECtHR highlighted that a State’s choice of a specific criminal justice system was in principle outside the scope of its supervision, provided that the system did not contravene the principles within the Convention.²⁹ It also indicated that States had an ongoing responsibility under the Convention to protect the public from violent crime, noting that:

“this is particularly so for those convicted of murder or other serious offences against the person. The mere fact that such prisoners may have already served a long period of imprisonment does not weaken the State’s positive obligation to protect the public; States may fulfil that obligation by continuing to detain such life sentenced prisoners for as long as they remain dangerous.”³⁰

5.4 However, in *Vinter*, the ECtHR found the UK was in breach of Article 3 ECHR on the basis that the sentence imposed was effectively irreducible finding that:

“A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought.”³¹

5.5 The decision was based on the fact that the Ministry of Justice ‘Lifer Manual’ provided a list of the grounds on which the Secretary of State may use their discretionary power to release a life prisoner. The ECtHR found that the compassionate grounds listed did not give any real hope of release.³²

5.6 Subsequently, in the case of *R v. McLoughlin*, the Court of Appeal emphasised that the Secretary of State has to make sentence review decisions in a way that is compatible with the Human Rights Act 1998 and

²⁸ *Vinter and Others v the United Kingdom*, Application nos. 66069/09, 130/10 and 3896/10, 09 July 2013, at para 106.

²⁹ *Ibid*, at para 104.

³⁰ *Ibid*, at para 108.

³¹ *Ibid*, at para 122.

³² *Ibid*, at para 125.

was not restricted by the grounds for release laid out in the 'Lifer Manual'. The Court therefore found that the UK was not in breach of Article 3 ECHR.³³

- 5.7 Following the above Court of Appeal decision, in the case of *Hutchinson v the United Kingdom*, the ECtHR found that the processes for review of whole life tariffs in England and Wales now did provide sufficient safeguards for human rights. In its judgment, the Court reaffirmed the principles laid down in *Vinter* that prisoners must have a hope of release.³⁴
- 5.8 The consultation recognises a number of possible reasons for non-disclosure including the passage of time, illness in prison, or the prisoner's state of mind at the time of the killing makes them uncertain of the relevant details; or whether they are making a deliberate decision not to disclose the information.³⁵ Although whole life sentences are, in principle, compatible with Article 3 ECHR, imposing an irreducible sentence may raise a question of compliance with Article 3. The Court has found violations of the Convention where a prisoner is deprived of any possibility of release. The Department should consider, if a prisoner was unable to disclose the whereabouts of a body, could the legislation result in a situation in which there is no prospect of release. Such a scenario could give rise to a violation of Article 3 ECHR.
- 5.9 The consultation highlights that the Parole Commissioners' decision on whether to release a prisoner on licence or not is made on the basis of an assessment of risk. The Department should ensure that the Parole Commissioners can continue to exercise discretion in assessing the risk associated with non-disclosure. The Department should also ensure that the distinct roles of the courts and the Parole Commissioners are maintained and that legislation does not compel the Parole Commissioners to take punitive action or extend sentences that have been determined by the Courts. Article 10(3) of the International Covenant on Civil and Political Rights specifically provides that the essential aim of the justice system should be the reformation and social rehabilitation of prisoners. This is emphasised in the UN Human Rights Committee's General Comment on Article 10, which stresses that no justice system should be only retributory.³⁶

5.10 The Commission recommends that the Department ensure that any

³³ *R v McLoughlin*, Case No: 2013/05646/A7 & 2013/05317/A5, 24 January 2014, at paras 32-33.

³⁴ *Hutchinson V United Kingdom*, Application no. 57592/08.

³⁵ Consultation document, at p.6.

³⁶ UN Human Rights Committee, General Comment No. 21, at para 10.

proposed legislative change complies with the Article 3 ECHR requirement that there must be a prospect of release.

5.11 The Commission further recommends that the Department ensure that the distinct roles of tariff setting and assessing risk are maintained by the Courts and Parole Commissioners.

6.0 Human Rights Impact Assessment

6.1 The Commission notes that the consultation document does not engage in any analysis of the relevant human rights framework, nor does it appear to be accompanied by a Human Rights Impact Assessment.

6.2 In line with the Department's obligations under the Human Rights Act 1998 and Northern Ireland Act 1998, it is important that a Human Rights Impact Assessment is conducted in developing law and policy arising from the present consultation. The purpose of such an assessment is to assist policy makers to identify the potential rights engaged and those which may negatively interfere or restrict rights. The Commission can provide further advice on the production of a human rights based impact assessment.

6.3 The Commission recommends that the Department conduct a Human Rights Impact Assessment before developing any new legislation, policies or practices, which takes account of all international human rights obligations.

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