

Criminal Justice Committee

33rd Meeting, 2022 (Session 6), Wednesday, 21 December 2022

Northern Ireland Troubles (Legacy and Reconciliation) Bill – legislative consent

Note by the clerk

1. At its meeting of [7 December](#), the Committee took evidence from the Cabinet Secretary for Justice and Veterans and his officials on the [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#) (“the Bill”). This Bill is UK Government legislation.
2. The Northern Ireland Troubles (Legacy and Reconciliation) Bill was introduced in the House of Commons on 17 May 2022. It was scheduled to have the first meeting of its committee stage in the House of Lords on 12 December 2022.
3. At the end of its consideration of the Bill and the issue of legislative consent on 7 December, the Committee agreed to seek further information from the Lord Advocate on her correspondence with the Northern Ireland Office (NIO). This is set out in **Annex A**.
4. Consequently, the Committee agreed to hold over consideration of whether to recommend legislative consent to the relevant provisions in the Bill to today’s meeting. A copy of the Scottish Government’s Legislative Consent Memorandum (LCM) is set out in **Annex B**.
5. **Members will wish to note that the Scottish Government does not recommend consent for the reasons explained in the LCM (paragraphs 71-75). Similarly, the Lord Advocate has expressed her views on certain provisions in the Bill in her letters to the NIO set out in Annex A.**

About the Bill

6. The Bill’s purpose is to implement a range of measures to address the legacy of the Northern Ireland Troubles. The Bill:
 - establishes a new independent body, the Independent Commission for Reconciliation and Information Recovery (the ICRIIR).

CJ/S6/22/33/3

- limits criminal investigations, legal proceedings, inquests and police complaints,
 - extends the prisoner release scheme in the Northern Ireland (Sentences) Act 1998, and
 - provides for experiences to be recorded and preserved and for events to be studied and memorialised.
7. The Scottish Government is of the view that the Bill (except for clauses 18 to 22, 35, 36 and 42 and the clauses within Part 4) requires that a legislative consent memorandum be lodged in the Scottish Parliament.
8. The Scottish Government's reasons for this view are set out in paragraphs 5 to 67 of the LCM.

Action/recommendation

9. **After discussion, members are asked to decide whether to recommend to the Parliament to agree with the view of the Scottish Government and not give its legislative consent to the relevant provisions in the Bill.**
10. **Members will also be asked for agreement that the clerks produce a short, factual report, setting out their recommendations to the Parliament on the issue of legislative consent. The draft would be cleared by the Convener.**

**Clerks to the Committee
December 2022**

Correspondence between the Lord Advocate and the Northern Ireland Office (NIO)

1. Letter from the NIO to the Lord Advocate (17 May 2022)

Dear Lord Advocate,

Northern Ireland Troubles (Legacy and Reconciliation) Bill

I am writing to you with regard to the Northern Ireland Troubles (Legacy and Reconciliation) Bill that will be introduced in Parliament later today. I am grateful for the constructive manner of the discussions which our officials have already had - particularly in view of our inability to share any Bill drafting until now. I attach a copy of the draft Bill. My officials stand ready to engage as much as necessary on the provisions relating to the investigation of deaths and prosecution of offences in Scotland.

Background

Northern Ireland's past remains one of the major factors in shaping its present - legacy issues continue to be deeply felt, with significant impacts on politics, public debate and trust in the police and wider justice system. There is broad agreement across Northern Ireland that the current system for dealing with the legacy of the Troubles is not working well for anybody, particularly victims and survivors. The Government recognises that access to information and accountability, via a thorough and robust investigative process, is absolutely vital to victims and survivors, and their families. That is why obtaining information, supported by full disclosure by the State, is the cornerstone of the proposals the UK Government has put forward.

This legislation will:

- establish a new Independent Commission for Reconciliation and Information Recovery (ICRIR) to enable individuals and family members to seek and receive information about Troubles-related deaths and serious injuries, and to produce an historical record of what is known in relation to every death that occurred during the Troubles;
- introduce a model of conditional immunity from prosecution, for those who provide the ICRIR with a genuine account of their involvement in deaths and serious injuries arising from the Troubles in NI from 1 January 1966 to 10 April 1998; and,
- provide for the delivery of an oral history and the memorialisation of the Troubles. This will involve securing the long-term preservation of existing oral history collections, with new physical and digital resources to maximise public engagement with different narratives and Troubles-related stories.

We believe that we now have a real opportunity to make progress, building on the experience of previous attempts but taking account of what has changed and what we have learned since then. The UK Government is determined in its aim to find a way through for as many families as possible, allowing them to obtain answers about the past that will subsequently help them - and wider society in Northern Ireland - to move towards a positive and reconciled future.

The Independent Commission for Reconciliation and Information Recovery
The focus of the Government's legislation is on the recovery and provision of information by a new body, the aforementioned ICIR. The establishment, management and operations of this body will be the responsibility of a panel of three to five Commissioners. This will include a Commissioner for Investigations who will have the necessary skills and experience to run the Commission's investigative functions. All Commissioners will be appointed by the Secretary of State for Northern Ireland who will also have powers of dismissal. The ICIR will have powers to access information including from public authorities and security services in Scotland and find out information regarding Troubles-related cases. This includes where there remain unanswered questions about allegations of wrongdoings by representatives of the State.

