



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Advice of the Northern Ireland Human
Rights Commission to the Northern Ireland
Office in respect of the NI (Executive
Formation etc.) Act 2019**

Victims' Payments

September 2019

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Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC):

- 1.6 The NIHRC recommends the principle of effective participation is adopted once final proposals are published. This requires compliance with the obligation to ensure meaningful participation.**
- 2.16 The NIHRC welcomes the Victims' Payments Scheme and recommends that this is designed, implemented and monitored, in fulfilment of the right to an effective remedy.**
- 3.8 The NIHRC advises that the Secretary of State can exercise discretion to determine whether or not an offender of a 'non-Troubles-related incident', or a perpetrator of a 'Troubles-related incident' that was injured by the same or subsequent 'Troubles-related incident' can be eligible for the proposed Victims' Payments Scheme and under what terms.**
- 3.9 The NIHRC advises that any decision by the Secretary of State to exclude an individual who perpetrated a 'Troubles-related incident' or an offender of a 'non-Troubles-related incident' should be legal, rational, fair, procedurally proper and proportionate to the legitimate aim pursued. Consideration should also be given to some form of appeal mechanisms, as recommended by the Commission on Victims and Survivors.**
- 3.10 The NIHRC advises that the Secretary of State's decision on the eligibility of perpetrators of 'Troubles-related incidents' does not cause secondary victimisation.**
- 3.20 The NIHRC advises that direct and indirect victims of 'Troubles-related incidents' should be eligible for the Victims' Payments Scheme. This should be widely**

interpreted. Particular consideration should be given to the eligibility of individuals that suffered shock-related injuries due to a 'Troubles-related incident' and their families.

3.24 The NIHRC recommends that, in line with the advice of the Commission for Victims and Survivors, victims of 'Troubles-related incidents' that occurred in or after 1966 should be eligible for the Victims' Payments Scheme.

3.29 The NIHRC advises that, in cases where an individual is a victim of a 'Troubles-related incident' that occurred in the United Kingdom, the Secretary of State does not exercise discretion to enable eligibility for the Victims' Payments Scheme to be determined on the grounds of residency or nationality.

3.37 The NIHRC advises that the Secretary of State has the ability to exercise discretion to determine whether the proposed Victims' Payments Scheme is the appropriate mechanism for remedying any injury that has resulted from a 'Troubles-related incident' that has occurred outside Northern Ireland or elsewhere in the United Kingdom. However, in cases where the United Kingdom was responsible, in whole or in part, for the incident an effective remedy must be provided.

3.38 The NIHRC recommends that the Victims' Payments Scheme applies to 'Troubles-related incidents' that occurred elsewhere in or outside of the United Kingdom. The scheme's extra-territorial application should be guided by the effective control, which can include *de jure* and *de facto* jurisdiction.

3.43 The NIHRC recommends that the Secretary of State makes it clear whether those that have already received compensation through existing schemes will be eligible for the Victims' Payments Scheme under section 10 of the 2019 Act and what limitations, if any, will apply. This includes considering the upper and lower limits of the

Victims' Payments Scheme, the period for application and whether to take into account an applicant's financial situation.

3.44 The NIHRC recommends that any victims' payments made under the scheme should not adversely impact on the payment of means-tested social security benefits.

4.8 The NIHRC recommends that a victim-centred approach is embedded within the Victims' Payments Scheme. This is particularly important for preventing secondary victimisation, re-traumatisation or stigmatisation. This requires that all staff members and professionals involved at all stages of the Victims' Payments Scheme are effectively trained to work with victims and survivors and that the training provided is specialised. It also requires that effective steps are taken to ensure that there is an awareness of specialised information, advice and support services. These mechanisms should be accessible, which requires ensuring that special needs, mental capacity, age-appropriateness and gendered elements are taken into account and reasonably accommodated.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the Commission), pursuant to Section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. The Northern Ireland Human Rights Commission also has a role under section 69 (3) to advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to protect human rights. In accordance with these functions, the following statutory advice is submitted to the Northern Ireland Office (NIO) in response to its request for advice on the implementation of the commitment to establish a scheme for payments to victims of 'Troubles-related' injuries, as set out in section 10 of the Northern Ireland (Executive Formation etc) Act 2019.
- 1.2 The NIHRC 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) systems.¹ The relevant regional and international treaties in this context include:
- European Convention on Human Rights 1950 (ECHR);²
 - UN International Covenant on Civil and Political Rights 1966 (ICCPR);³
 - UN Convention against Torture 1984 (UN CAT);⁴
 - UN Convention on the Rights of the Child 1989 (UN CRC);⁵
and
 - UN Convention on the Rights of Persons with Disabilities 2006 (UN CRPD).⁶

¹ The NI Executive is subject to the obligations contained within the specified regional and international treaties by virtue of the United Kingdom Government's ratification. In addition, the NI Act 1998, Section 26(1) provides that "if the Secretary of State considers that any action proposed to be taken by a Minister or NI department would be incompatible with any international obligations... [s]he may by order direct that the proposed action shall be taken". The NIHRC further recalls that the NI Act 1998, Section 24(1)(a) states that "a Minister or NI department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act... is incompatible with any of the Convention rights".

