

Supplementary Legislative Consent Memorandum

Northern Ireland Troubles (Legacy and Reconciliation) Bill

Background

1. This memorandum has been lodged by Angela Constance, Cabinet Secretary for Justice and Home Affairs, under Rule 9B.3.1(c)(ii) of the Parliament's standing orders.
2. This memorandum concerns amendments to the United Kingdom Northern Ireland Troubles (Legacy and Reconciliation) Bill that was introduced in the House of Commons on 17 May 2022. The Bill can be found at [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill - Parliamentary Bills - UK Parliament](#). This memorandum is supplementary to 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.

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

3. In summary, the aims of the Bill, as amended, 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 however now refer such a matter to the Lord Advocate if it thinks there is evidence of an offence under Scots law (see paragraph 21 below) 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.
- To amend early release provisions for prisoners serving sentences for Troubles related sentences in Northern Ireland. These provisions will apply to prisoners transferred to Northern Ireland from Scotland.
- To 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.

Provisions which relate to Scotland

The ICRIR, the Commissioners and ICRIR Officers

4. The UK Government has tabled amendments to the provisions relating to the establishment, membership and functions of the ICRIR and further amendments relating to its officers. The ICRIR is to be a UK wide body with functions exercisable in or as regards Scotland. Insofar as the provisions relating to the establishment, membership and function of the ICRIR and the provisions relating to its officers, require the consent of the Scottish Parliament, (as set out in [paragraphs 6-10 of the original LCM](#)), so do the amendments to those provisions for the same reasons. The amendments will have the effect of:
 - Requiring the ICRIR to produce a work plan for each financial year before the start of the year, make further provisions with regard to its annual reports and to provide accounts to the national audit office who will be under a duty to audit the ICRIR and lay those in the UK Parliament.
 - Requiring the ICRIR and not the Secretary of State to produce guidance relating to how ICRIR decides a request for immunity.
 - Making further provision relative to the appointment process, duration of appointment, and relevant experience and conditions of appointment and number of Commissioners.
 - Adding the Chief Constable of Police Scotland and the Police Investigations and Review Commissioner (PIRC) to the list of persons who must provide reasonable assistance to the ICRIR in connection with information, documents or other information either has supplied to the ICRIR.
 - Making further provision relative to the appointment of ICRIR officers.

Admissibility of information provided to the ICRIR

5. The UK Government has tabled amendments relative to the admissibility of certain evidence, that has been given to ICRIR, in subsequent Scottish criminal and civil proceedings. Matters relating to general criminal and civil court procedure fall within the legislative competence of the Scottish Parliament as set out in [paragraphs 25 to 28 of the original LCM](#), accordingly, so do these amendments for the same reasons.

Amendments relative to the functions of the ICRIR

6. The UK Government has tabled amendments placing a general duty on the ICRIR to require it to have due regard to the needs of families and victims when carrying out all of its functions and also to be subject to an overarching duty to promote reconciliation.
7. In addition, amendments now require the Commissioner for Investigations to take into account the ICRIR's obligations to act compatibly with the European

Convention on Human Rights (as per the Human Rights Act 1998) when carrying out any review, including in reviews where there has been a request for immunity. This makes clear the existing underlying duty on the ICRIR (in the same way as any public body), to exercise all of their functions compatibly with the ECHR where the underlying UK Parliament Act that gives them their functions allows them to. Amendments also now expressly require the ICRIR to consider whether to conduct an ICRIR led criminal investigation as part of a review).

8. Further amendments have been tabled to require the ICRIR to engage in a more detailed way with those who have requested a review and with those referred to and/or affected by a resultant report, including an obligation to better explain its approach to each review, (even where a final report is not published). These amendments seem designed to aid understanding of the process and to respond to particular questions posed by those requesting the review, (or explain why the ICRIR can't respond). Further amendments have been laid to clarify that such reviews, whether they are criminal investigations or not, are to look into all of the circumstances of an event.
9. These amendments all relate to the way in which the ICRIR carries out its functions of the review and investigations of deaths or harmful conduct, insofar as these deaths or conduct took place in or as regards to Scotland. They mostly (see paragraph 11 below for exceptions), 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](#)).
10. A further amendment provides that the Commissioner for Investigations is to decide as part of his/her review whether a criminal investigation is to form part of the review.
11. The exception to the requirement for consent is: where the amendments described in paragraph 6-8 above relate to the power of the ICRIR to grant immunity.
12. The Bill policy on immunity relates to the independence of the Lord Advocate (see paragraph 17 below for the discussion on legislative competence).
13. The policy on criminal investigations: (that the Lord Advocate is not permitted to direct such an investigation) empowers the ICRIR to actively decide whether a criminal investigation (to be carried out by ICRIR), should take place. Its purpose is connected to the Bill's policy that all such investigations are to cease except where carried out by ICRIR. This amendment relates to a matter within the legislative competence of the Scottish Parliament for the same reasons as set out [in paragraphs 11 and 25](#) of the original published LCM.
14. A further amendment has been tabled increasing the penalty for failing to comply with a notice from the ICRIR requiring the provision of information. Such a notice relates to the general functions of the ICRIR as it reviews matters relating to crime and deaths, in or as regards Scotland, but connected to the NI

Troubles. It therefore falls to be consented to by the Scottish Parliament for the reasons set out in [paragraphs 11 and 25 of the original LCM](#).

