



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

PRELIMINARY POSITION PAPER

REPORT OF THE CONSULTATIVE GROUP ON THE PAST

Summary

This paper has been prepared in order to inform the thinking of the Northern Ireland Affairs Committee in its inquiry into the Report of the Consultative Group on the Past. The present paper is not intended as the Commission's comprehensive response to the Report, but as an aid to informed discussion of some of the Group's proposals from a human rights perspective, especially in respect of legal processes.

The paper includes discussion of the proposed processes of review and investigation, information recovery, and examination of themes arising from the conflict. It explores the compatibility of the Group's proposals with human rights law, in particular the right to life as defined in Article 2 ECHR, and identifies a number of areas in which the proposals appear to be problematic. The Commission, in developing its position on a number of the key issues presented in the Report, has sought to keep the rights of victims to the fore. Our rights-based analysis leads us to concentrate in this paper on what may appear to be a legalistic critique of those aspects of the Report that address investigation and truth recovery. This is not to be taken as undervaluing the ethos of promoting reconciliation that so clearly informed the Group's thinking.

The Commission is not, in general terms, rejecting the notion of a Legacy Commission. In respect of the proposed legal processes, the key consideration is the interplay that such a body established for a finite period has with the 'package of measures' already in existence, and whether it can add value to those measures that the European

human rights system have assessed as the requirements for compliance with Article 2. The most important issue is whether the proposed review and investigation function is compliant with international standards.

The view of the Commission is that the current context of the rule of law in Northern Ireland does not require or justify any compromise with the state's obligation to comply with Article 2. The Commission is not convinced that the proposal to merge the work of the PSNI Historical Enquiries Team and the historical casework function of the Office of the Police Ombudsman under the auspices of the Legacy Commission will provide an improved investigative system.

In relation to information recovery and thematic examination, the Commission remains concerned about issues relating to 'protected statements' and procedural safeguards for witnesses.

Bearing in mind commitments already made by the State in terms of Article 2 compliance, the Commission is of the view that it may be preferable to allow HET and OPONI to complete its work. If, having completed their transit through all applicable current processes, it could be shown that cases had received an Article 2 compliant investigation and all available information had been collated, they could become eligible for entry to a victim-centred truth recovery body that was envisaged as adding value to what the compliant investigation had achieved.

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹ advising on legislative and other measures which ought to be taken to protect human rights,² advising on whether a Bill is compatible with human rights³ and promoting understanding and awareness of the importance of human rights in Northern Ireland.⁴ In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty

¹ Northern Ireland Act 1998, s.69 (1).

² *Ibid.*, s.69(3).

³ *Ibid.*, s.69(4).

⁴ *Ibid.*, s.69(6).

obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.

2. This paper is provided to the Northern Ireland Affairs Committee to inform its thinking in its current inquiry into the Report of the Consultative Group on the Past (hereafter, the Report, and the Group). However, the Committee is asked to note that the material in the paper, rather than constituting evidence solely for that inquiry, has been made available in advance to the Secretary of State for Northern Ireland and to the Irish Department of Foreign Affairs, both having asked us for a human rights analysis of the main elements of the Report. It is thus already in the public domain. The matters covered are obviously of urgent and compelling public interest so the Commission judged it necessary to release the paper to those authorities in addition to making it available to the Committee. It is also important to note that the present paper is not intended as the Commission's comprehensive response to the Report, but as an aid to informed discussion of some of the Group's proposals from a human rights perspective, especially in respect of legal processes. This is a preliminary paper and the Commission will respond to other issues addressed by the Group, either in a further position paper or in responding to any implementation proposals that may emerge. To summarise what follows, the Commission shares the Group's view of the necessity of a strategic, society-wide effort to build reconciliation, and it believes that a Legacy Commission or similar initiative can have a place; however it believes that some of what is proposed goes too far in terms of compromising human rights that the state is obliged to respect, protect and fulfil. A Legacy Commission that adds value, by drawing out information that cannot otherwise be found, is possible; one that is driven by considerations around cost and time-saving is likely to harm the rights of, in particular, victims and survivors of the conflict, and this is more likely to harm than to help in reconciling our society. Lasting reconciliation can only happen if the principles of justice and the rule of law are upheld.

Introduction

3. Any discussion of the past in terms of reconciliation and truth recovery needs to be grounded in a rights-based approach, with particular attention to the rights of victims. The Commission has

conducted a considerable amount of work on the rights of victims in Northern Ireland, including the publication in July 2003 of the report, *Human Rights and the Victims of Violence*. Additionally, the Commission's work in developing a Bill of Rights for Northern Ireland includes proposals for protecting victims' rights.

4. The Commission's advice to the Secretary of State on the scope for a Bill of Rights for Northern Ireland states that:

Legislation must be enacted to recognise all the victims of the Northern Ireland conflict and to ensure that their rights are protected. These rights include rights to redress and to appropriate material, medical, psychological and social assistance.⁵

5. The Commission, in developing its position on a number of the key issues presented in the Report, has sought to keep the rights of victims to the fore. Our rights-based analysis leads us to concentrate in this paper on what may appear to be a legalistic critique of those aspects of the Report that address investigation and truth recovery. This is not to be taken as undervaluing the ethos of promoting reconciliation that so clearly informed the Group's thinking. Others responding to the Group's ideas will perhaps incline towards prioritising societal reconciliation over the rights of individuals, but the Commission believes that a successful reconciliation process, which will take years if not generations, needs to be built on the sure foundation of respect for human rights. Compromising the rights of victims in the short term, such as by denying their right to normal individual investigative processes through substituting a time-limited, less intensive and largely collective process, may be seen as creating a space for reconciliation work by diverting attention and scarce resources from some particularly painful issues. However, our view, and the experience from many jurisdictions that have instituted truth commissions, is that this approach not only does injustice and lasting psychological harm to individuals, but stores up problems for the future that may need to be readdressed – as has happened in a number of states where truth commissions have been recreated in two or more guises.

6. Given the breadth, depth and historical importance of the issues

⁵ NIHRC (2008) *A Bill of Rights for Northern Ireland, Advice to the Secretary of State for Northern Ireland* at p 43.

raised in the Report, every aspect of the proposals deserves serious analysis. The Group's co-chairs, Lord Eames and Denis Bradley, and their colleagues faced a range of very difficult and sensitive issues. Notwithstanding the criticisms that we are compelled to make below of some aspects of the Report, we do not underestimate the value of the Group's work, nor the sincerity and integrity of its approach. The Report represents the culmination of a wide-ranging consultation exercise undertaken with many of the key agencies, with individuals and through public meetings, to address the legacy of the conflict. The Report has attempted to address the conflict in this jurisdiction through a variety of mechanisms which touch upon the criminal and civil justice systems, inquests, socio-economic rights and issues relating to reconciliation and reparation. The complexity and magnitude of the task before the Group in compiling its findings and recommendations to address the needs of victims and other related aspects of the legacy of the past, is fully acknowledged.