² Ratified by the United Kingdom in 1951.

³ Ratified by the United Kingdom in 1976.

⁴ Ratified by the United Kingdom in 1988.

⁵ Ratified by the United Kingdom in 1991.

⁶ Ratified by the United Kingdom in 2009.

1.3 In addition to these 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:

- Report of the UN Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy;⁷
- CoE European Convention on the Compensation of Victims of Violent Crimes;⁸
- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;⁹
- UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law;¹⁰
- CoE Committee of Ministers Recommendation on the Assistance of Crime Victims;¹¹
- Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime;¹²
- UN Committee Against Torture, General Comment No 3;¹³
- UN Committee on the Rights of Persons with Disabilities General Comment No 2;¹⁴
- UN Human Rights Committee, General Comment No 36;¹⁵ and
- UN Committee on the Rights of Persons with Disabilities General Comment No 7.¹⁶

⁷ E/CN.4/1997/47, 'Report of the UN Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms Radhika Coomaraswamy', 12 February 1997.

⁸ European Convention on the Compensation of Victims of Violent Crimes 1983.

⁹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985.

¹⁰ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005.

¹¹ Council of Europe, 'Recommendation Rec(2006)8 of the Committee of Ministers to Member States on the Assistance of Crime Victims', 14 June 2006.

¹² Directive 2012/29/EU, 'Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA', 25 October 2012.

¹³ CAT/C/GC/3, 'UN CAT Committee General Comment No 3', 13 December 2012.

¹⁴ CRPD/C/GC/2, 'UN CRPD Committee General Comment No 2 – Article 9: Accessibility', 22 May 2014.

¹⁵ CCPR/C/GC/36, 'UN Human Rights Committee General Comment No 36: Right to Life', 30 October 2018.

¹⁶ CRPD/C/GC/7, 'UN CRPD Committee General Comment No. 7: Participation of Persons with Disabilities, Including Children with Disabilities, Through Their Representative Organisations, in the Implementation and Monitoring of the Convention', 9 November 2019.

- 1.4 The present advice will cover the Victims' Payments Scheme to be provided for by way of secondary legislation pursuant to section 10 of the Northern Ireland (Executive Formation etc.) Act 2019. It was produced in the absence of any draft secondary legislation for scrutiny. The NIHRC is content to provide any further or specific advice on issues arising from this paper, and may make further comment once the consultation phase has commenced, or further details of the proposed legislative frameworks become clear.
- 1.5 The NIHRC recognises that victims and survivors groups have already played an important role in the genesis of the proposed Victims' Payments Scheme. Nonetheless, any firm proposals should comply with the obligation to ensure "meaningful participation".¹⁷
- 1.6 The NIHRC recommends the principle of effective participation is adopted once final proposals are published. This requires compliance with the obligation to ensure meaningful participation.**

2.0 Right to an Effective Remedy

- 2.1 Within domestic law, the Belfast (Good Friday) Agreement 1998 states that "the participants believe that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation".¹⁸ This is further reflected in the Joint Declaration by the United Kingdom and Irish Governments, which states that "the two Governments fully accept that acknowledging and addressing the suffering of the victims of violence is a necessary element of reconciliation".¹⁹
- 2.2 There is no right to compensation within international law, with the exception of victims of arrest or detention that contravenes the right to liberty and security.²⁰ However, compensation is regarded as an element of the right to an effective remedy.²¹

¹⁷ CRPD/C/GC/7, 'UN CRPD Committee General Comment No. 7: Participation of Persons with Disabilities, Including Children with Disabilities, Through Their Representative Organisations, in the Implementation and Monitoring of the Convention', 9 November 2019, at para 4.

¹⁸ Belfast (Good Friday) Agreement 1998, at para 11.

¹⁹ The Joint Declaration by the British and Irish Governments 2003, at para 26.

²⁰ Article 5(5), ECHR.

²¹ *McGlinchey v United Kingdom* (2003) 37 EHRR 821.

2.3 The ECHR, Article 13, provides:

everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

2.4 The ECHR, Article 13, is not directly covered within the Human Rights Act 1998, section 1. However, the right to an effective remedy is incorporated through domestic legal remedies via the Human Rights Act 1998, section 8.

2.5 The ECtHR is clear that compensation, or the possibility of seeking compensation, for damage sustained due to a violation or abuse of human rights is a required component of an effective remedy, but it cannot be the only remedy.²²

2.6 ICCPR, Article 2(3), states:

each State Party to the present Covenant undertakes:

- a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) to ensure that the competent authorities shall enforce such remedies when granted.

