

# Criminal Justice Committee

21st Meeting, 2023 (Session 6), Wednesday 13  
September 2023

## Supplementary Legislative Consent Memorandum

### Note by the clerk

#### Introduction

1. At its meeting of 21 June, the Committee discussed the issue of consent to the relevant parts in the UK Government's Northern Ireland Troubles (Legacy and Reconciliation) Bill.
2. After taking evidence from the Cabinet Secretary for Justice and Home Affairs, members agreed with the Scottish Government (by division: For 6, Against 0, Abstentions 2) that the Scottish Parliament should not give its consent to the relevant provisions in the Bill as set out in the Scottish Government's draft motion.
3. Since that date, two further amendments have been made to the Bill which affect the competences of the Scottish Parliament. For this reason, the Scottish Government lodged a [supplementary Legislative Consent Memorandum](#) (see **Annex**) on 4 September 2023.
4. This LCM sets out the details of the new amendments, which relate to the way in which the Independent Commission for Reconciliation and Information Recovery carries out its functions (insofar as they relate to Scotland) of criminal investigations and of the review and investigations of deaths or harmful conduct.
5. The Scottish Government has stated that these amendments do not affect its overall view on consent to the relevant parts of the Bill.
6. Additionally, it should be noted that because of the timetable being followed in the UK Parliament on this Bill, as at 7 September, it has now been passed the final stages in the House of Commons and, subject to final consideration in the Lords of the changes that have been made, should pass into law shortly.

## **Action**

- 7. Members are asked to note the development above and note the supplementary LCM.**

**Clerks to the Committee  
September 2023**

## Supplementary LCM

### *Background*

1. This memorandum has been lodged by Angela Constance, Cabinet Secretary for Justice and Home Affairs, under Rule 9.B.3.1(c) of the Parliament's standing orders.

2. This memorandum concerns amendments to the United Kingdom Northern Ireland Troubles (Legacy and Reconciliation) Bill agreed to and tabled in July 2023. The Bill can be found at Northern Ireland Troubles (Legacy and Reconciliation) Bill - Parliamentary Bills - UK Parliament. This memorandum is supplementary to both the memorandum lodged by Keith Brown Cabinet Secretary for Justice and Veterans on 20 October 2022 (LCM-S6-27) relating to the Bill as it was introduced in the House of Commons and the supplementary legislative consent memorandum lodged by Angela Constance Cabinet Secretary for Justice and Home Affairs on 16 June 2023 (LCM-S6-27a) relating to the Bill as it had been agreed to by the House of Lords at Report Stage.

3. The Bill was introduced and received its first reading in the House of Commons on 17 May 2022. After being amended at Report Stage in the House of Lords the Bill was further amended at 3rd Reading in the House of Lords on 4 July 2023 and then considered by the House of Commons on 18 July 2023, which reversed all non-Government amendments and in addition made some changes in lieu of the House of Lords amendments. The Bill, as now amended by the House of Commons, will be considered by the House of Lords on 5 September 2023.

### *Content of the Northern Ireland Troubles (Legacy and Reconciliation) Bill*

4. In summary, the aims of the Bill, are to:

- Establish a new independent body, the Independent Commission for Reconciliation and Information Recovery (ICRIR). When requested to do so, this body will conduct reviews into deaths and harmful conduct which resulted from conduct forming part of the Troubles. A review may be requested by a variety of persons, including victims, relatives of the deceased, the Secretary of State, and in certain circumstances by others such as the Lord Advocate or a Procurator Fiscal. Clause 1 of the Bill defines "harmful conduct" as an act or omission which caused a person to suffer physical or mental harm of any kind. Clause 1 also defines "the Troubles" as events or conduct relating to the constitutional status of Northern Ireland or political or sectarian hostility between people in Northern Ireland that occurred between 1 January 1966 and 10 April 1998. Conduct forming part of the Troubles can therefore have taken place in Scotland or otherwise be subject to the jurisdiction of the Scottish courts.
- Provide that the ICRIR may open a review into a death or into harmful conduct if an individual comes forward seeking immunity (see below) in

relation to that specific death or harmful conduct, if it does not already have a live investigation ongoing.