7. This paper includes discussion of the proposed processes of review and investigation, information recovery, and examination of themes arising from the conflict. It explores the compatibility of the Group's proposals with human rights law, in particular the right to life as defined in Article 2 ECHR, and identifies a number of areas in which the proposals appear to be deficient or problematic. Many of the issues presented are common to other post-conflict 'truth recovery' exercises, and it is a matter of judgement whether the circumstances of Northern Ireland present adequate justification for departing from the established model of investigative processes in view of the public interest in securing truth and, to the extent possible, 'closure'. Conditions in Northern Ireland are significantly different from those obtaining in other societies emerging from large-scale wars, genocides or dictatorships, where it has been necessary to establish truth commissions and similar mechanisms to address the impossibility of applying ordinary investigative and judicial processes.
8. The Commission is not, in general terms, rejecting the notion of a Legacy Commission. In respect of the proposed legal processes, the key consideration is the interplay that such a body established for a finite period has with the 'package of measures' already in existence, and whether it can add value to those measures that the European human rights system have

assessed as the requirements for compliance with Article 2. The most important issue is whether the proposed review and investigation function is compliant with international standards. First, there is a need to consider the impact of merging the Historic Enquiries Team (HET) and the historic casework function of the Office of the Police Ombudsman for Northern Ireland (OPONI) into one body that is situated within the Legacy Commission, and whether the proposed review and investigation process is sufficiently robust. Second, in relation to information recovery and thematic examination, issues relating to protected statements and the issues relating to procedural safeguards for witnesses need to be resolved in ways that are compliant with human rights. Third, it is important to consider the impact of the proposal to hold no further public inquiries into historical cases.

9. The proposed new investigative apparatus represents a considerable departure from the 'package of measures' presently in place. If, on the other hand, HET and OPONI are allowed to complete their work, this may allow for a more clearly defined role for the legacy commission that was more akin to a victim-centred truth recovery mechanism. If cases were deemed to have received a full review that was in accordance with Article 2 prior to entry into the legacy commission, then information recovery and thematic examination, commencing after that standard had been satisfied, could be construed as something other than a contribution to compliance with Article 2. However the processes must not be allowed to do anything that violates the Article 2 rights, and they are also required to be compliant with other human rights standards including Article 6 (right to a fair trial). The focus would move away from the possibility of securing evidential potential and individual guilt of crimes, and would instead offer a more informal truth recovery process, aimed at establishing the respective and collective responsibility of state and non-state actors for deaths, and providing historical clarification and official acknowledgement of specific actions, tactics and strategies, through thematic examination. Even if the process of truth recovery itself must reopen old wounds, it may, by helping society move towards an agreed vision of what has happened, assist in creating the conditions for reconciliation.
10. **The considered view of the Commission, which since its creation in 1999 has consistently upheld the investigative requirements derived from Article 2 jurisprudence as the**

minimum acceptable standard, is that the current context of the rule of law in Northern Ireland does not require or justify any compromise with the state's obligation to comply with Article 2. In its dealings with the Council of Europe's Committee of Ministers the United Kingdom gave assurances, which were accepted, that the policing and criminal justice systems in Northern Ireland were capable of delivering the Article 2-compliant investigations that were required into deaths arising from the conflict here. We look to the state to deliver fully on the obligations that it has acknowledged, and to the extent that there is a case for a truth recovery or other special mechanism, that has to be made in terms of adding value to the Article 2-compliant investigation, not as a less expensive or more expedient alternative.

11. The Commission's primary concerns focus upon the legal process whereby the review and investigation of historical cases is undertaken. The Commission would concur that the present system for addressing historical cases is open to criticism, but it needs to be improved and properly resourced, rather than substituted by an ad hoc mechanism that has the potential to compromise Convention rights and the rule of law. The Report fails to critically evaluate current mechanisms for investigating historical cases, but the Commission's view is that the current 'package of measures' represents significant advances in terms of delivering an Article 2-compliant investigation. The Commission could only support alternatives that offer an improvement in terms of human rights compliance. **The Commission is not convinced that the proposal to merge the work of the PSNI Historical Enquiries Team (HET) and the historical case-work function of the Office of the Police Ombudsman (OPONI) under the auspices of a Legacy Commission will provide an improved investigative system.** We address below a number of problems that arise around timelines, staffing, accountability and oversight.
12. **In relation to information recovery and thematic examination, the Commission remains concerned about issues relating to 'protected statements' and procedural safeguards for witnesses** (in particular in respect of those who have been compelled to give evidence). The proposed system of gathering testimony through protected statements, with no opportunity for cross-examination of witnesses other

than by the Legacy Commission itself, omits due process protections and presents problems around the integrity of evidence.

13. Bearing in mind commitments already made by the State in terms of Article 2 compliance, **the Commission is of the view that it may be preferable to allow HET and OPONI to complete its work.** If, having completed their transit through all applicable elements of the current processes, it could be shown that cases had received an Article 2-compliant investigation and all available information had been collated, they could become eligible for entry to a victim-centred truth recovery body that was genuinely envisaged as adding value to what the compliant investigation had achieved. The Commission has no objection to such a body examining cases that have been closed once all evidential possibilities have been explored, but no case that could potentially meet the Article 2 threshold of “investigation capable of leading to prosecution” should be transferred.

Protecting the rights of victims

14. A key aim of human rights law is to underpin the rule of law through democratic institutions. To the extent that a truth recovery mechanism may supplant, disempower or devalue judicial institutions, and/or insulate other state institutions from proper scrutiny, it may subvert the rule of law and diminish confidence in the constitutional order. Should the separation of powers be undermined by responses to ‘the past’ that are skewed too far towards an aim of reconciliation, we may undermine judicial authority to challenge the Executive which will again in the long term be detrimental to democracy.
15. The Report struggles to combine the aspirations of truth and reconciliation, and does not adequately acknowledge the tensions that can exist between the two concepts. In the South African experiment these two agendas were somewhat artificially and unsatisfactorily shoehorned into one commission, but in most other cases truth has been the primary goal, in the hope that reconciliation might follow. Reconciliation may be seen as delayed or imperilled by detailed investigation of past abuses, but a human rights-based approach impels us to prioritise effective investigation and disclosure of the truth, the first

means and the first end of justice, as the surest foundations for reconciliation; peace cannot be built on the denial of justice.

16. The Commission's advice in respect of victims' rights draws on international instruments including the United Nations' Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.⁶ The key elements of the 'Basic Principles' include access to justice and fair treatment, restitution, compensation and assistance, and they provide essential guidance on the appropriate treatment of victims:

Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered. (point 4, Basic Principles)

17. Other international instruments also provide for the 'right to remedy' for victims⁷. At the second World Conference on Human Rights, held in Vienna in 1993, the recognition of victims and their right to redress was highlighted:

The World Conference on Human Rights expresses grave concern about continuing human rights violations in all parts of the world in disregard of standards as contained in international human rights instruments and international humanitarian law and about the lack of sufficient and effective remedies for the victims.⁸

18. In addition to the 'Basic Principles', the UN General Assembly adopted the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law in December 2005. The Draft Guidelines bring together in one document all the relevant mechanisms, procedures and established norms that encapsulate victims' rights while reaffirming the international legal principles

⁶ Adopted by the UN General Assembly Resolution 40/34 of 29 November 1985.

