

Supplementary Briefing: UK Government's Proposed Amendments to NI Troubles (Legacy and Reconciliation) Bill

January 2023

1.0 Overview

- 1.1 Several amendments have been announced by the UK Government regarding the NI Troubles (Legacy and Reconciliation) Bill.¹ The UK Government's openness to making amendments is welcomed. However, even with the UK Government's announced amendments, the Northern Ireland Human Rights Commission's (NIHRC)² remains gravely concerned that the NI Troubles (Legacy and Reconciliation) Bill is not compliant with human rights. The NIHRC also remains concerned, that in light of its earlier advice, the UK Government has not taken the opportunity to specifically address compliance with Protocol Article 2.
- 1.2 Victims and survivors need to be genuinely at the centre of the NI Troubles (Legacy and Reconciliation) Bill, including ensuring that any resulting legislation has broad community support. The NIHRC remains concerned that this is not the case.
- 1.3 This supplementary briefing focuses on a direct response to the UK Government's announced amendments. Even with the proposed amendments much of the NIHRC's initial advice remains valid. Thus, this supplementary briefing is to be viewed as complementary to and read in conjunction with the NIHRC's initial advice on the Bill, which is re-attached and available at www.nihrc.org.

¹ NI Office, 'Press Release: Government to bring forward amendments to Legacy Bill following months of engagement', 23 November 2022.

² The NIHRC, pursuant to section 69(1) of the Northern Ireland (NI) Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in NI. The NIHRC is also required, under section 78A(1), to monitor the implementation of Article 2(1) of the Protocol on Ireland/NI of the UK-EU Withdrawal Agreement (Protocol Article 2).

2.0 Conducting Reviews

2.1 The UK Government has stated that it intends to confirm within Clause 13 that the Independent Commission for Reconciliation and Information Recovery (ICRIR) established by the legislation will be able to conduct criminal investigations where it judges that to be appropriate.³

Human rights compliant assessment

2.2 Such an amendment should ensure that decisions are based on a human rights compliant assessment of all Troubles-related cases engaging Articles 2 and 3 of the ECHR. Yet, contrarily, it is the NIHRC's understanding that the initial approach of an onus on specific individuals to 'request' reviews is to continue.

2.3 The starting point for the ICRIR should be a full assessment of whether an independent, thorough, objective, impartial analysis of all relevant elements and that follows an obvious line of inquiry has been conducted for each Troubles-related case engaging Articles 2 and 3 of the ECHR.⁴⁵

2.4 The ECHR does not prohibit victims and survivors and their family members from seeking or being provided with additional information beyond the minimum requirements, but this process should be initiated of the State's own motion.⁶

2.5 The nature and degree of scrutiny which satisfies this minimum threshold, including whether a criminal investigation is required, should be determined by the surrounding circumstances of the particular case.⁷ This includes ensuring that an assessment of already undertaken investigations is conducted to confirm that such investigations were human rights compliant, and where they were not, steps are taken to remedy this.⁸ Such an assessment is required for the ICRIR to determine if duplication is necessary.

³ NI Office, 'Press Release: Government to bring forward amendments to Legacy Bill following months of engagement', 23 November 2022.

⁴ *Kolevi v Bulgaria* (2009), at para 201; *Armani da Silva v UK* (2016), at para 234.

⁵ *Ibid.*

⁶ *McCann v UK* (1995) 21 EHRR 97, at para 173; *McKerr v UK* (2001) ECHR 329, at para 111; *Hugh Jordan v UK* (2001) ECHR 327, at para 105.

⁷ *McCann v UK* (1995) 21 EHRR 97, at para 79.193.

⁸ *Hemsworth v UK* (2013) ECHR 683; CoE Committee of Ministers, 'Item H46-42 McKerr Group v UK (Application No 28883/95)', 7-8 June 2016; CM/Notes/1436/H46-35, 'CoE Committee of Ministers Decision on McKerr Group

Necessary steps

2.6 There should be an express requirement to consider key ECHR principles in the list of matters that should be considered when deciding what steps are necessary in conducting a review, including whether a criminal investigation should take place. This could be implemented by including a specific requirement that the ECHR must be taken into account. Alternatively, a form of words could be drafted that reflects established ECHR investigatory principles. For example, the Bill could state that the Commissioner for Investigations must consider whether an independent, thorough, objective, impartial analysis of all relevant elements and that follows an obvious line of inquiry has been conducted into each Troubles-related case that falls within the scope of this legislation. Also, where a review is required, the Commissioner for Investigations must consider the surrounding circumstances of the particular case to determine the nature and degree of scrutiny which satisfies this minimum threshold.

Protocol Article 2

2.7 The NIHRC's concerns in respect of compliance with Protocol Article 2 and the EU Victims' Directive persist.⁹ The NIHRC reiterates its concern that there is no explicit provision for interested persons to provide information to inform the ICIR's immunity decisions, nor is there a requirement for victims and their family members to be informed of a request for immunity or the outcome of such an immunity request. Given that the outcome of the immunity decision is to prevent prosecutions, this leaves no avenue for a victim to request a review, as required under the EU Victims' Directive.