²² *Gäfgen v Germany* (2010) ECHR 759, at paras 118-119.

2.7 Regarding “a person who has sustained an injury as a result of a Troubles-related incident”, the right to an effective remedy is engaged in the context of violations of the right to life (related to a threat to life, which has not resulted in the individual’s death)²³ and the right to freedom from torture and other cruel, inhuman, or degrading treatment or punishment.²⁴

2.8 In the context of the right to life, the UN Human Rights Committee sets out in its General Comment No 36 that:

investigations into allegations of violation of Article 6 [of the ICCPR] must always be independent, impartial, prompt, thorough, effective, credible and transparent, and in the event that a violation is found, full reparation must be provided, including, in view of the particular circumstances of the case, adequate measures of compensation, rehabilitation, satisfaction.²⁵

2.9 Regarding torture and other cruel, inhuman or degrading treatment or punishment, the UN CAT, Article 14(1), states “each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible”. Article 14(2) continues “nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law”.

2.10 The UN CAT Committee’s General Comment No 3 clarifies:

the obligations of States parties to provide redress under Article 14 are two-fold: procedural and substantive. To satisfy their procedural obligations, States parties shall enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent

²³ Article 2, ECHR; *Osman v United Kingdom* (2000) 29 EHRR 245.

²⁴ Article 3, ECHR; Article 1, UN CAT.

²⁵ CCPR/C/GC/36, ‘UN Human Rights Committee General Comment No 36: Right to Life’, 30 October 2018, at para 28.

judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the substantive level, States parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.²⁶

2.11 Good practice highlighted by the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims states that victims “should as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation... which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition”.²⁷

2.12 The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states that:

when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes.²⁸

2.13 The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power further provide that:

the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of

²⁶ CAT/C/GC/3, 'UN CAT Committee General Comment No 3', 13 December 2012, at para 5.

²⁷ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005.

²⁸ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, at Principle 12.

which the victim is a national is not in position to compensate the victim for the harm.²⁹

2.14 The UN Basic Principles and Guidelines continue that:

compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- a) physical or mental harm;
- b) lost opportunities, including employment, education and social benefits;
- c) material damages and loss of earnings, including loss of earning potential;
- d) moral damage;
- e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services.³⁰

2.15 The European Convention on the Compensation of Victims of Violent Crimes replicates the principles set out at a UN level.

2.16 The NIHRC welcomes the Victims' Payments Scheme and recommends that this is designed, implemented and monitored, in fulfilment of the right to an effective remedy.

²⁹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, at Principle 13.

³⁰ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005.

3.0 Eligibility

Perpetrators of 'Troubles-related Incidents' and Offenders

- 3.1 Section 10(3)(d) of the 2019 Act requires that "whether or not a person has been convicted of an offence" can be used to determine whether an individual is eligible for a victims' payment under the scheme. This requires consideration of whether such an approach is permitted under human rights law and to what extent.
- 3.2 The United Kingdom Government has reaffirmed "the principle that there is no hierarchy of victims", within the Joint Declaration by the British and Irish Governments.³¹
- 3.3 The Victims and Survivors (NI) Order 2006 does not expressly permit or prevent a perpetrator of a 'Troubles-related incident' from being a victim simultaneously. This can be related to a 'Troubles-related incident' that they perpetrated, or a subsequent 'Troubles-related incident'. It also does not prevent an offender of a 'non-Troubles-related incident' from being categorised as a victim. However, any limitation or refusal of the eligibility of perpetrators of a 'Troubles-related incident' or an offender of a 'non-Troubles-related incident' must be legal, rational, fair and procedurally proper.³² Considering general human rights principles, such decisions should also be "proportionate to the legitimate aim pursued".³³
- 3.4 The Commission for Victims and Survivors has recommended that "there is a clear need for an appeals mechanism as part of the Victims and Survivors Pension Arrangement assessment process".³⁴
- 3.5 The European Convention on the Compensation of Victims of Violent Crimes, Article 8, states that:

³¹ The Joint Declaration by the British and Irish Governments 2003, at para 26.

³² *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 408.

³³ *Sunday Times v United Kingdom* (1979) ECHR 1, at para 62.

³⁴ Commission for Victims and Survivors, 'Victims and Survivors Pension Arrangement (VASPA) Advice Paper' (CVS, 2019), at para 1.19.

- 1) Compensation may be reduced or refused on account of the victim's or the applicant's conduct before, during or after the crime, or in relation to the injury or death.
- 2) Compensation may also be reduced or refused on account of the victim's or the applicant's involvement in organised crime or his membership of an organisation which engages in crimes of violence.
- 3) Compensation may also be reduced or refused if an award or a full award would be contrary to a sense of justice or to public policy (*ordre public*).