⁷ Article 8 of the Universal Declaration of Human Rights (UDHR), Article 2 of the International Covenant on Civil and Political Rights (ICCPR), Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 11 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 39 of the Convention on the Rights of the Child (CRC), Article 13 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), and European Convention for the Compensation of Victims of Violent Crimes (ETS No 116).

⁸ Pt 29 of the Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, June 1993, A/CONF.157/23.

of accountability, justice and the rule of law. The Draft Guidelines set out the obligation for states to respect, protect and fulfil international human rights law regarding victims, and stipulate that states should:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation [...]⁹

19. Taken together the Basic Principles and Draft Guidelines provide a coherent list of duties of the state towards victims, but also offer a distinct set of rights for victims which can be summed up as:

- The right to justice;
- The right to know the truth;
- The right to reparations – which entails restitution, compensation, rehabilitation such as medical care and satisfaction and guarantees of non-repetition of violations.¹⁰

20. The Commission has also contributed to the ongoing discussion regarding victims' rights by responding to government consultations dealing with victims and survivor services, the Victim's Commissioner and a draft strategic approach for Victims and Survivors.¹¹ In its responses the Commission noted the lack of reference to human rights in the government consultations

⁹ Section II pt 3 'Scope of the Obligation', at p5 of the Draft Guidelines, http://www.iccnw.org/documents/OHCHR_Res35_Victims_Reparations_19Apr05.pdf

¹⁰ Chapter 5, 'International Standards Concerning Victims' *Human Rights and Victims of Violence*, NIHRC, 2003.

¹¹ NIHRC, 'Services for Victims and Survivors of the Troubles and Establishment of a Commissioner for Victims and Survivors', July 2005; NIHRC, response to Draft Statutory Instrument: The Victims and Survivors (Northern Ireland) Order 2006, June 2006; NIHRC, 'Outline draft strategic approach for Victims and Survivors', October 2008.

- and highlighted the benefits of a rights-based approach to government policy in relation to victims and survivors.
21. The draft strategic approach for victims and survivors mentions the need to 'assist', 'address', 'ensure', 'establish', 'recognise' and give 'voice' to victims issues. In its response, the Commission noted that the difference in taking a rights-based approach to policy is that victims and survivors should not be at the mercy of a benevolent government to provide them with services. Rather victims and survivors should feel empowered by the knowledge that they have the 'right' to service provision and appropriate care and due attention because their government is fulfilling its human rights obligations.
 22. While this section has briefly outlined the rights of victims in respect of the right to justice, truth and reparations, the rest of the paper will focus primarily on that aspect of dealing with the past which addresses the right to an effective investigation into unresolved conflict-related deaths.

Deficiencies in the Report

23. One respect in which the Commission finds the Group's Report lacking was the apparent failure to engage with leading human rights advisors through the Bar Council and Law Society. Members of both organisations have been key to securing disclosure and justice and rehabilitation for clients in Northern Ireland and elsewhere affected by the conflict, sometimes at great personal cost and risk to their lives, and the exclusion of that experience is to the detriment of the document. As a leading academic lawyer remarked at a recent conference on the Report, "There are significant deficits in the way it understands the legal universe". The key role of human rights lawyers in designing successful approaches to post-conflict mechanisms is evident internationally.
24. Another important contextual consideration omitted by the Report is the fact that most if not all examples of Truth Commissions internationally arose as part of a negotiated peace settlement to a conflict of much greater intensity than that in Northern Ireland. This is of crucial significance when we come to consider the terms of the Report. The Belfast (Good Friday) Agreement did not refer specifically to how to investigate the past, and key developments in human rights law, such as the

- Jordan judgment (2001), came after the Agreement was signed. Rather than providing a clear framework for human rights-compliant investigation, the Agreement refers to reconciliation and victims saying "...it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation".
25. One reason for this is that the participants in the Agreement looked forward to the work of the first Victims Commissioner, Sir Kenneth Bloomfield, who published his report only weeks later, on 29 April 1998. The remit of the Bloomfield Report was essentially a memorial one: "to look at possible ways to recognise the pain and suffering felt by victims of violence arising from the Troubles of the past 30 years including those who have died or been injured in the service of the community" (terms set by Secretary of State on 24 October 1997). Although Sir Kenneth did refer to truth and justice (at para. 5.32), he acknowledged that for some groups "all questions of memorialisation and compensation were secondary in their minds to the establishment of the full truth". This is a helpful phrase because in many ways the Eames-Bradley Report fails properly to acknowledge or articulate this, and the struggle there has been over decades to establish truth in order to protect human rights.
26. Neither did the Agreement's treatment of policing and justice provide a strong steer for 'dealing with the past'; policing and justice were dealt with in a way that was entirely forward-looking: "it [is] essential that policing structures and arrangements are such that the police service is professional, effective and efficient ... [and] accountable, both under the law for its actions and to the community it serves". This raises an interesting theme in the Group's Report. The Group's co-chairs have both spoken publicly of the need to "free up institutions". We must remember that the chief aim of international human rights systems, at least since the time of the Universal Declaration of Human Rights, has been to deter future violations. We must therefore always be cautious that responses to conflict are not aimed at *reconciling* to the detriment of *detering*, because otherwise we store up trouble for our institutions to deal with later and therefore only 'free them up' artificially and temporarily. This is as important a consideration in terms of the economics of dealing with the past as it is in terms of the

27. The Report is silent on this context, just as the Bloomfield Report did not go beyond acknowledging the desire to secure “as complete a picture as possible of the gross violations of human rights which took place”. In his 2008 evidence to the Parliamentary Northern Ireland Affairs Committee (NIAC) Sir Kenneth Bloomfield said that he had not been “asked to look at the wider issue which is now on the agenda of what we do about the past”. The Group was addressing these issues formally for government for the first time. In doing so, it should have addressed much more extensively the human rights considerations that must inform and constrain any of the options that it canvasses.
28. The Commission agrees with the sentiment expressed by Sir Kenneth Bloomfield that “we do not want any remedies which are divisive in themselves” (NIAC evidence); it may well be that the very reason the Agreement did not seek to address dealing with the past was because the issue was perceived as intrinsically divisive, and best left until the new constitutional dispensation was firmly in place. The Commission is no better placed than anyone else to determine whether the moment has arrived to put a new mechanism in place: our only concern is that human rights must be protected at least as well in any new initiative.

Truth commissions

29. The second half of the 20th century has been marked by a proliferation of truth commissions. There have been some 33 commissions established in 28 countries between 1974 and 2007, with more than half of these having been created since 1997. The “reality” of truth commissions has been described as “usually less than the promise”.¹² However, they have been advocated as the only system whereby the ‘bigger picture’ of a conflict can be provided. The United Nations has described them as non-judicial fact finding bodies, temporary, officially

¹² Rolston, B. “Assembling the jigsaw: truth, justice and transition in the North of Ireland”, *Race & Class*, 2002: 44 (1).