The ICIR will investigate a death or very serious injury (within the same temporal scope of the model of conditional immunity) where approached by an individual seeking immunity, a victim or family member requests it, or further to a referral from the Secretary of State for Northern Ireland or others such as the Attorney General for Northern Ireland, Advocate General for Northern Ireland, or a Coroner in England and Wales, or you in your capacity as Lord Advocate, or a Procurator Fiscal or a Sheriff in Scotland.

In addition, the ICIR will produce a historical record of what is known in relation to every death that occurred during the Troubles (that has not already been the subject of a request or referral to the body), drawn from open source material. These proposals would mean the body would take forward an investigation in relation to deaths or serious injuries, but for the purpose of genuine and robust information recovery, rather than to create a file for prosecution. This would ensure that resources are focused on the specific needs of the family or individual. It would also ensure that more families and individuals obtain more information, more quickly.

Limitation of legal proceedings and release of prisoners

The Bill will introduce a model of conditional immunity from prosecution, for those who provide the ICIR with a genuine account of their involvement in deaths and serious injuries arising from the Troubles in NI from 1 January 1966 to 10 April 1998. This will be available in all cases except where, at the time of commencement, there is an active prosecution (that is, where a decision to prosecute has been taken and the related proceedings have not yet concluded).

There will be a general prohibition on criminal investigations into Troubles-related offences. This will not affect investigations carried out by the new body, when exercising its functions, nor will it affect ongoing police investigations where these

are carried out in support of pre-commencement prosecutions. New prosecutions for Troubles-related offences which are not connected with a death or serious injury will be prohibited. New prosecutions for offences which relate to a death or serious injury will only be permitted where a case is referred to prosecutors by the new body, following a review (and assuming immunity from prosecution has not been granted). Pre-commencement prosecutions (where a decision to prosecute has already been taken by the point of entry into force) will not be affected.

Existing inquests which have not reached an advanced stage by the date which is twelve months after introduction or by which the ICIR is operational (whichever comes first) will not be progressed, though they may be referred into the new body by the family or the Sheriff, the Lord Advocate and the Procurator Fiscal. Civil claims that already existed before the Bill's introduction will also be allowed to continue, but there will be a bar (which will take effect 2 months after Royal Assent) on any new cases from the date of introduction.

The Bill makes provisions about the accelerated release of prisoners under the Northern Ireland (Sentences) Act 1998, by extending the temporal scope of the provisions to catch offences committed between 1966 and 1973 (in line with the period subject to investigation by the ICIR); removing the existing limit that the provisions apply only to prisoners sentenced to life or for a term of at least five years; and extending the scope of these provisions to include persons serving sentences anywhere in the UK and not just in Northern Ireland. Prisoners currently serving any sentence in Scotland will, as now, be required to transfer to Northern Ireland to apply to the scheme.

Conclusion

In your capacity as the independent head of prosecutions and investigations of deaths in Scotland, I recognise your strong interest in our Bill, and I and my officials would be very happy to discuss its details further with you if helpful. I am copying this letter to the Secretary of State for Scotland and the Secretary of State for Levelling Up, Housing and Communities. I have also written in similar terms to the Cabinet Secretary for Justice and Veterans.

Yours sincerely,

RT HON BRANDON LEWIS CBE MP
SECRETARY OF STATE FOR NORTHERN IRELAND

NB. The NIO also provided a copy of the Bill.

2. Letter from the Lord Advocate to the NIO (15 June 2022)

Dear Secretary of State,

Thank you for your letter dated 17 May 2022, regarding the Northern Ireland Troubles (Legacy and Reconciliation) Bill. I note your letter was addressed to me in my capacity as the independent head of the systems of criminal prosecution and the investigations of deaths in Scotland.

In Scotland, all public prosecutions are brought by prosecutors within the system for which I am constitutionally responsible (and accountable both to the courts and to the Scottish Parliament). The system for which I am responsible includes the investigation of crime, since in Scotland the police investigate crime subject to direction from the public prosecutor. For practical purposes, therefore, I exercise oversight and direction of the entire system of investigation and prosecution of crime, as well as the investigation of deaths, in Scotland.

I exercise these functions independently of any other person. The constitutional importance of the Lord Advocate's independence in exercising these functions is recognised in the Scotland Act 1998.

The Bill, in its current form, engages a number of areas over which I have constitutional responsibility and does so in a manner novel to Scots criminal law. As the terms of the Bill were only relatively recently made public, detailed and careful consideration of its impact on the systems for which I am responsible will require to take place in the coming weeks.

In this regard, I understand that there has been engagement in relation to the Bill between officials from the Northern Ireland Office and the Crown Office and Procurator Fiscal Service. I anticipate that engagement continuing.

I am copying this letter, for their information, to the Cabinet Secretary for Justice and Veterans.

Yours sincerely,

**RT HON DOROTHY BAIN QC
LORD ADVOCATE**

3. Letter from the Lord Advocate to the NIO (10 October 2022)

Dear Secretary of State,

I was grateful to your predecessor, Brandon Lewis, for writing to me in my capacity as independent head of the systems of criminal prosecution and the investigation of deaths in Scotland, providing a copy of the Northern Ireland Troubles (Legacy and Reconciliation) Bill (the “Bill”).

As I noted in my reply to the Secretary of State, the Bill engages a number of areas over which I have constitutional responsibility in a Scottish context and does so in a manner novel to Scots law. As there had been limited opportunity to review the Bill before it was introduced to Parliament, detailed and careful consideration of its terms required to take place.