The granting of immunity

15. The UK Government has laid amendments to expand upon the ICRIR's duty to consider all relevant information when determining the truthfulness of a person's request for immunity, it must also now take reasonable steps to obtain information relevant to that determination, for example, speaking to witnesses.
16. Further amendments oblige the ICRIR to offer victims and their families the opportunity to submit a personal statement as part of the immunity process, and for the person submitting such a statement to require it to be published by the ICRIR (subject to a power of redaction of parts of it by the ICRIR). There is no process for such a statement to play a part in the immunity decision making process.
17. Amendments for the purpose of ICRIR's power to grant immunity relate to the Bill's policy to modify the effect of section 48(5) of the Scotland Act by making the decision making of the Lord Advocate, in her capacity as head of the system of prosecution, subject to the ICRIR panel's decision on whether to grant immunity from prosecution. They therefore fall outwith the legislative competence of the Scottish Parliament for the same reasons as set out in [paragraphs 39 - 42 of the original LCM](#).

False statements to the ICRIR, revocation of immunity by the court, and offences which will not attract immunity

18. The UK Government has tabled an amendment to make it an offence to make a false statement to the ICRIR in connection with the carrying out of its functions relative to its investigation of deaths and harmful conduct and also in connection to its granting of immunity from prosecution. Insofar as the offence relates to the ICRIR review functions then it falls within the competence of the Scottish Parliament and requires consent for the same reasons given in [paragraphs 11 and 25 of the original LCM](#). The offence does not require consent where it relates to the granting of immunity. This is for the same reasons as set out in [paragraphs 39 - 42 of the original LCM](#).
19. Amendments have also been tabled which require the court upon conviction in relation to false information given in the course of a request for immunity, to revoke any immunity granted by ICRIR in that process. In addition, amendments have also been laid which require immunity to be revoked by the court where the immune person is subsequently convicted of terrorism or offences connected to terrorism. These amendments provide for automatic consequences upon a conviction for such offences. As such they do not represent an interference in the decision making of the Lord Advocate, and as such are Scots criminal law measures which fall within the legislative competence of the Scottish Parliament.

20. Amendments also prevent the granting of any subsequent application for immunity relating to matters for which immunity has been revoked. The effect of these amendments is to remove the ICRIR immunity function in these instances, effectively restoring the Lord Advocate's function with regard to being able to prosecute (or not) the offences concerned. The effect of the Bill overall in this narrow aspect does not then modify section 48(5) of the Scotland Act and thus these amendments are within the competence of the Scottish Parliament, being for the purpose of modifying Scots criminal law.

Information that can be passed prosecutors

21. The Bill has been amended for Scotland to require that after a review of a death or harmful conduct, the relevant conduct itself must be passed to the Lord Advocate if (a) the ICRIR considers that there is evidence that it constitutes an offence under the law of Scotland committed by an individual known to the ICRIR and (b) the Lord Advocate directs that it be passed over. Previously the ICRIR had discretion over whether to refer the conduct over. The amendment results in the Lord Advocate regaining some control over whether to raise a prosecution. This amendment is a substantial concession and delivers a similar practical outcome to that proposed by the Lord Advocate in her letter to the Secretary of State for Northern Ireland on [10 October 2022](#).

Criminal enforcement action by ICRIR where there is no immunity, but where a case is yet to be passed to prosecutors

22. The UK Government has tabled amendments to the Bill which permit, (in cases where there has been no immunity granted), ICRIR officers to take preliminary criminal enforcement action, including arresting or otherwise detaining a person and also charging them, where a case has not been referred to prosecutors. If the matter is then referred, prosecutors can conduct proceedings arising from such a charge. For the same reasons given in [paragraph 47 and 48 of the original LCM](#), this amendment is considered to be outwith the competence of the Scottish Parliament as it is made with the purpose of modifying the effect of section 48(5) of the Scotland Act. The amendments do not then fall to be consented to.