- sanctioned and authorised, that investigate a pattern of abuses of human rights or humanitarian law.¹³
30. Truth commissions are in their infancy and interestingly one tool used to judge their maturity is their compliance with human rights, and throughout this position paper we will refer to experiences in other jurisdictions with truth commissions and their failings in terms of human rights.
31. As highlighted by the group Healing through Remembering in its report *Making Peace with the Past*, international evidence suggests that a truth recovery process should be based on the following principles:
- a. Prioritising the needs of victims
 - b. The aim should be truth recovery and “not the imposition of false reconciliation”.
 - c. Individuals have the right to a remedy.
 - d. The ordering or recommending of reparations
 - e. There is an arguable right to truth (i.e., individuals have the right to know the truth about their individual cases and society has the right to know about the patterns or systemic failures which allowed violations of human rights).
 - f. Some tolerance of amnesties provided that certain conditions are met.¹⁴
 - g. Independence of the truth-recovery mechanism from the state.¹⁵
32. Thus truth commissions generally tend to take a victim-centred approach. For victims to have their pain acknowledged “remains their most fundamental right”.¹⁶ Such an approach explains, to some extent, the non-judicial character of most commissions, which typically deal with circumstances that involve deaths and other human rights violations on a scale vastly greater than that experienced in Northern Ireland, far beyond the capacity of the

¹³ Office of the United Nations High Commissioner for Human Rights (2006). *Rule-of-Law Tools for Post-Conflict States: Truth commissions*, New York: United Nations.

¹⁴ Note that international human rights law allows no amnesty for ‘gross violations’, a term that in a strictly legal sense covers few if any aspects of the conflict in Northern Ireland. On a related matter, the present paper does not address the section of the Consultative Group’s Report that addresses the issue of so-called ‘on-the-runs’.

¹⁵ Healing Through Remembering (October 2006) *Making Peace with the Past*, page viii-ix. See also Amnesty International, *Truth, justice and reparation: Establishing an effective truth commission*, 11 June 2007.

¹⁶ NIHRC (June 2003) *Human Rights and Victims of Violence*, p 6.

ordinary judicial and policing institutions to address in the way that they deal with 'ordinary' crime. It is widely recognised that truth commissions are more suited to addressing the legacy of sustained conflict, than merely the normal peacetime packages for investigating conflict-related deaths. It must be noted that frequently a truth commission will not aim at the same outcomes as domestic peacetime judicial processes, given that the criminal courts are concerned with establishing individual guilt rather than inquiring into the respective and collective responsibility of actors in a conflict for incidents that they will not, in all cases, acknowledge as crimes. However, it is the official acknowledgement that a wrong has been committed that can provide some vindication for victims and their families.

33. Dealing with the legacy of the past necessarily involves providing an effective investigation into unresolved conflict-related deaths. The question that must be asked is whether the proposed Legacy Commission can fulfil the State's international obligations to protect human rights and prevent future violations. Regionally (that is, within Europe) this is often articulated as providing an Article 2 compliant investigation; however it touches upon much broader issues for society. In a state where the rule of law applies, the primary obligation of the state is to ensure the effective investigation of individual cases, to a standard that is capable of founding a prosecution (but that is not necessarily required to lead to prosecution). In such cases, only when that obligation has been discharged, and it is clear that no further investigative opportunities exist, should cases be eligible for transmission to a more victim-centred 'truth recovery' process, which is less formal, possibly based on hearings in private with limited immunity granted to statements. Any such process has not only to serve the public good in terms of clarifying historical truth, it must also have due regard to the rights of victims and survivors, and must work within the parameters of the domestic and international human rights obligations of the state. In any such process, the possibility of combining the different aims of uncovering the truth, achieving reconciliation, tolerance and mutual trust, and protecting the human rights of all in delivering justice, presents great and possibly insurmountable difficulties.

Particular circumstances

34. The conflict in Northern Ireland resulted in widespread and systemic violations of the right to life by state and non-state

actors. While there is no universally agreed definition of Troubles-related deaths, approximately 3,700 people have been killed, with many more suffering injury, illness or loss that led to a premature death. There remain over 2,000 outstanding unsolved killings, and the lack of effective investigation of unsolved killings has been an ongoing source of conflict, along with cross-border aspects, including issues around the 'Disappeared'.

35. In recognising international practice around truth commissions, it is necessary to acknowledge that 3,700 deaths over four decades, while representing an appalling burden for our small population, is a relatively small number in comparison to the horrendous conflicts and genocides that have provided the rationale for innovative models of truth recovery in Latin America, Africa and elsewhere. The Report does not make this necessary exploration of international comparators, nor does it acknowledge the stated position of the UK Government, in its response to the Council of Europe's Committee of Ministers, that the ordinary criminal justice, public inquiry and coronial systems available in Northern Ireland provide a sufficient means of addressing the legacy of the conflict. Having formally taken that position, it is for Government to make the case for any departure from that stance, yet the Report appears to start from the premise that the present systems cannot, in fact, cope. We return to this point below.
36. It is also important to note that in the Report there is no reference to violations of human rights short of killing; whilst great attention is given in the document to the need for what might be termed 'macro' or 'big picture' truth, the Report does not address in any significant detail issues around injury, sexual violence including rape, torture, maltreatment, violations of property rights, violations of rights of association, assembly and expression, and so on, with the implication that our ordinary criminal justice and civil justice systems are entirely suitable for dealing with such violations but (without explanation) are not suitable for death investigations.
37. Moreover, Northern Ireland already occupies a distinct timeframe in that unlike most international examples, the proposed Legacy Commission and the Belfast (Good Friday) Agreement are already over a decade apart, whereas most such exercises are built into or are directly preceded by a peace settlement or a

major constitutional upheaval. The passage of time is not the most important issue; rather, what matters is that, wherever it starts, a truth recovery process should add value to what the state has been or may be able to deliver through 'normal' investigative processes. While some might say that the optimum timing for a Northern Ireland truth commission has passed, the Commission's view is that Article 2-compliant investigations should run their course, with any subsequent initiatives following through outstanding issues including truth recovery, historical clarification and ensuring the provision of a holistic response to the needs of victims.

38. It should also be acknowledged that the Agreement is primarily a forward looking document. However, it does seek to address the "suffering of victims of violence as a necessary element of reconciliation" and makes reference to what has become the Commission for Victims and Survivors. The Agreement refers to a new police service that will deliver justice efficiently and effectively, and the requirement of justice, taken with the equality principle written through the Agreement, could require that such a service should apply equally to legacy cases. The Commission itself is set up as part the Agreement's response to the past and in respect of a possible Bill of Rights is charged with articulating advice on "rights supplementary to the Convention to reflect the particular circumstances of Northern Ireland [and] the principles of mutual respect... and parity of esteem". The particular circumstances of this region necessarily include the issues around investigation of conflict-related killings. This was reflected in the Commission's advice on a Bill of Rights for Northern Ireland: "Legislation should be enacted to ensure that all violations of the right to life relating to the conflict in Northern Ireland are effectively investigated". Further, that any mechanisms established "must be fully in compliance with international human rights law".¹⁷
39. As noted above, unlike other jurisdictions that have considered the establishment of commissions, in Northern Ireland we already have a 'package of measures' to deal with the past which have been at least in theory accepted as human rights compliant – namely the package presented to the Committee of Ministers over a period of years for review following the judgment in

¹⁷ *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland*, 10 December 2008, pp 61-62.