In that review, I continue to be grateful for the engagement of officials from the Northern Ireland Office and the further discussions which they have engaged in with officials from the Crown Office and Procurator Fiscal Service.

I am of the view that the Bill does impact on the constitutional role of the Lord Advocate, as head of the systems of prosecution and investigation of deaths in Scotland, and in particular the requirement to take decisions in that capacity, independently of any other person. Such independence is explicitly required by section 48(5) of the Scotland Act 1998.

In particular, I consider that the provision of immunity by the Independent Commission for Reconciliation and Information Recovery (ICRIR) and, in particular, the requirement in clause 36 that a matter must be referred by the Commissioner for Investigations to the relevant prosecutor, before a decision on prosecutorial action can be taken represents, in a Scottish context, the imposition of another legal person’s authority on the decision making of the Lord Advocate. I understand, of course, that the United Kingdom Parliament is sovereign, however, my view is that the constitutional impact of the decision should be both clearly understood and, if necessary, articulated.

The requirement in clause 36 for a referral from the Commissioner for Investigations before a decision on prosecutorial action can be taken would mean that, were I, as Lord Advocate, to decide that it was appropriate, in the public interest, to commence a prosecution in a case where immunity had not been granted, I would be prevented from doing so, unless and until a referral was made by another person, namely the Commissioner for Investigations.

I understand that the United Kingdom Government considers that in the majority of cases where immunity has not been granted and prosecution is a possibility, ICRIR would decide to, or perhaps would be required (to ensure ECHR compliance), to refer the matter to the relevant prosecutor. I understand also that it is anticipated that ICRIR would enter into a memorandum of understanding with each relevant United Kingdom prosecution authority, in relation to referrals. I would suggest that, if this is the anticipated position, there would be benefit in this being clearly expressed on the face of the Bill.

CJ/S6/22/33/3

I note, in particular, the approach that was recently taken by the United Kingdom Government in relation to the Armed Forces Act 2021 which introduced section 320B into the Armed Forces Act 2006.

Were a similar approach to be taken in the Northern Ireland Troubles (Legacy and Reconciliation) Bill, it might make clear that a protocol must be entered into between the ICIR and Lord Advocate. It might explicitly require ICIR to consult the Lord Advocate in relation the potential referral of any serious or connected Troubles related conduct. It might require the Lord Advocate to consult the ICIR in relation to any relevant Troubles related circumstances which come to the attention of the Lord Advocate where prosecutorial action is being considered, whilst respecting that the ultimate decision on prosecutorial action remains one for the Lord Advocate.

It would be desirable constitutionally, in particular, if the Bill explicitly required ICIR to refer a case to the Lord Advocate, in circumstances where the Lord Advocate requests such a referral. This would only apply to cases where the ICIR had taken the decision not to grant immunity. In that way, the independence of the Lord Advocate, when making a decision to prosecute, would not be impinged on by a reliance on the Commissioner for a referral.

I am copying this letter, for information, to the Cabinet Secretary for Justice and Veterans.

Yours sincerely,

**RT HON DOROTHY BAIN QC
LORD ADVOCATE**

Copy of the Scottish Government's LCM on the Bill

Background

1. This memorandum has been lodged by Keith Brown, Cabinet Secretary for Justice and Veterans, under Rule 9B.3.1(a) of the Parliament's standing orders, and is supported by Ash Regan, Minister for Community Safety. The Northern Ireland Troubles (Legacy and Reconciliation) Bill is a UK Government Bill that was introduced in the House of Commons on 17 May 2022, it was approved by that House 4 July 2022 and had its first reading in the House of Lords on 5 July 2022. The Bill can be found at [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill - Parliamentary Bills - UK Parliament](#).

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

2. The Bill does the following and has the following policy objectives:

- The Bill will establish a new independent body, the Independent Commission for Reconciliation and Information Recovery (ICRIR). When requested to do so, this body will conduct investigations into deaths and harmful conduct which resulted from conduct forming part of the Troubles. 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.
- The ICRIR may also open an investigation 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.
- Certain State bodies 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.

- The Bill will 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.
- The Bill will bar investigations into Troubles related incidents by any organisation other than the ICRIR, and bar prosecutions for Troubles-related offences not involving death or harmful conduct, or which are not connected to offences involving death or harmful conduct. It will 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 Prosecutor. These provisions will apply to incidents and potential prosecutions in or as regards Scotland.
- The Bill also bars civil legal claims arising from conduct forming part of the Troubles where a 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. These provisions will apply to civil claims in or as regards Scotland.
- The Bill will also 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.
- The Bill will 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 a substantive hearing by 1 May 2023 or the date on which the ICRIR becomes operational (whichever comes first); substituting instead that such a death will be investigated by the ICRIR.
- As a matter of Northern Irish law, the Bill will 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 require the lodging of a Legislative Consent Motion

3. The Scottish Government is of the view that the Bill (except for clauses 18-22, 35, 36 and 42 and the clauses within Part 4) requires that a legislative consent memorandum be lodged in the Scottish Parliament.

4. The Scottish Government is of this view for the following reasons.

Part 1 of the Bill (clause 1)

5. This Part provides key definitions in support of the remainder of the Bill. Insofar as those definitions relate to the purpose of the Bill, and help define the functions of the ICRIR and other bodies affected by the Bill, and where such a purpose or function falls within the legislative competence of the Scottish Parliament, then a LCM is required to be lodged with regard to them. Insofar as those definitions relate to matters which modify the functions of the Scottish Ministers then a LCM is required to be lodged with regard to them.