Prohibition on PIRC investigation of complaints relating to Troubles related conduct by the police, and extension of PIRC remit to investigate ICRIR actions

23. The UK Government has tabled amendments which will now stop any new or active investigation by the PIRC into police misconduct which related to conduct forming part of the troubles. This amendment therefore limits PIRC's existing powers. The functions of the police and the PIRC insofar as they relate to the general criminal law and the operation and standards of the police are matters which are within the legislative competence of the Scottish Parliament and as such require the consent of the Scottish Parliament. Further amendments have been laid that permit PIRC to enter into an agreement with

ICRIR to allow PIRC to investigate serious incidents involving ICRIR officers, or complaints against ICRIR officers. It would also allow for the PIRC to be directed to investigate the potential criminal offending of ICRIR officers. As the ICRIR officers will, in respect of their investigations, be exercising the same functions as a constable, the amendments fall within the legislative competence of the Scottish Parliament and require consent.

Prisoner release in Northern Ireland

24. The Bill currently provides for the earlier release of prisoners from Northern Ireland where they have committed troubles related offences. This includes prisoners transferred from Scotland on a restricted basis (and therefore under Scottish Ministers control) who committed offences between 1966 and 7 August 1973. The UK Government has laid amendments restructuring the application of the proposed early release changes, to exclude prisoners who have been convicted after the power of ICRIR to grant immunity became available to it. Accordingly, early release will not be available for those who have not taken the opportunity to apply for immunity. Further amendments have been laid which disapply the early release provisions to prisoners sentenced to less than 5 years and who would have not had to serve a minimum term in prison under the terms of the Bill as introduced. For the reasons given in [paragraph 55-59 of the original LCM](#), the Bill amends executive competence in respect of prisoners transferred on a restricted basis (and therefore under the control of the Scottish Ministers) and thus requires consent.

Dates where criminal investigations and Fatal Accident inquiries must cease

25. Amendments have been made to provide that criminal investigations into Troubles related offences may continue to be undertaken until 1 May 2024, and that Fatal Accident Inquiries may similarly continue. On 1 May 2024 the Commission will take over such investigations except where in the case of a FAI the sheriff has, having concluded the hearings, already begun the process of considering his/her determination in the matter.

Miscellaneous

26. Further UK Government amendments have been laid relating to the Bill provisions empowering the ICRIR to request communications data from UK companies for the purpose of preventing or detecting crime under the Investigatory Powers Act 2016. The UK Government amendments have the effect of removing some of the powers of the ICRIR in this regard and modifying others that required consent in terms of the reasons given in [paragraph 63 of the original LCM](#). Insofar as the power is modified (and not removed) the requirement for the legislative consent of the Scottish Parliament remains. Further amendments have been laid relative to ICRIR sharing relevant sections of a draft report criticising a person rather than the full draft report and allowing persons to make representations about that material; to ensure that

organisations as well as individuals which are due to be criticised by the Commission can receive relevant sections of a draft report; and to delay the publication of final reports where referral to prosecutors has been made. All fall within the legislative competence of the Scottish Parliament where they relate to the ICRIR exercising its function in Scotland.

Effect of amendments overall

Justice for victims and effective punishment for perpetrators

27. It would appear that one of the major intended policy effects of the amendments is to better persuade persons involved in and affected by the Troubles to engage truthfully with the ICRIR process and the opportunity for immunity. These include the amendments which focus the ICRIR on the promotion of reconciliation, and on making the system more victim focussed, with victims and family impact statements being submitted when immunity is being considered. This is buttressed by the positive duty now imposed on the ICRIR to obtain information on the truthfulness of the perpetrator's account (which goes to the heart of whether immunity will be granted) and a further duty imposed on ICRIR to have due regard to the needs of families and victims.
28. Other amendments focus on the perpetrator, such as the offence of making false statements to the ICRIR in the course of its work and the revocation of related immunity if convicted of that offence or of terrorism offences. Amendments also remove early prison release for perpetrators who have not engaged with ICRIR and who are subsequently convicted. Further amendments now prevent PIRC from investigating live or new complaints made in relation to the activities of the police in Scotland during the Troubles, transferring that role to the ICRIR.
29. The Bill now states that the ICRIR must act compatibly with the European Convention on Human Rights (ECHR) as far as it is required to do so by the Human Rights Act 1998. Accordingly where the Bill can be interpreted in a certain way that meets the conditions of the ECHR then it must be interpreted by the ICRIR in that way, in terms of the actions ICRIR needs to take. Questions remain however as to whether the Bill can be interpreted compatibly with ECHR and this has been raised by Amnesty International.
30. While the amendments which enhance the reconciliatory focus of the ICRIR are welcomed, immunity will still be available for those who have committed murder and other serious offences, including where such offences were carried out by State actors on members of the public. They do not displace the Scottish Government's concerns 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.
31. In addition, it remains the case that once the ICRIR completes its term of operation (currently persons will have 5 years to refer a case), no criminal sanctions will be applicable with regard to Troubles related offences that come

to light after that time or which were otherwise not dealt with by the ICRIR during its time of operation. It will be for the Secretary of State to decide when to wind up the operations of the ICRIR and it therefore remains a possibility that that could occur where a murder or serious offence has not yet been investigated. Once the ICRIR has been wound up, no cases can then be passed to the Lord Advocate for prosecution, no matter what new evidence arises.