Jordan. The UK Government has advised the Council of Europe Committee of Ministers that the measures available are adequate for the task, and the Committee has allowed some matters to close; however it says that it awaits evidence of 'concrete results' from the HET.

40. The Commission is not aware of another jurisdiction using a Truth Commission to supplement or supplant an investigative and criminal justice apparatus that is fully operational and, in the official view, up to the task. For example, in South Africa the Promotion of National Unity and Reconciliation Act provided for three Committees within the Truth and Reconciliation Commission (TRC), and police investigative teams were not included in any of these precisely because the police were, for obvious reasons, not trusted as having the capacity to undertake effective and impartial investigations into political crimes of the past. There had in fact been only two relatively small inquiries, one based in Pretoria and the other in Durban, to investigate discrete events, and their impact on the work of the TRC was minimal. While it is obvious that not all quarters in Northern Ireland invest their full confidence in policing and in the other investigative machinery available to the state, few would attempt to draw a direct parallel with situations in South Africa or other post-conflict jurisdictions where the police and other key institutions were perceived as weak, corrupt, partial or in a state of collapse.

The Legacy Commission

41. The Group proposes the creation of a Legacy Commission that attempts to address the past without 'harming' the future. It seeks to combine the processes of "reconciliation, justice and information recovery" with the "overarching objective of promoting peace and stability in Northern Ireland". This, in essence, is where many of the problems lie in that justice is conflated with the processes of reconciliation and information recovery.
42. The Group has proposed that the mandate of the Legacy Commission will consist of four strands of work:
 - Help society towards a shared and reconciled future, through a process of engagement with community issues arising from the conflict;

- Review and investigate historical cases;
 - Conduct a process of information recovery; and
 - Examine linked or thematic cases emerging from the conflict.
43. The following section will briefly outline the key roles envisaged for the three strands relating to review and investigation, information recovery and thematic examination of historical cases, followed by an evaluation of the proposed roles.

Review and investigation unit

44. It is proposed that the Unit would build on the work already undertaken by the Historical Enquiries Team (HET) and the historical casework function of the Office of the Police Ombudsman (OPONI), both of which would cease to exist.
45. The Report states that the Unit “would review historical cases to establish whether there was a reasonable prospect of obtaining sufficient evidence to warrant prosecution; and, if necessary, to conduct that further investigation.” It would conduct the process of review and investigation in a form equivalent to that conducted by the police and with equivalent powers. Cases where there was sufficient evidence would be passed to the Director of Public Prosecutions for a decision.

Information recovery unit

46. It is proposed that the Information Recovery Unit would deal with individual cases to establish answers to unresolved questions of importance to victims’ families concerning the circumstances surrounding the death. ‘Protected statements’ could be made to the Information Recovery Unit (and the Thematic Examination Unit), both of which would have the power to compel the production of documents. It is viewed as a distinct process from Review and Investigation and would only deal with cases once a decision was taken to complete a review without further substantive investigation or to pursue further channels of investigation. The consent of the next-of-kin would be sought prior to a case being passed to this process.
47. It is proposed that Protected Statements could be made which would not be admissible in criminal or civil proceedings against the person making them. It is the Statement, not the person,

that is protected. As discussed at paragraph 68 below, it is the view of the Commission that protected statements are capable of amounting to amnesties. In 37 truth commissions considered to date no amnesty was ultimately allowed, and the analysis offered by Amnesty International's representative at the recent CAJ conference on the Report was that the "South African amnesties would now be unlawful" and that "protected statements look a lot like amnesties in disguise". Whilst we recognise what the Group was trying to achieve in opening a door to disclosure, we must agree with Amnesty that "The practical problem cannot be solved by bending the legal principles that perpetrators need to be brought to justice".

Thematic examination unit

48. The Unit would examine those cases that have raised particular concern, or are linked by the circumstances of death or touch on a theme, "such as an area of paramilitary activity or collusion". The Unit would operate in a similar way to the information recovery unit apart from its additional power to compel witnesses from Northern Ireland and Great Britain. The intention of the information recovery and the thematic examinations is described as primarily a means to resolve unanswered questions and to provide a greater understanding of the conflict rather than to name or blame individuals. It is proposed that it would replace the need for further public inquiries relating to historic cases.

Proposed review & investigation unit: an evaluation

49. Existing mechanisms have been criticised for a number of reasons including:
- Lack of disclosure
 - Lack of transparency and accountability
 - Each mechanism provides different opportunities. The victim is required to be aware of the structure, powers, time-scales, mandate and remit of all mechanisms before being able to make an informed choice as to the appropriate outcome.
 - Lack of promptness
 - Absence of rehabilitative structures.
 - Absence of compensatory structures (apart from criminal injuries compensation).

- Limited potential for clearly identifiable and public outcomes including enforceability of recommendations/findings.
 - Inability of outcomes to affect and achieve long term verifiable change.¹⁸
50. While the Legacy Commission may have a valuable role to play in addressing wider societal issues arising from the conflict, it is difficult to ascertain how the proposed new process improves on existing mechanisms in terms of maximising evidential potential.
51. There is an argument that oversight and staffing could be placed on a more independent footing if investigations became the responsibility of a new specialised agency. However, there is a concern that given the timescale and problems already encountered in relation to recruitment, that staff presently carrying out the work of HET and those working on the historical cases referred to OPONI would in all likelihood be recruited to carry out review and investigation under the auspices of the Legacy Commission. To recruit and train large numbers of new investigators with the equivalence of police powers, and with policing-level investigative skills and standards, is likely to require considerable time and may not be achievable, particularly in a situation where no Parliamentary slot has been identified for any piece of legislation required to implement any aspect of the Group's Report.
52. An issue of equality immediately arises in relation to cases that, because of the working methods chosen by the HET and OPONI, have already had a relatively 'normal' police-style reinvestigation, and those that fall outside the chronological (or other priority) criteria that were adopted.
53. By merging OPONI's historical case-work function with HET, it will mean that the new merged structure will not only be based in the same office but will be reviewed by the same body, the Legacy Commission, that is operationally directing its work. In terms of oversight the proposal to appoint an independent Commissioner of international standing would answer some of the criticisms levelled at the proximity of HET to PSNI, and the fact that the oversight function for the HET rests with the Chief Constable. It has taken considerable effort to establish OPONI

¹⁸ 'Overview Table of current mechanisms for dealing with the legacy of the conflict' prepared for NIHRC by Laura McMahon, barrister, February 2008.

as an independent oversight body charged with investigating allegations of police misconduct. However the Commissioner for Review and Investigation, as a member of the Legacy Commission, would in effect be overseeing the work of the Commission of which he or she is part, and of course if the Commission is ultimately a body appointed and funded by Government, there will inevitably be those who question the extent of its independence.