3.6 References in the international standards to an offender and their provision of compensation, involvement in mediation or contact suggest that the victim and perpetrator are considered as two separate people.³⁵

3.7 Furthermore, the CoE Committee of Ministers require that victims "should be protected as far as possible from secondary victimisation".³⁶ This is "the victimisation that occurs not as a direct result of the criminal act, but through the response of institutions and individuals to the victim".³⁷ There is risk that deeming the perpetrator of the same or subsequent 'Troubles-related incident' eligible for the Victims' Payments Scheme could lead to secondary victimisation for those injured in 'Troubles-related incidents' that are not perpetrators. Drawing from European Convention on the Compensation of Victims of Violent Crimes, Article 8, an individual's conduct can be taken into account when determining eligibility for compensation. Therefore, the Secretary of State has discretion to determine whether or not a perpetrator of a 'Troubles-related incident' that was injured by the same or subsequent 'Troubles-related incident' can be eligible for the Victims' Payments Scheme and under what terms.

³⁵ See for example, UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, at Principle 7.

³⁶ Council of Europe, 'Recommendation Rec(2006)8 of the Committee of Ministers to Member States on the Assistance of Crime Victims', 14 June 2006, at para 3.3.

³⁷ Council of Europe, 'Recommendation Rec(2006)8 of the Committee of Ministers to Member States on the Assistance of Crime Victims', 14 June 2006, at para 1.3.

- 3.8 The NIHRC advises that the Secretary of State can exercise discretion to determine whether or not an offender of a 'non-Troubles-related incident', or a perpetrator of a 'Troubles-related incident' that was injured by the same or subsequent 'Troubles-related incident' can be eligible for the proposed Victims' Payments Scheme and under what terms.**
- 3.9 The NIHRC advises that any decision by the Secretary of State to exclude an individual who perpetrated a 'Troubles-related incident' or an offender of a 'non-Troubles-related incident' should be legal, rational, fair, procedurally proper and proportionate to the legitimate aim pursued. Consideration should also be given to some form of appeal mechanisms, as recommended by the Commission on Victims and Survivors.**
- 3.10 The NIHRC advises that the Secretary of State's decision on the eligibility of perpetrators of 'Troubles-related incidents' does not cause secondary victimisation.**

Direct and indirect victims

- 3.11 Section 10(3)(a) of the 2019 Act requires consideration of "the nature or extent of a person's injury", for the purposes of defining whether they are eligible for a victims' payment under the scheme. This requires further consideration.
- 3.12 Within domestic law, the Victims and Survivors (NI) Order 2006, Section 3(1), provides that a victim or survivor is:
- a) someone who is or has been physically or psychologically injured as a result of or in consequence of a conflict-related incident;
 - b) someone who provides a substantial amount of care on a regular basis for an individual mentioned in paragraph (a); or

- c) someone who has been bereaved as a result of or in consequence of a conflict-related incident.

3.13 The Victims and Survivors (NI) Order 2006, Section 3(2), continues that:

without prejudice to the generality of paragraph (1), an individual may be psychologically injured as a result of or in consequence of:

- a) witnessing a conflict-related incident or the consequences of such an incident; or
- b) providing medical or other emergency assistance to an individual in connection with a conflict-related incident.

3.14 This replicates international law standards, which recognise both direct and indirect victims.

3.15 Under the ECHR, a direct victim is an individual who is able to show that he or she was “directly” affected by an alleged violation.³⁸ The CoE Guidelines on Eradicating Impunity for Serious Human Rights Violations defines a victim as “a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by a serious human rights violation”.³⁹ The European Convention on the Compensation of Victims of Violent Crimes provides that “when compensation is not fully available from other sources the State shall contribute to compensate those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence”.⁴⁰

3.16 If the direct victim has died, under the ECHR, it may be possible for an indirect victim to take action. An indirect victim is traditionally viewed as the next-of-kin,⁴¹ but it is now accepted that such status can extend to close family members. The question of whether they

³⁸ *Tanas v Moldova*, Application No 7/08, Judgment of 27 April 2010, at para 104; *Burden v United Kingdom* (2008) ECHR 356, at para 33; *Lambert and Others v France* (2015) ECHR 545, at para 89.

³⁹ H/Inf (2001) 7, ‘Directorate General of Human Rights and Rule of Law - Eradicating Impunity for Serious Human Rights Violations’ (CoE, 2011), at para 5.

⁴⁰ European Convention on the Compensation of Victims of Violent Crimes 1983, at Article 2(1).