Part 2 of the Bill (Clauses 2-33)

6. This relates to the establishment and functions of the ICRIR. The ICRIR is to be a UK wide body with functions exercisable within or as regards Scotland. Where those functions are exercisable in or as regards Scotland then an LCM will require to be lodged where those functions relate to matters within the legislative competence of the Scottish Parliament.

Powers and functions of the ICRIR

7. Clauses 2 – 6 and Schedule 1 – 7 of the Bill establish the ICRIR and make ancillary, general and foundational provisions relative to it and its functions. The ICRIR's functions fall within legislative competence of the Scottish Parliament as set out in the analysis of the clauses below, accordingly so do these provisions.

8. Clause 2 lists the ICRIR's functions and makes provisions as to ICRIR reporting and funding, it gives effect to schedule 1 of the bill which contains provisions as to Commissioners and officers of the ICRIR.

9. Clause 3 relates to officers of the ICRIR who will carry out the functions of the ICRIR and clause 4 provides limits to those functions. Clause 5 makes provision requiring 'relevant authorities' (as defined in clause 54) to make materials and information available to the ICRIR in connections with its functions. Those authorities include Police Scotland, the Police Investigations and Review Commissioner (PIRC) and the Scottish Ministers and this provision falls within the legislative competence of the Scottish Parliament where the authority in question provides information connected to a matter falling within legislative competence. In addition, by conferring a function on Scottish Ministers clause 5 alters the executive competence of the Scottish Ministers and thus also requires a Legislative Consent Memorandum to be lodged in that regard.

10. Clause 6 makes further provision relative to conferring the powers and privileges of a Scottish police constable upon the Commissioner for Investigations and other ICRIR officers for use in the carrying out of their functions; it also gives effect to schedule 2 which makes further provision in that regard and which also confers a function on Scottish Ministers to enter into an agreement with the Commissioner for

Investigations with regard to the exercise by ICRIR officers of the powers and privileges of the constable. By conferring a function on Scottish Ministers, schedule 2 alters the executive competence of the Scottish Ministers and thus also requires a Legislative Consent Memorandum to be lodged in that regard.

Investigation of deaths

11. Matters relating to the investigation of deaths in or as regards Scotland fall within the legislative competence of the Scottish Parliament. The functions of the ICRIR and the processes which relate to the investigation of certain Troubles related deaths in or as regards Scotland are set out in and governed by the following clauses and schedules.

12. Clause 7 makes modification to Scottish criminal procedure and the law on the admissibility of evidence in Scottish criminal proceedings where evidence was obtained by the ICRIR in certain circumstances in the carrying out of its functions, (including those relating to the investigation of deaths or harmful conduct). As such it falls within the legislative competence of the Scottish Parliament.

13. Clause 8 makes modification to the law on the admissibility of evidence in Scottish civil proceedings and in FAIs where evidence was obtained by the ICRIR in certain circumstances in the carrying out of its functions, (including those relating to the investigation of deaths or harmful conduct). As such it falls within the legislative competence of the Scottish Parliament.

14. Clause 9 makes provision for close family members and other persons (such as a sheriff, a procurator fiscal and the Lord Advocate) to request a review of a Troubles related death and the circumstances under which such a request can be made. Clause 9 (and clause 15) also introduces schedule 3 which defines the close family members who can request reviews of certain deaths and which defines the relevant family members who will receive drafts of reports produced after such reviews (and prior to publication). Such deaths and their review relate to matters which can fall within the legislative competence of the Scottish Parliament.

15. Clauses 11-13 make further provision relative to the review of a Troubles related death by the ICRIR and as per the reasons set out in paragraph 11 of this memorandum, such further provisions also fall within the legislative competence of the Scottish Parliament.

16. Clause 14 introduces schedule 4 which makes provision about enforcement of notices which require the submission of evidence relative to the carrying out of the ICRIR's investigatory functions. Again as these are in connection with and supportive of the investigatory function of the ICRIR these provisions also fall within the legislative competence of the Scottish Parliament for the reasons given in paragraph 11 of this memorandum.

17. Clauses 15 – 17 make provision as to the reports of the ICRIR that result from its review into Troubles related deaths. These provisions relate to the outcome of the ICRIR investigations into deaths and as such they also fall within the legislative

competence of the Scottish Parliament for the reasons given in paragraph 11 of this memorandum.

18. Clauses 24 and 25 relate to the production and publication of a 'historical record' which gives an account of the circumstances of each Troubles related death that is not otherwise reviewed under clauses 13 – 33. While not connected to the investigation of deaths otherwise reviewed by the ICRIR in terms of clauses 13 -33 of the Bill, provisions with the purpose of creating such a historical record of Troubles deaths are not a reserved matter with regard to deaths occurring in or as regards Scotland and thus these provisions fall within the legislative competence of the Scottish Parliament.

19. Clauses 26 to 31 relate to the processing, holding and disclosure of information by the ICRIR that it has as it carries out its functions. As the ICRIR's functions require a LCM then these provisions, when governing those functions, also require a LCM.

20. Clause 26 (and schedules 5 and 6, which it introduces) relate to the disclosure of information held by ICRIR as it carries out its functions. The clause also makes clear that certain disclosures are not permitted, including (at clause 26(9)), those prohibited by Part 5 of the Investigatory Powers Act 2016 (police equipment interference warrant for the purpose of detecting and preventing serious crime). The prevention and detection of crime is a matter within the legislative competence of the Scottish Parliament and the application of the prohibition on disclosure in Part 5 of the 2016 Act also means that this provision requires a LCM as those provisions also relate to matters which fall within the legislative competence of the Scottish Parliament.