54. Further explanation is required as to how cases currently under HET and OPONI will effectively become the responsibility of the new Legacy Commission. There is a lack of clarity regarding timelines and lines of responsibility for cases. HET is essentially a unit servicing an area of obligation of PSNI. It could be argued that the proposed merger of HET and OPONI's historical case-work function would mean that, in effect, there were two 'police forces' operating in Northern Ireland; one (under the Commission) with responsibility for conflict-related deaths and one (the PSNI) covering the same period for non-conflict-related deaths. Where might this new arrangement leave the present role of the Murder Investigation Teams (MITs), which are tasked with taking on 'live' cases which have enough evidential potential to constitute new lines of inquiry? Does the Legacy Commission propose that it will pass cases directly to the Public Prosecution Service, and, if so, will it also take on the function of the MITs? Will a new liaison unit have to be created between the PSNI and the Legacy Commission, which would be required to engage with inquiries, inquests and the Criminal Cases Review Commission? What body will fulfil the function of reviewing decisions to pursue further channels of investigation?
55. There is a failure in the Report to critically evaluate current mechanisms but there is an implied criticism of the law being used to fight the conflict through the courts, as if the courts were overburdened with matters related to 'dealing with the past'. However, the Council of Europe's Committee of Ministers has highlighted the lack of effective judicial investigations in the Northern Ireland conflict, and there was a long struggle for the application of Article 2 compliant investigations in this jurisdiction. One of the reasons for this was a perceived reluctance by state agencies to share the truth or to provide evidence. Should responsibility for investigation transfer to a new commission, there is nothing to suggest that it would not meet with similar difficulties; there is no obvious reason why the

State, to the extent that it might have been disposed to withhold full co-operation with established procedures, should open itself to investigation by a new entity.

56. Despite a new review and investigation unit being established, it is likely that the new process would meet with similar problems to those encountered within the current mechanisms relating to absence of data, loss of staff and loss of 'corporate memory'.
57. More recent academic commentary on truth recovery processes acknowledges the great potential of *sequencing* responses, that is, allowing 'normal' processes to work themselves out before adopting exceptional ones: this in effect is what has already happened in Northern Ireland in that the conflict-related deaths have been placed into police-led reinvestigation mechanisms that were well established prior to the Group's consideration of a special procedure. The Commission's position is that the HET should be allowed to finish its task, with an accountability mechanism through OPONI and, should that body be created with a limited remit, the Legacy Commission, before any novel mechanism is put in place. To move HET cases fully into a new and less satisfactory investigative route would mean, among other things, that victims in Northern Ireland would be distinguished from victims elsewhere in the UK, and in other jurisdictions, who had experienced comparable violations of human rights.
58. The lack of legal underpinning offered in the document leads to real difficulties in relation to the core concept of *legal certainty*. Sir Kenneth Bloomfield had mentioned to the Northern Ireland Affairs Committee the need for a clear approach, and this is a crucial matter for the Commission. Radical changes are proposed to the duty of the police to investigate crime but it is impossible to understate the impact of the proposals. Legal certainty is not only a human rights concept (see e.g. the Rome Statute of the International Criminal Court, Article 22.2) but a core constitutional principle (see e.g. Lord Diplock in *Black-Clawson* 1975 AC 591 at 638: "A citizen before committing himself to any course of action should be able to know in advance what are the legal consequences").
59. It is unclear how current procedures escalating an HET inquiry to a live Murder Investigation Team (MIT) investigation would be controlled unless police officers were working directly to the

Legacy Commission, which would require their having full powers of arrest, etc. If that were to be so, Northern Ireland would in effect have three units with police powers - Legacy teams, OPONI and PSNI - and it is unclear how these would be coordinated. If, for example, PSNI officers were to be seconded to the Legacy Commission, would they have any more or less independence than non-seconded PSNI personnel? If OPONI were to lose the oversight responsibility that it currently has for HET investigations, would the Commission in effect oversee itself? **The Commission's view is that it would be preferable that OPONI retain an oversight role for Legacy Commission investigations.**

Domestic applicability of Article 2

60. The Human Rights Act 1998 provides the domestic framework for the Convention. All of the cases to be considered by the proposed Legacy Commission will involve deaths occurring before the commencement of the Human Rights Act 1998. Following the decision of the House of Lords in *re McKerr*, Article 2 is not enforceable domestically in relation to deaths that occurred before the Act came into force on 2 October 2000. This means that the investigation and investigative processes of the mechanisms of the Legal Commission are not required domestically to be compliant with Article 2. However, the state remains obligated under Article 2 under the Convention. Where an Article 2 compliant investigation has not been provided domestically, and all domestic legal options have been exhausted or where there is no effective remedy domestically to avail of, an application against the state can be made to the ECtHR. The mechanisms proposed by the Legacy Commission for investigating deaths should therefore comply with all of the requirements of an effective investigation set out in the *Jordan* case which are:

- The persons responsible for and carrying out the investigation must be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also practical independence. (*Jordan*, para 106).
- The investigation must be capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to

secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard. (*Jordan*, para 107.) This means that the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including eyewitness testimony, forensic evidence, and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.¹⁹

- The investigation must be prompt; a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. (*Jordan*, para. 108.)
- There must be public scrutiny of the investigation or its results sufficient to secure accountability in practice as well as in theory. (*Jordan*, para. 109.)
- The next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. (*Jordan*, para. 109).

61. The failure to take these measures constitutes a breach of the obligation to exercise exemplary diligence and promptness in dealing with such serious matters as murders and the use of lethal force by agents of the state.²⁰ Obviously, the requirement that the investigation be prompt is not possible to fulfil in relation to historical cases in terms of the date of death; however the Legacy Commission itself should conduct its review and investigation promptly.

62. There are concerns that the current proposals for review and investigation may close down options for accessing information even further than the *McKerr* ruling in respect of historical cases. By this it is meant that although the *McKerr* judgment did not provide the family in question with an Article 2 investigation, the House of Lords noted that the procedural obligation owed to the McKerr family under Article 2 under the European Convention on Human Rights had not been fulfilled by the successful application

¹⁹ *Salman v Turkey* (2002) 34 EHRR 425; *Tanrikulu v Turkey* (2000) 30 EHRR 950; *Gül v Turkey* (2002) 34 EHRR 710.

²⁰ *Medova v Russia* application no. 25385/04 15 January 2009 para. 108, quoting *Paul and Audrey Edwards v the United Kingdom*, no. 46477/99, § 86, ECHR 2002-II).

by the family to the European Court of Human Rights.²¹ As such, the role that is proposed for review and investigation requires greater clarity in respect of investigative standards for exploring evidential potential in historical cases. There is also a requirement for additional information to be provided regarding an appeals procedure in relation to the review and investigation process.

