

## **CAJ briefing note: Northern Ireland (Executive Formation) Bill 2019 – amendments on Northern Ireland legacy investigations into the actions of the security forces**

### **About CAJ**

The Committee on the Administration of Justice (CAJ) is an independent human rights NGO with cross community membership in Northern Ireland and beyond. It was established in 1981 and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its international human rights obligations.

### **The amendments**

Clause 3 of the Northern Ireland (Executive Formation) Bill 2019, obliges the Secretary of State to publish a report by 4 September 2019 on progress towards forming an NI Executive, and subsequent reports on 9 October and each fortnight thereafter. The bill now contains two extra reporting duties in clause 3<sup>1</sup>, inserted by amendments in the Commons, which relate to NI legacy investigations. Namely (in summary), this adds requirements to:

- Report on protecting the security forces from ‘repeated’ investigation through a presumption of non-prosecution where there is not compelling new evidence, whether this is through a Statute of Limitations or by another legal mechanism;
- Report on progress towards developing prosecution guidance by the Attorney General for Northern Ireland in respect of certain Troubles-related incidents differentiating where the alleged offender had been lawfully or unlawfully ‘supplied’ with a weapon.

The first amendment was pressed to division and carried by 308 votes (including all Tory and DUP MPs voting) to 228 by other parties. The second amendment was then also approved and both stand part of the bill as introduced to the Lords.

***CAJ urges Peers to oppose these provisions standing as part of the bill, on grounds of conflict with international human rights obligations relating to the right to life, impunity, non-discrimination & non recurrence, along with conflict with the outworking of the Belfast/Good Friday Agreement and Stormont House Agreements.***

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<sup>1</sup> Clause 3 Progress reports: (1) The Secretary of State must, on or before 4 September 2019, publish a report explaining what progress has been made towards the formation of an Executive in Northern Ireland (unless an Executive has already been formed).

....

(4) The report under subsection (1) must include a report on progress made towards protecting veterans of the Armed Forces and other security personnel from repeated investigation for Troubles-related incidents by introducing a presumption of non-prosecution, in the absence of compelling new evidence, whether in the form of a Qualified Statute of Limitations or by some other legal mechanism.

...

(5) The report under subsection (1) must include a report on progress made towards developing new prosecution guidance for legacy cases of Troubles-related incidents by the Attorney General for Northern Ireland to take into account whether or not the person who allegedly committed an offence had the means to do so because that person had been lawfully supplied with a deadly weapon, with a presumption in favour of prosecuting in cases where a person who has allegedly committed an offence had the means to do so because that person had been unlawfully supplied with a deadly weapon.

## **The GFA and the independence of the Public Prosecutions Service (PPS)**

Policing and criminal justice reforms are one of the ‘good news’ stories of the outworking of the Belfast/Good Friday Agreement, its Criminal Justice Review and the Patten Commission. The provisions envisaged by the amendments would, however, dismantle key reforms introduced further to the peace settlement.

A cornerstone of the current reformed justice system is that prosecutorial decision making is vested in an independent Director of Public Prosecutions (DPP) in the PPS and that prosecutorial decisions are made on the basis of the statutory Code for Prosecutors.

The Statutory Code for Prosecutors is issued by the DPP (not the Attorney General for Northern Ireland nor either legislature) under [s37 of the Justice Northern Ireland Act 2002](#). The code sets out the basis for decision making on prosecutions.

These reforms took place against a backdrop of controversial political interventions by former Attorney Generals to prevent prosecutions of members of the security forces.<sup>2</sup> The Criminal Justice Review recommended that legislation should “confirm the independence of the prosecutor” and “there should be no power for the Attorney General to direct the prosecutor, whether in individual cases or on policy matters.”<sup>3</sup>

### *Implications of the first Amendment (presumption of non-prosecution)*

The first amendment would interfere in the independence of the DPP and the Code for Prosecutors by usurping the function of decision making in the code to add a ‘presumption of non-prosecution’ for members of the security forces where there is not ‘compelling’ new evidence. The amendment also appears to confuse and conflate the investigative and prosecutorial functions.

This evidential threshold is higher than the *Brecknell* threshold<sup>4</sup> that requires investigation and potential prosecution. There has been recognition from Government that applying a statute of limitations only to the security forces will be unlawful in international law, and consequently the Secretary of State has ruled out support for such a proposal,<sup>5</sup> yet this amendment provides precisely for such differential treatment.