⁴¹ *Varnava and Others v Turkey* (2009) ECHR 1313, at para 112.

were legal heirs of the deceased is not relevant.⁴² The European Court of Human Rights (ECtHR) has adopted a less strict approach to who qualifies as an indirect victim when the individual is closely linked to the death or disappearance of the direct victim. As an indication of what is meant by a close family member in the context of the ECHR, Article 2, the ECtHR has accepted married partners,⁴³ unmarried partners,⁴⁴ parents,⁴⁵ siblings,⁴⁶ children,⁴⁷ and nephews.⁴⁸ In other contexts, the ECtHR has been more restrictive and, generally, declines to grant standing to any other person unless that person could, exceptionally, demonstrate an interest of their own.⁴⁹

3.17 The ECtHR has found that close relatives can be defined as victims, due to the impact that stagnated investigations and challenging criminal justice processes can have on them. For example:

applicants, who are close relatives of the disappeared, must be considered victims of a violation of Article 3 of the [ECHR] on account of the distress and anguish which they suffered, and continue to suffer, as a result of their inability to ascertain the fate of their family members and of the manner in which their complaints have been dealt with.⁵⁰

3.18 The ECHR approach is supported by a number of regional and international standards.⁵¹

⁴² *Van Colle v United Kingdom* (2012) ECHR 1928, at para 86.

⁴³ *McCann v United Kingdom* (1995) 21 EHRR 97; *Salman v Turkey* (2000) ECHR 357.

⁴⁴ *Velikova v Bulgaria* (2000) ECHR 198.

⁴⁵ *Ramsahai and Others v the Netherlands* (2007) ECHR 393; *Giuliani and Gaggio v Italy* (2011) ECHR 513.

⁴⁶ *Andronicou and Constantinou v Cyprus*, Application No 86-1996-705-897, Judgment of 9 October 1997.

⁴⁷ *McKerr v United Kingdom* (2001) ECHR 329.

⁴⁸ *Yasa v Turkey* (1998) ECHR 83.

⁴⁹ *Karpylenko v Ukraine* (2016) ECHR 173, at para 104; *Nassau Verzekering Maatschappij NV v the Netherlands* (2011) ECHR 1798, at para 20.

⁵⁰ *Malika Yusupova and Others v Russia* (2015) ECHR 43, at para 210; *Bazorkina v Russia* (2006) ECHR 751, at paras 139-141.

⁵¹ Council of Europe, 'Recommendation Rec(2006)8 of the Committee of Ministers to Member States on the Assistance of Crime Victims', 14 June 2006, at para 1.1; H/INf (2001) 7, 'Directorate General of Human Rights and Rule of Law - Eradicating Impunity for Serious Human Rights Violations' (CoE, 2011), at para 5; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, at Principle 13; European Convention on the Compensation of Victims of Violent Crimes 1983, at Article 2(2); European Convention on the Compensation of Victims of Violent Crimes 1983, at Article 2(1)(b); UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, at Principles 1, 2 and 18; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, at Principle 8.

3.19 It is unclear if eligibility for the Victims' Payments Scheme will extend to individuals that suffered shock-related injuries when indirectly exposed to the immediate consequences of a 'Troubles-related incident'. For example, arriving at the scene where a relative had been murdered or seriously injured.

3.20 The NIHRC advises that direct and indirect victims of 'Troubles-related incidents' should be eligible for the Victims' Payments Scheme. This should be widely interpreted. Particular consideration should be given to the eligibility of individuals that suffered shock-related injuries due to a 'Troubles-related incident' and their families.

Timeframe

3.21 Section 10(5) of the 2019 Act states that provision can be made for victims' payments under the scheme "in respect of past periods (including periods before this Act was passed)". However, it does not determine the applicable timeframe.

3.22 As set out in the Commission for Victims and Survivors' advice:

the Victims and Survivors (NI) Order 2006, provides interpretation that a 'conflict related incident' means an incident appearing to the Commissioner to be a violent incident occurring in or after 1966 in connection with the affairs of NI. Therefore, the Commission [for Victims and Survivors] recommends that any individual that presents with a 'conflict related' injury, should be assessed and if they qualify, awarded the Victims and Survivors Pension Arrangement, regardless of when the injury took place, post 1966.⁵²

3.23 In this context, human rights law is concerned with the point in time at which the obligations set out within a particular treaty apply. Taking the ECHR as an example, it was ratified by the UK in 1953,

⁵² Commission for Victims and Survivors, 'Victims and Survivors Pension Arrangement (VASPA) Advice Paper' (CVS, 2019), at para 4.43.

binding it to the obligations contained within, including the right to an effective remedy. While, the ECHR was incorporated into domestic law in 1998, the NIHRC is of the view that the ECHR applied in UK since 1953, which fits with the Commission for Victims and Survivors recommendation.

3.24 The NIHRC recommends that, in line with the advice of the Commission for Victims and Survivors, victims of 'Troubles-related incidents' that occurred in or after 1966 should be eligible for the Victims' Payments Scheme.