21. Clause 29 makes provision for the Secretary of State to give guidance to persons (including ICRIR, Police Scotland, the PIRC and the Scottish Ministers) about the identification of sensitive information (as defined in clause 54), to which those persons must have regard. Accordingly, in addition to relating to a matter within the legislative competence of the Scottish Parliament the clause confers a function on the Scottish Ministers and requires a LCM as it modifies the executive competence of the Scottish Ministers.

22. Clause 30 provides that the Secretary of State may make regulations concerning the holding and handling of information by the ICRIR. The subject matter of such regulations relates to matters such as the storage, destruction and notification about, information held by the ICRIR collected in the discharge of its functions. Such functions are within the legislative competence of the Scottish Parliament, and regulations making further ancillary and connected provisions in that regard also fall within that competence. This clause will also then require a LCM as it empowers the further regulation of matters falling within the Scottish Parliament's legislative competence.

23. Clause 31 provides that the Secretary of State may make regulations that prevent the destruction of biometric materials and allow the use of same by the ICRIR in the carrying out of its functions (which functions are subject to a LCM). The purpose of the provision is the support of the ICRIR functions and thus the clause

falls to similarly require a LCM. Further the power to override the destruction provisions set out in section 18(3) to (5) of the Criminal Procedure (Scotland) Act 1995 as applied by schedule 4 of the International Criminal Court (Scotland) Act 2001, relate to ICC crimes, and as such do not relate to a reserved matter; thus such a modification falls within the legislative competence of the Scottish Parliament. The United Kingdom Government indicated in its explanatory notes to the Bill that this clause did not require a LCM. The United Kingdom Government have now accepted that an LCM will in fact be needed for the reasons set out above.

24. Clause 32 provides for a review of the performance of the functions of the ICRIR by the Secretary of State. Where those functions relate to a matter within the Scottish Parliament's legislative competence, then so does a provision providing for such a review. Clause 33 sets out an enabling power for the Secretary of State to make regulations concerning the winding up of the ICRIR, if satisfied that the need to exercise its functions has ceased. It relates to the termination of the ICRIR as it exercises functions which do not relate to a reserved matter, this clause therefore makes provision that falls within the legislative competence of the Scottish Parliament.

Investigation of harmful conduct (including criminal conduct and conduct which may attract a claim in civil proceedings)

25. Matters relating to the investigation and prosecution of criminal offences and which relate to general criminal procedure fall within the legislative competence of the Scottish Parliament. Matters which relate to the justiciability of harmful conduct in civil proceedings in Scotland also fall within the legislative competence of the Scottish Parliament. The functions of the ICRIR and the processes which relate to the investigation of harmful conduct in or as regards Scotland are set out in and governed by the following clauses and Schedules.

26. Clause 7 makes modification to Scottish criminal procedure and the law on the admissibility of evidence in Scottish criminal proceedings where evidence was obtained by the ICRIR in certain circumstances in the carrying out of its functions, (including those relating to the investigation of deaths or harmful conduct). Scots criminal law and the law on the admissibility of evidence in Scottish criminal proceedings fall within the legislative competence of the Scottish Parliament.

27. Clause 8 makes modification to the law on the admissibility of evidence in Scottish civil proceedings and in FAs where evidence was obtained by the ICRIR in certain circumstances in the carrying out of its functions, (including those relating to the investigation of deaths or harmful conduct). The law relating to the admissibility of evidence in Scottish civil proceedings and in FAs falls within the legislative competence of the Scottish Parliament.

28. Clause 10 empowers any person who suffered serious physical or mental harm due to Troubles related harmful conduct to request that the ICRIR carry out a review of that conduct. It also empowers the Secretary of State to request a review into any

Troubles related harmful conduct. Such conduct and its review relates to matters (such as Scots criminal and civil law, and the investigation of criminal conduct) which fall within the legislative competence of the Scottish Parliament.

29. Clauses 11-13 make further provision relative to the review of Troubles related harmful conduct by the ICRIR and as per the reasons set out in paragraph 25 of this memorandum such further provisions also fall within the legislative competence of the Scottish Parliament.

30. Clause 14 introduces schedule 4 which makes provision about enforcement of notices which require the submission of evidence relative to the carrying out of the ICRIR's investigatory functions. Again as these are in connection with and supportive of the investigatory function of the ICRIR these provisions also fall within the legislative competence of the Scottish Parliament for the reasons given in paragraph 25 of this memorandum.

31. Clauses 15 – 17 make provision as to the reports of the ICRIR that result from its review into Troubles related harmful conduct. These provisions relate to the outcome of the ICRIR investigations into harmful conduct and as such they also fall within the legislative competence of the Scottish Parliament for the reasons given in paragraph 25 of this memorandum.

32. Clauses 26 to 31 relate to the processing, holding and disclosure of information by the ICRIR that it has as it carries out its functions. As the ICRIR's functions require a LCM then these provisions, when governing those functions, also require a LCM.