- Provide that certain State bodies (including Scottish Ministers) will be under a duty to give the ICRIR full disclosure of all relevant material that is reasonably required for it to fulfil its functions. Other persons can also be compelled to provide evidence in person or in writing to the ICRIR when acting in the course of its duties. The ICRIR can exercise its functions and investigate deaths or harmful conduct in or as regards Scotland.
- Introduce a conditional immunity scheme, allowing those who cooperate with the ICRIR to receive immunity from prosecution for offences resulting in or connected with Troubles-related deaths and harmful conduct. Individuals will be able to apply for immunity for conduct related to any relevant case where a decision to prosecute is yet to be made by prosecutors. These provisions will also apply to offences committed in or as regards Scotland.
- Bar investigations from 1 May 2024, into Troubles related incidents by any organisation other than the ICRIR, and, unless a decision to prosecute has been made, bar prosecutions from 1 May 2024 for Troubles-related offences not involving death or harmful conduct, or which are not connected to offences involving death or harmful conduct.
- Prevent criminal enforcement action from being taken against a person who has not been given immunity in respect of a serious or connected Troubles related offence, unless and until the ICRIR refers the matter to the Lord Advocate. The ICRIR must refer such a matter to the Lord Advocate if it thinks there is evidence of an offence under Scots law and the Lord Advocate directs the referral to be made.
- Bar civil legal claims arising from conduct forming part of the Troubles from continuing where the claim had yet to be raised by 17 May 2022 (the date of the Bill's introduction). Those raised before the Bill's introduction may continue, but no new civil legal claims may be raised. These provisions will apply to civil claims in or as regards Scotland.
- Amend early release provisions for prisoners serving sentences for Troubles related offences in Northern Ireland. These provisions will apply to prisoners transferred to Northern Ireland from Scotland.
- Stop Fatal Accident Inquiries (FAIs) which relate to a death that resulted directly from the Troubles, and which have not yet reached the stage of the sheriff making his/her determination by 1 May 2024; substituting instead that such a death will be investigated by the ICRIR.
- As a matter of Northern Irish law, to require designated persons to carry out a programme of memorialisation work, including an oral history initiative. The aim is to provide a central place for people of all backgrounds to share their experiences and perspectives relating to the Troubles.

5. In addition, the Bill as amended since its last consideration by the Scottish Parliament will:

a) As a matter of Northern Irish law:

o make provision that retrospectively validates all interim custody orders made under Article 4 of the Detention of Terrorists (Northern Ireland) Order 1972, as well as paragraph 11 of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973. This has the effect of providing that a person's detention under an interim custody order was not unlawful simply because it had been made by a junior Minister rather than by the Secretary of State personally. This reverses the effect of a Supreme Court judgment in 2020 that such orders were not lawful as they had not been made by the Secretary of State personally.

o Prohibit certain types of legal proceedings, including civil cases, applications for compensation as a result of miscarriages of justice, and appeals against conviction which rely on the 2020 judgment from being brought or continued.

b) As a matter of law throughout the United Kingdom, make it clear that the ICRIR's duties when looking into the circumstances of a death or serious injury apply regardless of whether a criminal investigation forms part of a review; meaning that it must consider the circumstances of a death or serious injury (which may be wider than that encompassed by a criminal investigation), even where it is also carrying out a criminal investigation into that death or serious injury.

c) As a matter of law throughout the United Kingdom, additionally require the ICRIR to be under a duty, where possible, to directly answer questions posed to it under clause 11(1) by (i) a person who suffered serious physical or mental harm or (ii) the Secretary of State, as part of a requested review of a death or other harmful conduct. The amendment makes it clear that where that is not possible the ICRIR must include a statement to that effect.  
Provisions which require the consent of the Scottish Parliament

6. The amendments described at 5(a) above do not fall within the legislative competence of the Scottish Parliament as they form part of the law of a territory other than Scotland, nor do they relate to functions exercisable in or as regards Scotland.