'Troubles-related incidents' that occurred within Northern Ireland and the United Kingdom

3.25 The Stormont House Agreement states that:

the Executive will take steps to ensure that victims and survivors have access to high quality services, respecting the principles of choice and need. The needs of victims who do not live in Northern Ireland should also be recognised.⁵³

3.26 Flowing from this, the Commission for Victims and Survivors' position is:

that there should be an equitable approach to dealing with victims and survivors, regardless of where they live. It is the Commission [for Victims and Survivors] view that this principle should apply to the payment of Victims and Survivors Pension Arrangement.⁵⁴

3.27 This includes individuals that fall within, at minimum, these categories:

- a resident of the United Kingdom who was injured in Northern Ireland or elsewhere in the United Kingdom;

⁵³ Stormont House Agreement 2014, at para 26.

⁵⁴ Commission for Victims and Survivors, 'Victims and Survivors Pension Arrangement (VASPA) Advice Paper' (CVS, 2019), at para 4.69.

- a national of the United Kingdom who was injured in Northern Ireland or elsewhere in the United Kingdom, but is no longer resident in the United Kingdom;
- a national of another country who resides outside the United Kingdom, but was injured in Northern Ireland or elsewhere in the United Kingdom.

3.28 The ECHR, Article 1, provides that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the ECHR”. Furthermore, the ECHR, Article 14, prohibits discrimination on the grounds of “national or social origin” and “birth”. Article 14 can only be invoked where the circumstances fall within the ambit of another Convention right. Moreover, the principle of equality of treatment is violated where the distinction has not objective and reasonable justification.⁵⁵ Therefore, considering section 10(3)(c) of the 2019 Act, the residency or nationality of the victim as a basis for eligibility would raise a question of discrimination.

3.29 The NIHRC advises that, in cases where an individual is a victim of a ‘Troubles-related incident’ that occurred in the United Kingdom, the Secretary of State does not exercise discretion to enable eligibility for the Victims’ Payments Scheme to be determined on the grounds of residency or nationality.

‘Troubles-related incidents’ that occurred outside Northern Ireland and United Kingdom

3.30 There were a number of ‘Troubles-related incidents’ that occurred outside Northern Ireland and United Kingdom. This requires a determination of whether the proposed Victims’ Payments Scheme can have extra-territorial application.

3.31 The first stage is to establish whether the United Kingdom had effective control and jurisdiction over the area or individual involved in the ‘Troubles-related incident’. The second stage is whether the

⁵⁵ *Stec and Others v United Kingdom* (2006) ECHR 393, at para 5.

United Kingdom through its actions, inactions or omissions were responsible, in whole or in part, for the 'Troubles-related incident'. This should be decided on a case-by-case basis, considering the United Kingdom's human rights obligations.

- 3.32 The ECHR, Article 1, focus on jurisdiction, as opposed to territory, enables the ECHR to be applied extra-territorially. There is guidance on how far this requirement extends. As set out in *Issa v Turkey* (2004), a limit is in place on its extra-territorial application to ensure that "Article 1 of the Convention cannot be interpreted so as to allow a State Party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".⁵⁶
- 3.33 The limits of the ECHR's extra-territoriality have evolved over time. In *Hess v United Kingdom* (1975), the (former) European Commission on Human Rights ruled that "a State is under certain circumstances responsible under the ECHR for the actions of its authorities outside its territory".⁵⁷ The ECtHR continued in *Bankovic v Belgium* (2001) that effective control through military occupation and "the exercise of all or some public powers" could extend a State's jurisdiction.⁵⁸ *Al-Skeini v United Kingdom* (2011) reduces the requirement to prove effective control to involving military action, not military occupation.⁵⁹
- 3.34 The effective control exercised does not have to be lawful for extra-territoriality to apply,⁶⁰ however evidence must be provided that a State is in effective control.⁶¹ This does not require determining "whether the High Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory".⁶² It is sufficient to show that a State has "overall control of the area".⁶³ A State can also be deemed to have jurisdiction when its agents exercise "control and authority over an individual", for example, following an extra-

⁵⁶ *Issa v Turkey* (2004) ECHR 629, at para 71.

⁵⁷ *Hess v United Kingdom*, Application No 23390/94, Judgment of 19 January 1996, at para 72.

⁵⁸ *Bankovic v Belgium* (2001) ECHR 890, at paras 71 and 80.

⁵⁹ *Al-Skeini v United Kingdom* (2011) ECHR 1093, at paras 138-140.

⁶⁰ *Issa v Turkey* (2004) ECHR 629, at para 69.

⁶¹ *Hussein v Albania and Other States*, Application No 23276/04, Judgment of 14 March 2006.

⁶² *Issa v Turkey* (2004) ECHR 629, at para 70.