33. Clause 26 (and schedules 5 and 6, which it introduces) relate to the disclosure of information held by ICRIR as it carries out its functions. The clause also makes clear that certain disclosures are not permitted, including (at clause 26(9)), those prohibited by Part 5 of the Investigatory Powers Act 2016 (police equipment interference warrant for the purpose of detecting and preventing serious crime). The prevention and detection of crime is a matter within the legislative competence of the Scottish Parliament and the application of this prohibition on disclosure in Part 5 of the 2016 Act also means that this provision requires a LCM as those provisions also relate to matters which fall within the legislative competence of the Scottish Parliament.

34. Clause 29 makes provision for the Secretary of State to give guidance to persons (including ICRIR, Police Scotland, the PIRC and the Scottish Ministers) about the identification of sensitive information (as defined in clause 54), to which those persons must have regard. Accordingly, in addition to relating to a matter within the legislative competence of the Scottish Parliament the clause confers a function on the Scottish Ministers and requires a LCM as it modifies the executive competence of the Scottish Ministers.

35. Clause 30 provides that the Secretary of State may make regulations concerning the holding and handling of information by the ICRIR. The subject matter of such regulations relates to matters such as the storage, destruction and notification about, information held by the ICRIR collected in the discharge of its functions. Such

functions are within the legislative competence of the Scottish Parliament, and regulations making further ancillary and connected provisions in that regard also fall within that competence. This clause will also then require a LCM as it empowers the further regulation of matters falling within the Scottish Parliament's legislative competence.

36. Clause 31 provides that the Secretary of State may make regulations that prevent the destruction of biometric materials and allow the use of same by the ICRIR in the carrying out of its functions (which functions are subject to a LCM). The purpose of the provision is the support of the ICRIR functions and thus the clause falls to similarly require a LCM. Further the power to override the destruction provisions set out in section 18(3) to (5) of the Criminal Procedure (Scotland) Act 1995 as applied by schedule 4 of the International Criminal Court (Scotland) Act 2001, relate to ICC crimes, and as such do not relate to a reserved matter; thus such a modification falls within the legislative competence of the Scottish Parliament. The United Kingdom Government indicated in its explanatory notes to the Bill that this clause did not require a LCM. The United Kingdom Government have now accepted that an LCM will in fact be needed for the reasons set out above.

37. Clause 32 provides for a review of the performance of the functions of the ICRIR by the Secretary of State. Where those functions relate to a matter within the Scottish Parliament's legislative competence, then so does a provision providing for such a review. Clause 33 sets out an enabling power for the Secretary of State to make regulations concerning the winding up of the ICRIR, if satisfied that the need to exercise its functions has ceased. It relates to the termination of the ICRIR as it exercises functions which do not relate to a reserved matter, this clause therefore makes provision that falls within the legislative competence of the Scottish Parliament.

Grant of immunity from prosecution and passing of information to prosecutors

38. Clauses 18 – 22 of the Bill make provision empowering the ICRIR to grant immunity from prosecution to a person who applies to it in respect of a non-sexual offence which relate to serious conduct forming part of the Troubles. Immunity is dependent upon the exercise of discretion by the ICRIR, relative to its views on the truthfulness of the account given by the perpetrator of his/her conduct to which the application for immunity relates. In coming to that decision, the ICRIR must take account of any guidance issued by the Secretary of State. This means that immunity from prosecution is not conferred by automatic operation of law, but rather by an independent decision maker acting under the law. In terms of clause 36, the Lord Advocate would not be permitted to prosecute any person in respect of whom immunity was granted.

39. The Scottish Government is of the view that while these provisions represent a modification of Scottish criminal procedure and the Scottish prosecution system, (by introducing a new decision maker into the prosecution process), they also modify the position provided for in section 48(5) of the Scotland Act 1998. Section 48(5) is modified because the decision making of the Lord Advocate, in her capacity as head

of the system of criminal prosecution and investigation of deaths in Scotland, would be ultimately subject to the independent discretion of the ICRIR panel, in their decision to grant immunity from prosecution.

40. As such, these clauses relate, at least in part, to a matter outwith the legislative competence of the Scottish Parliament. Section 48(5) is a “protected enactment” by virtue of paragraph 4(1) of schedule 4 of the Scotland Act and thus these provisions, in modifying that section, fall outwith the legislative competence of the Scottish Parliament.

41. In addition, while the change represents a modification of the functions of a Scottish Minister, the modifications are limited to the Lord Advocate’s retained functions as the head of the system of the investigation of crime and the investigation of deaths in Scotland, and not her functions generally as a Scottish Minister. As such an LCM is not required on that ground.

42. The UK Government is of the view that the effect of the clause is not to modify section 48(5) however, and as such they are of the view that this clause does require an LCM because it falls within the legislative competence of the Scottish Parliament.

43. Clause 12 relates to a review into a death caused by the person requesting immunity, or in consequence of their conduct, with clause 23 making provision about the passing of information about conduct which may constitute an offence to the Lord Advocate from the ICRIR. These provisions do modify and relate to Scots criminal law and criminal proceedings as they apply to such conduct and offences, and therefore fall within the legislative competence of the Scottish Parliament.

Part 3 of the Bill (Clauses 34 - 42)

44. This Part of the Bill, while also conferring functions on ICRIR, makes particular provision with regard to: criminal investigations and enforcement, immunity from prosecution, actions in delict (and under the Damages (Scotland) Act 2011), and to FAs carried out under the Inquiries into Fatal Accidents Sudden Deaths etc. (Scotland) Act 2016. These matters generally fall within the legislative competence of the Scottish Parliament and will require a LCM. This Part also includes changes to the law on prisoner release in Northern Ireland, which has an effect on the executive competence of Scottish Ministers in relation to prisoners transferred from Scotland to Northern Ireland.