2.8 Where a decision is taken for a criminal investigation to form part of the review process, additional guidance on the procedures around this investigation concerning the rights of victims and their families is required. This does not appear to be addressed in amendments announced by the UK Government.

v UK (Application No 28883/95), 10 June 2022, at para 4; UN Economic and Social Council, 'Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions', 24 May 1989, at para 11.

⁹ Directive 2012/29/EU, 'Directive of European Parliament and the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

3.0 Commissioners Appointments

Consultation

- 3.1 The UK Government has stated that it intends to strengthen the Independent Commission's independence by making clear that the Secretary of State should consult individuals before appointing the Chief Commissioner to the ICIRIR.¹⁰
- 3.2 The NIHRC welcomes this safeguard. However, it would be beneficial to have some indication of the persons who may be consulted in this regard. For example, the NI Judicial Appointments Commission has been suggested as one such body.

Independence

- 3.2 The UK Government's proposed amendment aimed at enhancing the ICIRIR's independence would only provide a safeguard for one aspect of the Secretary of State's intended role. The NIHRC's initial advice on the Bill raised concerns about the extent of the Secretary of State's influence and involvement across the Independent Commission's operations.¹¹ The Secretary of State is to be involved in: making the rules/guidance, proposing cases for review, determining resources, monitoring the Independent Commission, and deciding when the Independent Commission's work should cease. It is not unreasonable for the Secretary of State to have a high-level role regarding the Independent Commission; however, the proposed amendment does not address our concerns regarding the 'extent' of this role.
- 3.3 It has also been suggested that the Bill should be amended to include the requirement that one or more Commissioners must have experience gained outside the UK that is relevant to the work of the Independent Commission is welcomed. However, given the established incompatibilities of previous bodies tasked with investigating Troubles-related offences, additional steps are required to ensure independence.¹² For example, it would be beneficial to have a list of who cannot be appointed as a Commissioner. This approach

¹⁰ NI Office, 'Press Release: Government to bring forward amendments to Legacy Bill following months of engagement', 23 November 2022.

¹¹ NI Human Rights Commission, 'Advice on NI Troubles (Legacy and Reconciliation) Bill' (NIHRC, 2022), at paras 2.26-2.34.

¹² *Hugh Jordan v UK* (2001) ECHR 327, at para 120; *McKerr v UK* (2001) ECHR 329, at para 128.

has been adopted with Operation Kenova, which does not permit “personnel who are serving in or have previously served in the Royal Ulster Constabulary, Police Service of NI, Ministry of Defence or Security Services”.¹³

4.0 False Information

- 4.1 The UK Government has stated that it intends to introduce an amendment that aims to ensure that individuals who knowingly or recklessly provide false information to the ICIR can be prosecuted and have their immunity revoked.¹⁴
- 4.2 The NIHRC welcomes this safeguard. However, the proposed immunity scheme will remain non-compliant if it continues to cover gross abuses of human rights, such as those related to Articles 2 and 3 of the ECHR, and without an existing effective reconciliation process and/or effective form of compensation in place, which do not exist in the NI context.¹⁵
- 4.3 Such a safeguard on its own is also insufficient for addressing the NIHRC’s concerns around accountability, equality and public scrutiny, as set out in our initial advice.¹⁶

5.0 Non-compliance Fine

- 5.1 The UK Government has stated that it intends to introduce an amendment that aims to increase the fine for non-compliance with the ICIR.¹⁷ The NIHRC welcomes such an amendment, but it is insufficient to address our fundamental concerns with the Bill’s human rights compliance.

¹³ Operation Kenova, ‘ECHR: Fundamental Freedoms Compliance – Version 3’ (OK, Date Unknown), at 9.

¹⁴ NI Office, ‘Press Release: Government to bring forward amendments to Legacy Bill following months of engagement’, 23 November 2022.

¹⁵ *Margus v Croatia* (2014) ECHR 523, at para 126; *Abdülşamet Yamana v Turkey* (2004) ECHR 572, at para 55; *Ali and Ayse Duran v Turkey* (2008) ECHR 289, at para 69; *Okkali v Turkey*, Application No 52067/99, Judgment of 17 October 2006, at para 76; *Yesil and Sevim v Turkey*, Application No 34738/04, Judgment of 5 June 2007, at para 38; *Ould Dah v France* (2009) ECHR 532; *Association 21 December 1989 and Others v Romania* (2012), Application Nos 33810/07 and 18817/08, Judgment of 24 May 2011.

¹⁶ NI Human Rights Commission, ‘Advice on NI Troubles (Legacy and Reconciliation) Bill’ (NIHRC, 2022), at paras 4.6-4.16.

¹⁷ NI Office, ‘Press Release: Government to bring forward amendments to Legacy Bill following months of engagement’, 23 November 2022.

6.0 Cessation of Criminal Proceedings

6.1 The UK Government's announced amendments do not address the NIHRC's grave concerns raised in our initial advice regarding the immediate cessation of criminal investigations (other than those referred by the ICIR to the prosecutor), police complaints, civil proceedings and inquests/inquiries linked to Troubles-related offences.¹⁸ Thus, the NIHRC's previous concerns remain.

¹⁸ NI Human Rights Commission, 'Advice on NI Troubles (Legacy and Reconciliation) Bill' (NIHRC, 2022), at paras 5.1-5.9.

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