⁶³ *Issa v Turkey* (2004) ECHR 629, at para 71.

territorial arrest.⁶⁴ Furthermore, a State can owe a duty of care to its own soldiers that are operating in another State.⁶⁵

3.35 Extra-territoriality of the ECHR obligations extend to *de facto* and *de jure* jurisdiction.⁶⁶ This includes “the positive obligation to take the diplomatic, economic, judicial or other measure that were both in its power to take and in accordance with international law”.⁶⁷

3.36 If it is deemed that the United Kingdom was responsible, in whole or in part, for a ‘Troubles-related incident’, the Secretary of State has some margin of appreciation, or discretion, as to how this will be remedied. As set out in *Saso Gorgiev v the Former Yugoslav Republic of Macedonia* (2012), the ECtHR ruled that “there are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means”.⁶⁸

3.37 The NIHRC advises that the Secretary of State has the ability to exercise discretion to determine whether the proposed Victims’ Payments Scheme is the appropriate mechanism for remedying any injury that has resulted from a ‘Troubles-related incident’ that has occurred outside Northern Ireland or elsewhere in the United Kingdom. However, in cases where the United Kingdom was responsible, in whole or in part, for the incident an effective remedy must be provided.

3.38 The NIHRC recommends that the Victims’ Payments Scheme applies to ‘Troubles-related incidents’ that occurred elsewhere in or outside of the United Kingdom. The scheme’s extra-territorial application should be guided by the effective control, which can include *de jure* and *de facto* jurisdiction.

Victims compensated by existing schemes

⁶⁴ *Al-Skeini and Others v United Kingdom* (2011) ECHR 1093, at paras 137 and 149.

⁶⁵ *Perevedentsevy v Russia* (2014) ECHR 438, at para 94.

⁶⁶ *Pisari v Republic of Moldova and Russia* (2015) ECHR 403, at para 60; *Mozer v Republic of Moldova and Russia* (2016) ECHR 213, at para 100.

⁶⁷ *Mozer v Republic of Moldova and Russia* (2016) ECHR 213, at para 100; *Sandu and Others v the Republic of Moldova and Russia* (2018) ECHR 626.

⁶⁸ *Saso Gorgiev v the Former Yugoslav Republic of Macedonia* (2012) ECHR 726, at para 44.

- 3.39 Section 10(5)(c) of the 2019 Act enables provision to be made “for payments to be reduced or repaid (in whole or in part) in specified circumstances”. The parameters of this requires consideration, particularly for those who are deemed eligible for the victims’ payments scheme, but have already received compensation via other schemes, such as those provided for under the Criminal Injuries Property (Compensation) Act (NI) 1971, the Criminal Damage (Compensation) (NI) Order 1977, the Criminal Injuries Compensation (NI) Order 2002, the Armed Forces and Reserve Forces (Compensation Scheme) 2005, or the Justice and Security (NI) Act 2007.
- 3.40 Section 10(5)(d) of the 2019 Act also enables the regulations to make provision “about the treatment under other legislation (for example social security legislation) of payments under the scheme”. The Northern Ireland social security scheme exempts certain compensation payments from being treated as income and impacting on means-tested benefits. By way of example, payments from specified schemes for people infected with HIV or Hepatitis C through blood products and NHS treatment are disregarded in full. These payments are also disregarded if given to certain relatives or if inherited from a victim who subsequently dies. Moreover, any income or capital that derives from such payments is also disregarded. Further, lump sum payments of capital from special compensation schemes are also ignored as savings, including for example, the blood payment scheme, compensation for the London bombings in 2005 and the ‘We Love Manchester’ fund after the 2017 attack. A similar arrangement could be applied to the Victims’ Payments Scheme for social security benefits purposes.
- 3.41 The European Convention on the Compensation of Victims of Violent Crimes, Article 9, states that:

with a view to avoiding double compensation, the State or the competent authority may deduct from the compensation awarded or reclaim from the person compensated any amount of money received, in consequence of the injury or death, from the offender,

social security or insurance, or coming from any other source.

3.42 The European Convention on the Compensation of Victims of Violent Crimes states:

- a) the compensations scheme may, if necessary, set for any or all elements of compensation an upper limit above which and a minimum threshold below which such compensation shall not be granted.
- b) the compensation scheme may specify a period within which any application for compensation must be made.
- c) the compensation may be reduced or refused on account of the applicant's financial situation.⁶⁹

3.43 The NIHRC recommends that the Secretary of State makes it clear whether those that have already received compensation through existing schemes will be eligible for the Victims' Payments Scheme under section 10 of the 2019 Act and what limitations, if any, will apply. This includes considering the upper and lower limits of the Victims' Payments Scheme, the period for application and whether to take into account an applicant's financial situation.

3.44 The NIHRC recommends that any victims' payments made under the scheme should not adversely impact on the payment of means-tested social security benefits.

4.0 Victim-centred approach

4.1 Section 10(7)(g) of the 2019 Act provides that regulations regarding the Victims' Payments Scheme may make provision about "information, advice or assistance in relation to the scheme or payments under it".

⁶⁹ Articles 5-7, Council of Europe European Convention on the Compensation of Victims of Violent Crimes 1983.