Criminal investigation/enforcement and the effect of immunity

45. Clause 34 modifies the way in which all Troubles related criminal offences can be investigated in Scotland by preventing their investigation. As such it requires a LCM as it modifies Scottish criminal procedure by automatic operation of law, and thus falls within the legislative competence of the Scottish Parliament.

46. Clause 35 prevents criminal enforcement action from being taken in Scotland against a person who has been granted immunity under clause 18 in respect of a

serious or connected Troubles related offence. As this clause is incidental and consequential on the effect of clauses 18-22, which are not within the legislative competence of the Scottish Parliament, then the Scottish Government is of the view that a LCM is similarly not required with regard to this clause. The Scottish Government therefore disagrees with the UK Government's view that a LCM is required in relation to this clause.

47. Clause 36 prevents criminal enforcement action from being taken, including in Scotland, 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 relevant prosecutor (the Procurator Fiscal or the Lord Advocate in Scotland). The Scottish Government is of the view that these provisions represent a modification of Scottish criminal procedure and the Scottish prosecution system, (by introducing a new requirement to be met prior to prosecution). The clause also creates the potential for conflict were the Lord Advocate to wish to commence a prosecution against an individual in respect of whom immunity had not been granted by the ICRIR: she would be prevented from doing so, unless and until the ICRIR took the decision to refer the case to the prosecutor, which they have no obligation to do. The Scottish Government are of the view that this clause has the potential to impact on the independence of the Lord Advocate, as provided for in section 48(5) of the Scotland Act 1998.

48. As such, this clause does not relate to a matter within the legislative competence of the Scottish Parliament. Section 48(5) is a "protected enactment" by virtue of paragraph 4(1) of schedule 4 of that Act and thus this provision in modifying that section falls outwith the legislative competence of the Scottish Parliament.

49. In addition, while the change represents a modification of the functions of a Scottish Minister, the modifications are limited to the Lord Advocate's retained functions as the head of the system of the investigation of crime and the investigation of deaths in Scotland, and not her functions generally as a Scottish Minister. As such an LCM is not required on that ground.

50. The UK Government is of the view that the effect of the clause is not to modify section 48(5). As such, the UK Government is of the view that this clause does require a LCM, because it falls within the legislative competence of the Scottish Parliament.

51. Clause 37 modifies the way in which enforcement action can be taken against all other Troubles related criminal offences in Scotland (i.e. those not classed as a serious or connected offence), by automatically preventing any enforcement action from being taken. Accordingly, it modifies Scottish criminal procedure and requires a LCM. Clause 38 makes further provisions with respect to the operation of clauses 34 to 37 and thus insofar as it relates to clause 34 and 37, requires a LCM.

Civil law actions

52. Clause 39 prevents all new civil actions (actions of delict or actions arising under section 4 of the Damages (Scotland) Act 2011) from being brought in Scotland

regarding Troubles related conduct. It also gives effect to Schedules 8 and 9 of the Bill which make further provisions in this regard, including permitting the Secretary of State to be notified by the sheriff or by the Court of Session (as the case may be) and to intervene on the question of whether the civil action concerned will contravene the effect of clause 39. This clause, and schedules 8 and 9, make a modification to Scots private law as it applies generally and thus falls within the legislative competence of the Scottish Parliament and requires a LCM.

Fatal Accident Inquiries

53. Clause 40 of the Bill introduces schedule 10. Part 2 of schedule 10 removes the investigation of certain Troubles related deaths in Scotland from the ambit of FAIs via amendments to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016. This amendment reflects the taking over of the role of the investigation of these deaths by the ICRIR. It has the effect of automatically preventing current investigations, and those inquiries which are not at an advanced stage, from being progressed under the 2016 Act. It further prevents new inquiries from being raised under the Act. These provisions relate to matter within the legislative competence of the Scottish Parliament and require a LCM.

54. The schedule also provides that for an inquiry at an advanced stage (where proceedings have begun before the earlier of 1 May 2023 or the date of commencement of the provision), that the sheriff may request that the death be considered by the ICRIR under clause 9 of the Bill, adjourn the inquiry and then subsequently either resume or discontinue the inquiry. This provision has the effect of permitting the sheriff to bring a 'live' FAI to an end prior to the end of the proceedings.

Prisoner release in Northern Ireland

55. Clause 42 gives effect to schedule 11 which changes Northern Irish prisoner release law as it applies to those who committed offences related to the Troubles. It removes the requirement to serve a minimum part of the sentence and extends the cohort of prisoners who may be subject to release for those offences to include those whose sentence relates to offences committed between 1 January 1966 and 7 August 1973. (Those who committed offences after that date but before 11 April 1998 are already included in the release scheme).

56. Prisoners can be transferred from Scotland to a Northern Irish prison to serve the remainder of their sentence. Scottish Ministers have the function of approving such a transfer and can choose to do so on a restricted basis. A restricted transfer means the prisoner's release, supervision and recall remain subject to Scots law and thus Scottish Ministers retain powers over that prisoner.

57. A prisoner who is transferred to Northern Ireland for a Troubles-related offence can apply to the Sentence Review Commissioner for release; and if agreed they cease to be a restricted transfer prisoner and are no longer under the control of the Scottish Ministers.