In addition to reversing the reforms of the Criminal Justice Review, such a provision would also conflict with the Stormont House Agreement (SHA), which maintains that in relation to legacy investigations by the Historical Investigations Unit (HIU) “the decision to prosecute is a matter of the DPP.”<sup>6</sup> Despite supporting these amendments the Conservative government and DUP have consistently stated their support for the SHA.

*Peers may wish to ask those promoting this amendment whether they consider the proposal compatible with the SHA and the peace settlement provisions on the independence of the DPP.*

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<sup>2</sup> For further information see appendix 2 CAJ correspondence to the Advocate General for Northern Ireland.

<sup>3</sup> Review of the Criminal Justice System in Northern Ireland. HMSO. March 2000 Para. 4.162-3

<sup>4</sup> Namely evidence/ information / credible allegation relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing ([Brecknell v UK, \[71\]](#))

<sup>5</sup> [Troubles legacy: Karen Bradley rules out statute of limitations](#) BBC News 1 October 2018, see also <http://eamonnmallie.com/2018/09/exclusive-sos-karen-bradley-writes-for-eamonnmallie-com-on-legacy-of-the-troubles/>

<sup>6</sup> Stormont House Agreement, paragraph 35.

### *Implications of the Second Amendment (Attorney General Guidance)*

The current Attorney General for Northern Ireland (AGNI), John Larkin, has advocated for an unconditional amnesty.<sup>7</sup> It is currently not the role of the AGNI to issue *prosecutorial* guidance, rather, as above, this function is vested in the DPP.

A current provision for issuing Statutory Guidance vested in the AGNI, is found in [Section 8 of the Justice NI Act 2004](#). The DPP must have regard to this Guidance<sup>8</sup> when preparing or amending the Code for Prosecutors. However this guidance, must relate to the exercise of the functions of the PPS and other criminal justice agencies “*in a manner consistent with international human rights standards relevant to the criminal justice system*”<sup>9</sup>.

Such human rights standards do not support, but counter against, impunity and the removal of due process from State actors in relation to legacy investigations. It would be a matter of concern, should an AGNI seek to stretch an interpretation of ‘international human rights standards’ beyond credible construction, to facilitate the purpose of the amendment. In the alternative, it would appear legislation would be required to grant the AGNI powers to issue guidance amending or usurping the Code for Prosecutors.

*Peers may wish to clarify with those promoting the amendment if the intention is to seek use the ‘section 8’ human rights guidance, or create an alternative power in the AGNI to take forward their proposals, and if there has been an indication from the AGNI whether he would be willing to issue such Guidance.*

A central tenant of the framing of the amendment is to differentiate a presumption of prosecution on the basis as to whether the suspect had been lawfully or unlawfully ‘supplied’ with the weapon, rather than what is then done with the weapon.

It is not clear whether there are circumstances where a killing or other serious offence with an unlawfully obtained weapon would already *not* be prosecuted where evidential tests are met. Hence, it is questionable what the amendment adds to that end. In general, some of the worst criminal atrocities are conducted with lawfully obtained weapons. The intention of the amendment therefore appears to be to introduce a presumption against prosecution in Troubles-legacy cases only where the accused person had been ‘lawfully supplied’ with the weapon in question.

It is not clear if the scope of ‘lawfully supplied’ is only intended to cover service issue weapons to the RUC or Armed Forces, or also to seek to stop prosecutions in ‘collusion’ cases where agents within paramilitary groups were supplied with weapons by members of RUC Special Branch or British Army intelligence, which were then used in killings (presuming such services still wish to try and maintain such activities were ‘lawful’).

Such a differentiation of presumption of non-prosecution on this basis would unduly interfere with the procedural duties under Article 2 ECHR, given as it would leave circumstances where it was not possible to prosecute killings that were unlawful by virtue of Article 2.

*Peers may wish to clarify the scope of ‘lawfully supplied’ and the compatibility of any such Guidance with Article 2 ECHR.*

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<sup>7</sup> See Prof Bill Rolston ‘[Amnesty: some thoughts in response to the Attorney General](#)’ Rights NI 2013

<sup>8</sup> s37(5A) Justice NI Act 2002 as amended.

<sup>9</sup> s8(1) Justice NI Act 2004.

