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## **Criminal Justice Committee**

# **Report on the Legislative Consent Memorandum for the Northern Ireland Troubles (Legacy and Reconciliation) Bill (UK Parliament legislation)**



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# Criminal Justice Committee

To consider and report on matters relating to criminal justice falling within the responsibility of the Cabinet Secretary for Justice and Veterans, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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# Committee Membership



**Convener**  
**Audrey Nicoll**  
Scottish National Party



**Deputy Convener**  
**Russell Findlay**  
Scottish Conservative  
and Unionist Party



**Katy Clark**  
Scottish Labour



**Jamie Greene**  
Scottish Conservative  
and Unionist Party



**Fulton MacGregor**  
Scottish National Party



**Rona Mackay**  
Scottish National Party



**Pauline McNeill**  
Scottish Labour



**Collette Stevenson**  
Scottish National Party

# Introduction

1. At its meetings on Wednesday 7 December 2022 and Wednesday 21 December 2022, the Criminal Justice Committee considered a Legislative Consent Memorandum ("LCM") from the Scottish Government on the Northern Ireland Troubles (Legacy and Reconciliation) Bill (UK Parliament).
2. The LCM can be found [here](#).

## Outline of the UK Bill

3. 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.
4. 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).
  - 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.
5. 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.
6. The Scottish Government's reasons for this view are set out in paragraphs 5 to 67 of the LCM.
7. A Legislative Consent Memorandum was lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, on 20 October 2022.
8. After consideration of the proposed purpose of the Bill, and the clauses requiring Legislative Consent Motions, the Scottish Government has decided **not to recommend** to the Parliament that it passes a motion consenting to the Bill.
9. The Scottish Government's reasons for not recommending consent are set out in paragraphs 72 to 75 of the LCM.

# Consideration by the Delegated Powers and Law Reform Committee

10. The Delegated powers and Law Reform Committee considered the powers to make subordinate legislation conferred on UK Ministers and Scottish Ministers in devolved areas in the Bill at its meeting on 8 November. The DPLR Committee agreed to write to the UK Government and to consider the Bill again at a future meeting.
11. The DPLR Committee subsequently [wrote to the Rt Hon Chris Heaton-Harris MP](#), Secretary of State for Northern Ireland on 10 November.
12. The DPLR Committee also published its [report](#) on the LCM on 15 November. Of particular note is the conclusion at paragraph 19 that:
  - ” The Committee's position ... 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.



## Consideration by the Committee and recommendation

13. At its meeting of 7 December, the Committee took evidence on the Bill from the Cabinet Secretary for Justice and Veterans and his officials.
14. At the end of its consideration of the Bill and the issue of legislative consent, 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 the Annex.
15. Consequently, the Committee agreed to hold over consideration of whether to recommend legislative consent to the relevant provisions in the Bill to its meeting on 21 December 2022.
16. At its meeting of 21 December, some members of the Committee expressed concern around the effect of the Bill in undermining the Lord Advocate's role as independent head of the systems of criminal prosecution and investigation of deaths in Scotland.
17. Concerns were also raised that the establishment of the ICRIR will impact on access to justice for victims of the troubles.
18. In addition, it was noted that both the Council of Europe Commissioner for Human Rights and Northern Ireland Human Rights Commission have commented that the Bill risks being found to be non-compliant with the European Convention on Human Rights and incompatible with the Good Friday agreement.
19. Six members of the Committee (Audrey Nicoll, Collette Stevenson, Fulton MacGregor, Rona Mackay, Pauline McNeill and Katy Clark) agreed with the Scottish Government that the Scottish Parliament should not consent to the relevant provisions in this Bill as set out in the Scottish Government's draft motion, and 2 did not (Jamie Greene and Russell Findlay).

A majority of the Committee agreed with the Scottish Government that the Scottish Parliament should not consent to the relevant provisions in this Bill as set out in the Scottish Government's draft motion.

# Annex

## **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 ICRIIR. 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 ICRIIR 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 ICRIIR 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 ICRIIR 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 ICRIIR 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 ICRIIR 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.

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 ICRIR and Lord Advocate. It might explicitly require ICRIR 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 ICRIR 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 ICRIR 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 ICRIR 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**