58. Schedule 11's extension of the period for which early release may be applied for, means that a prisoner who committed a Troubles-related offence in or in relation to Scotland, between 1966 and 7 August 1973, who is transferred to Northern Ireland, will now be able to apply for release under the amended scheme, cease to be a restricted transfer prisoner, and Scottish Ministers will lose their control over their release. The inclusion of such prisoners will mean that Scottish Ministers' powers over such prisoner can now be removed via the prisoner's application to the Sentence Review Commissioner. This modification of Scottish Ministers' powers requires there to be a LCM for this provision.

59. The United Kingdom Government indicated in its explanatory notes to the Bill that these provisions did not require a LCM. The United Kingdom Government have now accepted that a LCM will in fact be needed for the reasons set out above.

Part 5 of the Bill (Clauses 52 - 58)

60. Part 5 sets out final provisions which apply to the above mentioned Bill provisions, to the extent that they apply, they fall within the legislative competence of the Scottish Parliament and require a LCM. Clauses 52 to 54 and 57 require particular explanation.

61. Clause 52 introduces schedule 12 which makes modification to enactments in consequence of the effect of the Bill; insofar as the modification is consequential on a matter within the legislative competence of the Scottish Parliament, then so is the amendment. The schedule does so as follows.

62. Paragraph 4 amends the Regulation of Investigatory Powers Act 2000, to bring the actions of the ICRIR within the remit of the Investigatory Powers Tribunal. Insofar as the remit of the ICRIR falls within the legislative competence of the Scottish Parliament so will the modification of the jurisdiction of the Tribunal. While not referred to in the explanatory notes to the Bill the United Kingdom Government have accepted that a LCM will be needed for this reason.

63. Paragraph 6 amends the Investigatory Powers Act 2016, this also falls with the legislative competence of the Scottish Parliament insofar as it is done in consequence of the effect of clause 26 (see above discussion on that clause).

64. Paragraph 8 modifies the Prescription and Limitation (Scotland) Act 1973 to make it subject to the effect of clause 39, this modification is within the legislative competence of the Scottish Parliament.

65. Clauses 52 and 53 together confer a power on Scottish Ministers enabling them to make consequential regulations, in respect of the Bill and make provisions about those regulations. This modifies the executive competence of the Scottish Ministers and thus requires to be subject to a LCM.

66. Clause 54 sets out the meaning of words and expressions in the Bill and insofar as they support the other provisions of the bill that require a LCM they also require one.

67. Clause 57 confers a power on Scottish Ministers enabling them to make transitory, transitional or saving provisions within regulations in connection with the coming into force of any provision of the Bill. This modifies the executive competence of the Scottish Ministers and thus requires the clause to be subject to a LCM.

Consultation

68. The UK Government does not appear to have undertaken a public consultation for this Bill; however, the then Secretary of State for Northern Ireland, The Rt Hon Brandon Lewis CBE MP, presented a policy paper to the UK Parliament, entitled *Addressing the Legacy of Northern Ireland's Past*, laying out their intentions for the Bill in July 2021.

69. The Scottish Government only received sight of the text of the Bill upon the Bill being introduced to the House of Commons on 17 May 2022. UK Government consultation with the Scottish Government prior to the introduction of the Bill has been limited with only minimal information regarding the aims of certain clauses of the Bill shared prior to the Bill's publication. As such, the Scottish Government has not had the opportunity to conduct any consultation in relation to this Bill.

Financial implications

70. There will be no new expenditure by the Scottish Government associated with this Bill. The UK Government 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.

Consent not recommended

71. After consideration of the proposed purpose of the Bill, and the clauses requiring Legislative Consent Motions, Scottish Ministers have decided not to recommend to the Parliament that it passes a motion consenting to the Bill.

Reasons consent is not recommended

72. The Government is of the view that the Bill, as currently drafted, is 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.

73. Further, the Bill makes novel and unwelcome changes to the functions and responsibilities of the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland, and whose independence is articulated in section 48(5) of the Scotland Act 1998. In particular, the power of the ICRIR to refuse to refer appropriate cases to the Lord Advocate, even where immunity has not been granted by the ICRIR impacts on the independence of the Lord Advocate, which is a fundamental cornerstone of our criminal justice system. While the provisions which make such changes in conflict with section 48(5) do not require consent, the provisions which do require consent perform a fundamental role in support of that impact as part of the larger framework created by the Bill relative to the general investigation, outcomes and consequences of deaths and conduct connected to the Troubles (which are within legislative competence). Consequently the Scottish Government cannot recommend consent to such measures where they will contribute towards such an outcome.

74. Finally the Scottish Government is cognisant of the views of persons such as the Commissioner for Human Rights at the Council of Europe¹, and the Northern Ireland Human Rights Commission² who have expressed concern that the Bill casts doubt upon the UK's compliance with the UK's duties under the European Convention on Human Rights.

75. For these reasons the Scottish Government recommends that the Scottish Parliament withhold consent for the provisions of this Bill which impact on devolved competencies.

Conclusion

76. 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 72 to 75 set out the Scottish Government's reasons for not including a draft motion in this Memorandum for the purposes of that rule; the Government does not support the Bill as it currently stands.

**Scottish Government
October 2022**

¹ [Submission by the Council of Europe Commissioner for Human Rights under Rule 9.4 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in the group of cases of McKerr v. the United Kingdom \(coe.int\)](#)

² [JCHR-Legacy-Briefing-NIHRC.pdf](#)