7. The amendments at 5(b) and 5(c) do fall with the Scottish Parliament's legislative competence as they relate to the way in which the ICRIR carries out its functions (insofar as they relate to Scotland), of criminal investigations and of the review and investigations of deaths or harmful conduct. They therefore require the consent of the Scottish Parliament, for the same reasons as set out in paragraphs 11 (deaths) and 25 (harmful conduct) of the original LCM).  
Reasons for not recommending legislative consent

8. The amendments do not remedy any of the issues that led to a recommendation of a refusal of consent in the original LCM and in the supplementary LCM of 16 June 2023.

9. It is still the case that immunity for murder and other serious offences committed in or as regards Scotland may still be granted by the ICRIR, even where such offences were committed by State actors against members of the public. Further, it remains that such immunity may be granted without the agreement of the Lord Advocate as head of the system of prosecution, effectively encroaching on the Lord Advocate's role as independent head of that system for such offences.

10. Accordingly, the Scottish Government's recommendation remains that the Parliament refuse to grant an LCM for this Bill as amended for the following reasons.

11. The Government is of the view that the Bill, as amended, remains incompatible with the Scottish Government's views that those who have suffered during the Troubles are able to obtain justice and that those who committed offences during that time are appropriately held to account/punished.

12. By continuing to confer a discretionary power in the ICRIR to grant immunity from prosecution for perpetrators of murder and other serious offences where these offences were committed during the Troubles, the Bill continues to encroach on the ability of the Lord Advocate to take decisions independently on whether to commence prosecutions (that independence is articulated in section 48(5) of the Scotland Act 1998).

#### *Consultation*

13. The Scottish Government has not undertaken its own consultation as part of the process. However, the Council of Europe's Human Rights Commissioner said on 4 July<sup>1</sup> that the Bill 'continues to raise serious question on whether it is compliant with ECHR standards on independent and effective investigations' and commented that the Bill fails to put victims at the heart of legacy.

#### *Financial implications*

14. There will be no new expenditure by the Scottish Government associated with this Bill, or the amendments included within this supplementary LCM. Upon the introduction of the Bill, the UK Government states that it expects that, during the five-year period of operation of the ICRIR, the Secretary of State for Northern Ireland will spend (on average) £35 to £50 million per year in providing resources to the ICRIR and to the designated persons carrying out memorialisation activities. The ICRIR will be wholly funded by the Secretary of State using that power. After the period of operation of the ICRIR, the Secretary of State is expected to incur some continuing costs in providing resources to the designated persons, but those costs are not expected to be substantial.

#### *Conclusion*

15. Under Rule 9B.3.3 (d) of the Parliament's Standing Orders, if a member of the Scottish Government does not propose to include a draft motion in the

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<sup>1</sup> <https://www.coe.int/en/web/commissioner/-/united-kingdom-backsliding-on-human-rights-must-be-prevented>

Memorandum, the Memorandum must explain why not. Paragraphs 8 to 12 set out the Scottish Government's reason for not including a draft motion in this Memorandum for the purposes of that rule.

16. This Bill, despite the further amendments made to it, continues to be at odds with the Scottish Government's view that those who have suffered during the Troubles are able to obtain justice and that those who committed offences during that time are appropriately held to account/punished. The Scottish Government strongly urges the UK Government to listen to the concerns of stakeholders, in particularly those in Northern Ireland, and amend the Bill further to ensure it meets that standard.

17. The UK Government advised the House of Lords that it will not make amendments to remove matters falling within legislative and executive competence despite the refusal of consent from the Scottish Parliament<sup>2</sup>. The Scottish Government urges them to reconsider this position.

**Scottish Government  
September 2023**

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<sup>2</sup> [https://hansard.parliament.uk/lords/2023-07-04/debates/350E1B11-8033-4F79-9654-EC69F062845A/NorthernIrelandTroubles\(LegacyAndReconciliation\)Bill](https://hansard.parliament.uk/lords/2023-07-04/debates/350E1B11-8033-4F79-9654-EC69F062845A/NorthernIrelandTroubles(LegacyAndReconciliation)Bill)