63. Is the perceived resistance to pursuing cases through legal processes based on an evaluation of the receding chances of taking cases to prosecution, or is it more to do with cost-effectiveness? The inference that human rights and evidential safeguards are too costly is unpalatable.
64. **Given the large number of concerns, in respect of the review and investigation functions the Commission prefers the option of providing additional resources to HET and OPONI so that historical cases can be completed.**

Proposed information recovery and thematic examination unit: an evaluation

65. Legal certainty and underpinning are perhaps most notably absent here. It is unclear who would qualify to engage with the Unit and benefit from protected disclosures, what kind of disclosure is required and how due process will be ensured. In South Africa, for example, applications had to be made by perpetrators. Over 4,000 applications were rejected as being for 'ordinary crimes', and undoubtedly many of the killings during the years of the Troubles would occupy 'grey areas' as to whether they were direct consequences of the political situation. How would the Commission decide this matter?
66. Furthermore in South Africa applicants were required to "fully disclose all relevant facts". This obligation was described by Du Bois-Pedain as the 'moral cornerstone' of the amnesty process.²² The Group's Report does not suggest any such obligation. Additionally, in South Africa applicants could be asked by evidence analysts for further information, and combatant organisations were asked to clarify that the person had been a

²¹ Lord Steyn in *re McKerr* at para. 43.

²² Du Bois-Pedain, A. (2007) *Transitional Amnesty in South Africa*, Cambridge UP, p 139.

member. There is nothing in the report explaining how additional elaboration would be sought and secured to ensure integrity of evidence.

67. The report does not refer to international human rights standards beyond the European Convention, despite the fact that the European region has had the most limited experience in engaging with these matters and has few instruments tailored for post-conflict justice issues. It is, rather, customary international law, and international and regional human rights systems outside Europe such as the Inter-American system, which have the most to say, and are yet not referred to. There is no reference to humanitarian law at all, despite the fact that this body of law provides a well-established set of legal parameters for post-conflict processes, and there is no reference to binding legal norms such as Nuremberg Principles of accountability, the Statute of the International Tribunal for Rwanda and the Rome Statute of the ICC. The academic lawyer referred to at paragraph 23 above characterised the Report as having “missed the opportunity to firmly ground the discussion of the past in human rights universe”.
68. In relation to the second and third strand, information-recovery and thematic examinations, there are serious concerns regarding the use of ‘protected statements’. We reiterate the point that no case should enter these strands until Article 2-compliant investigations have been completed. Whereas the aim of protected statements is to “encourage free and frank disclosure” they are tantamount to an amnesty, with some limitations. Amnesties are not without precedent in Northern Ireland, and in the context of a public inquiry (albeit very different to a private hearing), the Commission has previously stated that any witness compelled to give evidence must be adequately protected; further, that “the truthfulness of [their] statements will largely depend on the perceived risk of testifying”, so that assurances that their evidence will not be used against them at a later stage promotes the likelihood of a true and complete testimony being provided.²³ Similar models have been utilised in relation to the work of the Commission for the Location of Victims’ Remains and the Bloody Sunday Inquiry, and in a somewhat different context, immunities have also attached to the decommissioning of

²³ *Effective Inquiries: Response of the Northern Ireland Human Rights Commission to the DCA Consultation*, August 2004

- paramilitary arsenals. The Commission (as noted in footnote 14) has chosen not to address the Report's implications for so-called 'on-the-runs' in the present paper, but it will return to that issue and to the human rights standards on amnesties in the context of responding to any implementation proposals.
69. Any analysis of the compatibility of Article 2 in relation to the granting of amnesties or partial immunities needs to be considered in the context of an investigative system in its entirety. Issues such as whether the final outcome has sufficient authority to access information, and whether the process is sufficiently independent, need to be assessed. Further, amnesties must be in the context of seeking the fullest account of the events that took place and ensuring that state takes responsibility for any wrongdoings. Thus, whereas it can be argued that, in principle, amnesties should not be permitted under international standards, case law indicates that amnesties can be permissible, other than for gross violations, provided that a certain balance may be reached. The failure to provide for punishment may sit uneasily in some cases, whereas other cases imply that the securing of public confidence in the process and absence of any toleration of collusion is key. Of utmost importance is that any appearance of tolerance or collusion in unlawful acts by the authorities would engage, and could indicate a breach of, Article 2.²⁴
70. The possibility has been raised that perhaps "the state could be persuaded to concede a meaningful truth process in return for not having to face a string of court cases lasting for decades into the future."²⁵ However, this comment goes to the very core of the potential difficulties of reaching an acceptable way forward on the issue of amnesties that is human rights compliant. In the first place, it seems to suggest a trade-off between the entitlement of individuals to assert their human rights (if needs be in "a string of court cases") and the societal benefit of uncovering truth. That is not a transaction that a Human Rights Commission can readily endorse. It also reflects Rolston's focus on 'pro-state' paramilitarism in that it addresses circumstances where the state, the party 'conceding', is assumed in possession of a particularly significant body of hitherto concealed truth. But

²⁴ *Dealing with the Legacy – a human rights perspective*: Submission from the Committee on the Administration of Justice to the Consultative Group on the Past

²⁵ Rolston, B. "Assembling the jigsaw: truth, justice and transition in the North of Ireland", *Race & Class*, Vol. 44 (1) 2002, p 100.

- if the Legacy Commission is to address the full range of Troubles deaths, not just those where collusion is suspected, it would be reasonable to assume that the meaningfulness of its truth process is at least equally dependent on 'concessions' by the non-state actors implicated in unsolved killings.
71. It is difficult to envisage how additional 'official' information would be made available within this process through the production of documents. There is no obvious reason why any official document previously sought in any legal process and not produced might come to light for the Legacy Commission. Further detail is required regarding the complex area of disclosure of information.
72. It is more likely that most information regarding responsibility for a killing will be provided by non-state actors through third parties and will be generic in nature. However, the Group refers to extreme cases where a person making a protected statement may "admit to murder" (p51). If the statement is protected the state might be in breach of Article 2 in that,
- [w]here 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 investigation measures. The steps that it will be reasonable to undertake will vary considerably with the facts of the situation.²⁶
73. Prior to giving their consent to participate in this process, families would need expert guidance as to how information gained through protected statements might adversely affect consequent legal actions. For example, families may wish to pursue compensation through the courts where for example evidence has shown that on the balance of probabilities the State has been negligent, or in breach of its duty where someone has been killed or injured and where a successful claim for compensation has not already been made.
74. If families were able to pursue compensation through the courts, this may act as a deterrent to those providing information at this stage of the process even if anonymity (where applicable) was maintained. Might there be occasions where information in

²⁶ *Brecknell v UK* judgment (2007) cited in CAJ submission to Group, at p4.

protected statements could generate 'hearsay evidence' as part of a civil action? In order to avoid this possibility, there would have to be consideration of the need for legislation that would disallow hearsay evidence in such cases. Such legislation, by limiting the scope of civil litigation, would itself have serious human rights implications, not least in terms of the ECHR right to remedy. In respect of families pursuing civil actions, there is also a need for clarity as to how cases might enter, exit and return to the information recovery process.