4.2 The Commission for Victims and Survivors in its advice states that assessments under the Victims' Payments Scheme "should be conducted in a sensitive and empathetic manner, not seek to be unduly intrusive and mindful that such processes can [be] re-traumatising".⁷⁰ The Commission for Victims and Survivors recommends:

the adoption of an integrated/composite approach that involves the establishment of a multi-disciplinary team/panel that would be responsible for assessing the impact of conflict-related physical and psychological injury. Panel members should be drawn from a number of relevant disciplines including psychiatry and psychology (Consultant Grade), physiotherapy and/or occupational therapy. All panel members should be trauma trained and ideally have had therapeutic experience of working with individuals and families whose health and wellbeing has been affected by the legacy of the 'Troubles'/conflict. All panel members should receive special training on the administration of the Victims and Survivors Pension Assessment (similar to training received by those responsible for assessing applications).⁷¹

4.3 This requires certain measures of assistance:

- a) States should identify and support measures to alleviate the negative effects of crime and to undertake that victims are assisted in all aspects of their rehabilitation, in the community, at home and in the workplace.
- b) The assistance available should include the provision of medical care, material support and psychological health services as well as social care and counselling. These services should be provided free of charge at least in the immediate aftermath of the crime.

⁷⁰ Commission for Victims and Survivors, 'Victims and Survivors Pension Arrangement (VASPA) Advice Paper' (CVS, 2019), at para 4.8.

⁷¹ Commission for Victims and Survivors, 'Victims and Survivors Pension Arrangement (VASPA) Advice Paper' (CVS, 2019), at para 1.18.

- c) States should ensure that victims who are particularly vulnerable either through their personal characteristics or through the circumstances of the crime, can benefit from special measures best suited to their situation.
- d) wherever possible, the assistance should be provided in a language understood by the victim.⁷²

4.4 The EU Directive establishing minimum standards on the rights, support and protection of victims of crime requires:

without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members.⁷³

4.5 The UN Basic Principles of Justice for Victims of Crime and Abuse of Power state that “victims should be treated with compassion and respect for dignity”.⁷⁴ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims also provides that “appropriate measures should be taken to ensure [victims’] safety, physical and psychological well-being and privacy, as well as those of their families” and “that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatisation”.⁷⁵ This is also supported by the UN CAT Committee,⁷⁶ which also calls for sensitivity towards

⁷² Council of Europe, ‘Recommendation Rec(2006)8 of the Committee of Ministers to Member States on the Assistance of Crime Victims’, 14 June 2006, at paras 3.1, 3.2, 3.4 and 3.5.

⁷³ Directive 2012/29/EU, ‘Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA’, 25 October 2012, at Article 18.

⁷⁴ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, at Principle 4.

⁷⁵ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, at Principle 10.

⁷⁶ CAT/C/GC/3, ‘UN CAT Committee General Comment No 3: Implementation of Article 14 by States Parties’, 13 December 2012, at para 21.

marginalised or vulnerable groups or individuals, particularly women and children,⁷⁷ for the purposes of preventing “re-traumatisation and stigmatisation”.⁷⁸

4.6 Assistance to ensure this is implemented in practice can be provided in a number of ways:

- a) victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.
- b) victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
- c) police, justice, health, social service and other personnel concerned should receive training to sensitise them to the needs of victims, and guidelines to ensure proper and prompt aid.
- d) in providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as... race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.⁷⁹

4.7 The failure to provide the appropriate protection for victims can be construed as an obstacle to the right to redress.⁸⁰ Furthermore, failure to provide the required support for victims involved in mechanisms to access their rights may inhibit victims from making

⁷⁷ UN CRC, Article 3(1), requires that “the best interests of the child shall be a primary consideration”. Furthermore, Article 12(1), requires that “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”.

⁷⁸ CAT/C/GC/3, ‘UN CAT Committee General Comment No 3: Implementation of Article 14 by States Parties’, 13 December 2012, at para 33, 34 and 36.

⁷⁹ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, at Principles 14-17.

⁸⁰ CAT/C/GC/3, ‘UN CAT Committee General Comment No 3: Implementation of Article 14 by States Parties’, 13 December 2012, at para 38.

complaints due to the fear of secondary victimisation by the process.⁸¹

4.8 The NIHRC recommends that a victim-centred approach is embedded within the Victims' Payments Scheme. This is particularly important for preventing secondary victimisation, re-traumatisation or stigmatisation. This requires that all staff members and professionals involved at all stages of the Victims' Payments Scheme are effectively trained to work with victims and survivors and that the training provided is specialised. It also requires that effective steps are taken to ensure that there is an awareness of specialised information, advice and support services. These mechanisms should be accessible, which requires ensuring that special needs, mental capacity, age-appropriateness and gendered elements are taken into account and reasonably accommodated.

⁸¹ E/CN.4/1997/47, 'Report of the UN Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms Radhika Coomaraswamy', 12 February 1997, at para 22.

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