## Appendix 1: Background to legacy prosecutions of the security forces

The question of legacy investigations into members the armed forces for conflict related killings in NI has been the subject of misinformation in both sections of the media and from the most senior levels of government. This has included claims that ‘all’ NI legacy investigations focus on the security forces, or that there is an ‘imbalance’ or ‘unfair’ focus on the armed forces or even a ‘witch hunt’. In reality the rule of law was rarely applied to the armed forces during the Troubles.<sup>10</sup>

In relation to the total number of deaths directly attributable to state actors in the conflict, academic research has found that 63% of victims were undisputedly unarmed, with only 12% confirmed as having been in possession of a weapon.<sup>11</sup> There is evidence of significant deficiencies in investigations into state killings, and of interference in the prosecutorial process, which led to very few prosecutions of state actors. Between 1970 and 1973 (the most violent period of the conflict), investigations into the soldiers’ actions were not conducted by the regular police but by the Royal Military Police (RMP) in a process characterised by procedural anomalies. There is clear authority from the domestic courts that RMP investigations, when judged by the standards of 1971-72, did not meet legal requirements under Article 2 ECHR.<sup>12</sup> Between 1969 and 1974, there were no criminal prosecutions against state actors in relation to deaths. In this period, 189 people were killed by state actors, 170 by the military.<sup>13</sup> There is archival evidence of political intervention in the prosecutorial process and other irregularities.<sup>14</sup>

In examining the process, UN Special Rapporteur Pablo De Grieff concluded that the “impunity gap in Northern Ireland” comes from “apparent selectivity in the deployment of prosecutorial resources”, noting that the figures on the prosecution of state actors do not coincide even with the figure of 10% of deaths directly attributed to the state. He warns, “Manifest unevenness in the distribution of investigatory and prosecutorial initiatives undermines confidence in rule of law institutions.”<sup>15</sup>

Further to the ‘Package of Measures’ put together by the UK in response to findings of European Court of Human Rights, *inter alia* the PSNI Historical Enquiries Team (HET) reopened unresolved Troubles killings, including the military cases of the early 1970s. However, none of the military cases proceeded beyond a paper based review to an investigation using police powers. The HET completed reviews of 32 military cases (out of a total of 1600 – 1038 reviews relating to killings by republicans). The HM Inspector of Constabulary found that the HET had given such preferential treatment to military cases, it had acted unlawfully. This led to the HET being stood down. A successor unit the PSNI Legacy Investigations Branch (LIB) had to pick up these and other cases that therefore required re-investigation (or in the case of military cases lawful investigation for the first time).<sup>16</sup>

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<sup>10</sup> For further detail see CAJ Submission to the United Nations Human Rights Committee in response to the Concluding Observations on the 7th Periodic Report of the UK under the International Covenant on Civil and Political Rights (ICCPR) (S465) June 2017, Follow up Procedure: “accountability for conflict-related violations in Northern Ireland” (CCPR/C/GBR/CO/7, paragraph 8).

<sup>11</sup> Prof Kieran McEvoy, [evidence to Defence Select Committee of UK Parliament, 7 March 2017](#) citing research by Professor Fionnuala Ní Aoláin (Ulster University and Minnesota Law School).

<sup>12</sup> In the Matter of an Application by Mary Louise Thompson for Judicial Review [2003] NIQB 80

<sup>13</sup> Prof Kieran McEvoy, citing research by Professor Fionnuala Ní Aoláin (as above).

<sup>14</sup> CAJ Apparatus of Impunity? Human rights violations and the Northern Ireland conflict (January 2015), chapter 8.

<sup>15</sup> UN DOC A/HRC/34/62/Add.1, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland, 17 November 2016, paragraphs 54 and 59.

<sup>16</sup> For further detail see CAJ Submission to the United Nations Human Rights Committee in response to the Concluding Observations on the 7th Periodic Report of the UK under the International Covenant on Civil and Political Rights (ICCPR) (S465) June 2017

Whilst there is yet to be a single conviction of a member of the security forces as a result of a legacy investigation, the first decision to prosecute one soldier in relation to the killing of a young man with learning disabilities in 1974 took place in 2015. This has been followed by a handful of other decisions, including a decision this year to prosecute one member of the Parachute regiment in relation to the Bloody Sunday massacre.

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