75. Additional concerns exist with the processes of information-recovery and thematic examinations, in that it is proposed that there be no public hearings or formal parties to proceedings. There are only vague references made to the use of "formal or informal means to establish answers to unresolved questions" (p146); further, that procedures for information recovery (and thematic examination) would be "flexible and might include contacts with suspected offenders, paramilitaries, or government agencies" (p147).
76. There is no general circulation of documents and no examination of witnesses except by the Legacy Commission, although participants would have the right to legal advice and representation. This begs the question as to how the veracity of evidence will be tested. On the one hand it appears to indicate a highly formalised system of hearing testimony through a cross-examination of witnesses conducted by the Legacy Commission. As such, there must be clear procedural safeguards for alleged perpetrators. There is a danger that in adopting a more victim-centred approach that Article 6 (right to a fair trial) may be breached.
77. There is a need for an appeals procedure (this has implications for judicial reviews) and there is a need for independent oversight of this process.
78. Also, given that those taking part in the information recovery process and thematic examinations are entitled to legal representation, the issue of availability of legal aid needs to be addressed, with clarity as to whether indicative costings of the process are based on particular assumptions about legal advice, level of representation, choice of counsel and so on.

79. The intention of the information recovery and the thematic examinations is described as primarily a means to resolve unanswered questions, and provide historical clarification of the conflict rather than to name or blame individuals. Thus the published reports upon completion of a thematic examination take on a crucial role in terms providing accountability, acknowledgement of wrongdoing and ensuring that violations do not recur. Inquiry reports should almost always be published in full, and within timeframes, with mechanisms to ensure public accountability of follow up work. Mechanisms relating to the enforceability and oversight of the implementation of any recommendations require very careful consideration in order that a robust system is put in place, and needs to be clearly outlined.
80. The Group does not think that the issues of collusion “are best explored through the normal judicial processes” (p70). Rather that they would be best examined under processes designed for the purposes of information recovery and reconciliation. The thematic examination unit would examine those cases that have raised particular concern, or are linked by the circumstances of death or touch on a theme, “such as an area of paramilitary activity or collusion”. The Unit would operate in a similar way to the Information Recovery Unit apart from its additional power to compel witnesses from Northern Ireland and Great Britain.
81. In all its work the Legacy Commission has considerable discretion to decide how much information would be made available to the family or put into the public domain. There is concern that the list of obligations, particularly those relating to the interests of national security and the objective of promoting reconciliation, may result in only a partial disclosure of information to families. Further, that the closed nature of the process raises questions about the ‘public interest’ aspect of information recovery, in that it is not just for the benefit of families but also to meet societal needs.

Public inquiries

82. Finally, there is a need to address the proposal that there should be no more public inquiries into historical cases. The Commission regards the only legislative vehicle currently available for public inquiries – the Inquiries Act 2005 – as falling short of ECHR compatibility. The Commission, supporting the findings of Judge Cory, recommends that the ‘emblematic cases’

- currently subject to inquiries should sit outside any Legacy Commission process.²⁷ Further inquiries could fall within the thematic examination process. Should this include an examination in to the events surrounding the Omagh bombing, further questions would then arise in relation to compellability of evidence from the Republic.
83. In relation to the legacy inquests (of which there are 22 outstanding), the Group makes reference to the “burden” imposed on the Coroners Service by outstanding cases. While the Group acknowledges that families have “fought for many years to establish their rights in these proceedings”, it makes a vague reference to the new processes for resolving unanswered questions and promoting reconciliation “as an opportunity to reduce the burden” upon the Coroners Service. Clarification is required as to whether this means that the new processes might remove the need for an inquest to be held into a particular legacy case, or that relevant information obtained through the new processes would be passed to the Coroners Office.
84. Clarification is required as to the exact involvement of the Irish Government with the Legacy Commission. Its role as presently defined is somewhat vague and contradictory in terms of the legislation required to enact the Group’s proposals, appointing Commissioners, and the level of contribution towards costs. As highlighted by the Justice for the Forgotten Group (JFF) there appears to be no “parity of esteem”²⁸ for victims killed outside of Northern Ireland. Further information is required as to whether the investigation of historical cases will apply solely to deaths occurring in Northern Ireland, excluding the special ‘linked’ cases referred to and the Dublin and Monaghan bombings. Consideration has also to be given to some 18 deaths that occurred outside these islands.

Concluding comments

85. Legal powers granted to a truth recovery mechanism affect the perception of how effective the proceedings are in achieving justice in the face of human rights violations. There is concern

²⁷ The six ‘emblematic cases’ are Robert Hamill, Billy Wright, Patrick Finucane, Rosemary Nelson, Bob Buchanan and Harry Breen, and Lord Justice Maurice Gibson and Cecily Gibson.

²⁸ *The Report of the Consultative Group on the Past – A Republic of Ireland Victims’ Organisation Perspective*, Justice for the Forgotten, February 2009.

that the proposed Legacy Commission has limited capacity to guarantee due process. There is a strong sense in the report of a 'trade off' between administrative expeditiousness and 'truth'. The proposed legacy commission appears to have wide-ranging powers that are not accompanied by clearly articulated procedural safeguards. The Legacy Commission must have such safeguards particularly as it is operating within a small jurisdiction and must gain legitimacy in the eyes of all, particularly victims and perpetrators.

86. In its earlier submissions to the Group the Commission raised issues relating to the integrity of evidence and procedural safeguards. It would appear that a number of serious concerns remain regarding these two issues. The difficult task ahead lies in deciding whether the proposed Legacy Commission can fulfil its mandate in relation to justice, information recovery and reconciliation. International experience tends to show a prevailing focus on either justice or healing.
87. There is a difficult balancing act to be sought between compulsion to appear before the thematic examination unit and the more informal and private aspects of this process. Powers of compulsion are normally balanced against Article 6 rights, which are absolute as opposed to Article 8 rights, which are limited. With the work of the information recovery unit and the thematic examination unit taking place 'behind closed doors', issues relating to due process become a concern.
88. In conclusion, the present system for addressing historical cases is not without its shortcomings. However, it does represent hard won advances in relation to the provision of an Article 2 compliant investigation. This paper outlines the difficulties that the Group's proposals present and which need to be addressed. A convincing argument is yet to be made that what is being proposed by the Group offers an improved mechanism for investigating conflict-related deaths. **It would be preferable to leave the mechanisms that are already in place to run their course, before referring historical cases to any investigative process that is neither designed as, nor capable of, satisfying the State's Article 2 obligations.**

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Northern Ireland Human Rights Commission
Temple Court, 39 North Street
Belfast BT1 1NA
Tel: (028) 9024 3987
Textphone: (028) 9024 9066
Fax: (028) 9024 7844
Email: information@nihrc.org
Website: www.nihrc.org