Prosecutions and the Lord Advocate's role

32. There are amendments to try to meet criticisms of the Bill in terms of matters not being passed to prosecutors by ICRIR while it is operating. The ICRIR is now expressly obliged to consider whether criminal investigations should be initiated and its officers are to be empowered to arrest or detain and to charge a person until it is decided whether to pass the matter to prosecutors for a prosecution to take place. Amendments partially remove the interference by the ICRIR with the powers of the Lord Advocate as head of the systems of prosecution and investigation of deaths in Scotland. While it is still the ICRIR which makes a decision on the granting of immunity, the Bill is amended to mean that it is the Lord Advocate who once again can make the decision on whether to prosecute where ICRIR consider there has been relevant conduct which constitutes an offence and where immunity has not been granted (including where the immunity has been revoked). This amendment meets the specific concerns raised by the Lord Advocate in her letter to the UK Government of [10 October 2022](#).

Letter from the Delegated Powers and Law Reform Committee to the Secretary of State for Northern Ireland

33. The Bill still provides in several places for the Secretary of State to make subordinate legislation (SIs) on matters that fall within the legislative competence of the Scottish Parliament. The DPLRC wrote to the Secretary of State on 10 November¹ on that matter and in its report of 15 November² provided that:

"The Committee... does not take a view on whether any particular powers in this Bill should in fact be conferred on Scottish Ministers (instead of or in addition to UK Ministers) or whether any particular powers in this Bill that are conferred on UK Ministers should be subject to a requirement for the Scottish Ministers' consent, the Committee just draws to the attention of the lead committee that the Bill confers new powers in devolved areas which will be exercised by UK Ministers with no opportunity for scrutiny by the Scottish Parliament".

¹ [External Letter \(parliament.scot\)](#)

² [Legislative Consent Memorandum: delegated powers relevant to Scotland in the Northern Ireland Troubles \(Legacy and Reconciliation\) Bill \(azureedge.net\)](#)

34. No amendments have been forthcoming to make the particular powers to make subordinate legislation (SIs) noted by the DPLRC, on matters that fall within the legislative competence of the Scottish Parliament, subject to the Scottish Minister's consent. The UK Government responded to the DPLRC on 25 January 2023³

Whether consent is recommended

35. The UK Government has taken steps towards meeting some of the of criticism levelled at the Bill, and has met the concerns raised by the Lord Advocate in her letter of [10 October 2022](#) that the Lord Advocate may direct the ICRIR to refer cases to her where ICRIR have come to the view that there has been relevant conduct which constitutes an offence and where immunity has not been granted or revoked. However, the Scottish Government remains concerned that the amended Bill will not remedy all of the issues that led to recommendation of a refusal of consent in the original LCM.
36. 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 interfering with the Lord Advocate's role as independent head of that system for such offences.
37. Accordingly the Scottish Government's recommendation remains that the Parliament refuse to grant consent for this Bill as amended for the following amended reasons.
38. The Scottish 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.
39. 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 as amended 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

40. The Scottish Government has not undertaken its own consultation as part of the process. The amendments with the greatest effect were only laid in the UK Parliament on 8th June and accordingly it is not yet known what the reaction of

³ [Annex D \(parliament.scot\)](#)

bodies such as the Commissioner for Human Rights at the Council of Europe, nor the Northern Ireland Human Rights commission will be to the Bill as amended. However, Amnesty International has criticised the amendments.

Financial Implications

41. There will be no new expenditure by the Scottish Government associated with this Bill, or the amendments included within this supplementary memorandum. 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

42. 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 Memorandum, the Memorandum must explain why not. Paragraphs 38 and 39 set out the Scottish Government's reason for not including a draft motion in this Memorandum for the purposes of that rule.
43. This Bill, and the UK Government tabled amendments 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. We strongly urge 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.

Scottish Government
June 2023

This Supplementary Legislative Consent Memorandum relates to the Northern Ireland Troubles (Legacy and Reconciliation) Bill (UK legislation) and was lodged with the Scottish Parliament on 16 June 2023

Northern Ireland Troubles (Legacy and Reconciliation) Bill – Supplementary Legislative Consent Memorandum

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