

Written Evidence submitted by the members of the Stormont House Agreement Model Bill Team to the Human Rights (Joint Committee) re Overseas Operations (Service Personnel and Veterans) Bill: Key Issues re Legacy, Human Rights and Northern Ireland

Executive Summary

1. The following summarises the main points in our evidence:

- While the draft Overseas Operations (Service Personnel and Veterans) Bill does extend to the actions of British armed forces personnel during Operation Banner in Northern Ireland, this evidence highlights three issues of relevance to Northern Ireland that relate to the Inquiry's remit.
- The Secretary of State for Northern Ireland in a Written Ministerial Statement, on the same day that the Overseas Operations Bill was introduced, expressed the government's decision to 'ensure equal treatment of Northern Ireland veterans and those who served overseas'. This commitment was used to justify retreating from the Government's commitment to enact into law the legacy commitments of the Stormont House Agreement and to instead propose a new approach to addressing legacy offences that is unlikely to fulfil the UK's obligations under international human rights law and may undermine the rule of law in Northern Ireland.
- We believe that there is a risk that the Overseas Operations Bill could be amended to extend its coverage to Northern Ireland. This could lead to the discontinuation of cases that have already been initiated against former armed forces personnel as well as creating a bar for new prosecutions. Any such move would undermine the devolution of justice arrangements and undoubtedly lead to a political crisis in Northern Ireland.
- The Overseas Operations Bill would also limit direct access to the NI courts and remedies for breaches of the ECHR in relation to proceedings in connection with overseas operations.

Background

2. This submission was prepared by the 'Model Bill Team' based at Queen's University Belfast and the Committee on the Administration of Justice (CAJ) – Northern Ireland's longest established independent human rights NGO. The group is referred to as the 'Model Bill Team' because they drafted a model bill in 2015 detailing what the commitments made in the Stormont House Agreement would look like in legislative form. The team consists of Professor Kieran McEvoy, Professor Louise Mallinder, and Dr Anna Bryson from Queen's University Belfast, School of Law; and Daniel Holder, Brian Gormally, and Gemma McKeown from CAJ. Since 2013, this team has produced a range of technical briefings and reports designed to help inform public debates on dealing with the past in Northern Ireland. As part of this work, the Model Bill Team have closely scrutinised proposals to 'protect' British service personnel from legal liability for actions

committed during the ‘Troubles’ in Northern Ireland from 1968 to 1998. Members of the team have also given written and oral evidence to the US Congress (2015), the Westminster Defence Select Committee (2017), the Dáil Joint Oireachtas Committee on the Implementation of the Good Friday Agreement (2018), and the Westminster Northern Ireland Affairs Committee (2019 and 2020). For further information, see <https://www.dealingwiththepastni.com>

Introduction

3. As the Committee will be aware, the above Bill was introduced into the House of Commons on the 18 March 2020; a date for second reading is awaited.¹ The Bill would introduce a qualified statutory presumption against prosecution against members of the British armed forces after a five-year period. We share the grave concerns of other human rights organisations that the ensuing legislation would facilitate a level of impunity for the UK military for war crimes abroad, including torture and extrajudicial killings. The purpose of this submission is not to repeat the concerns raised in detail by other human rights organisations (and indeed from some within the military).² Rather, we wish to raise matters specific to Northern Ireland.
4. As per Clause 1(6), the Bill does not extend to cover legacy cases in Northern Ireland during Operation Banner, as relevant offences are to have occurred outside the ‘British Islands’. However, as detailed below, we believe that experiences in Northern Ireland raise three issues related to this Bill, which fall directly within the remit of this inquiry, including the ‘UK’s procedural obligations under Article 2 of the European Convention on Human Rights’ and the UK’s broader ‘compliance with international obligations’.

The Overseas Operations Bill is Linked Explicitly to the UK’s Unilateral Retreat from the Stormont House Agreement and its Legal Obligations to Conduct Article 2 ECHR Compliant Legacy Investigations in Northern Ireland

5. On the same day the Overseas Operations Bill was introduced, the Secretary of State for Northern Ireland, through a Written Ministerial Statement (WMS), signalled the

¹ UK Parliament, ‘Overseas Operations (Service Personnel and Veterans) Bill 2019-21’ <https://services.parliament.uk/bills/2019-21/overseasoperationservicepersonnelandveterans.html> (accessed 7 September 2020).

² See e.g. Liberty, ‘Liberty Responds to News UK Soldiers Unlikely To Face Prosecution For Iraq War Crimes’ (2 June 2020) <https://www.libertyhumanrights.org.uk/issue/liberty-responds-to-news-uk-soldiers-unlikely-to-face-prosecution-for-iraq-war-crimes/>; Human Rights Watch, ‘UK Bill a License for Military Crimes?’ (20 March 2020) <https://www.hrw.org/news/2020/03/20/uk-bill-license-military-crimes>; Ian Cobain, ‘New UK law shields soldiers over Iraq and Afghanistan war crimes allegations’ *Middle East Eye* (18 March 2020) <https://www.middleeasteye.net/news/new-uk-law-protect-soldiers-over-iraq-and-afghanistan-war-crimes-allegations>; Amnesty International UK, ‘UK: Military prosecutions bill will have a “devastating impact on reputation of armed forces”’ (18 March 2020) <https://www.amnesty.org.uk/press-releases/uk-military-prosecutions-bill-will-have-devastating-impact-reputation-armed-forces>. The UN CAT also previously condemned the proposals, see Owen Bowcott, ‘UN condemns MoD plans to grant veterans amnesty’, *The Guardian* (17 May 2019) <https://www.theguardian.com/uk-news/2019/may/17/mod-plans-to-grant-veterans-amnesty-condemned-by-un>

unilateral abandonment of the UK commitment to implement the Stormont House Agreement (SHA).³ The 2014 SHA is a bilateral agreement with the Irish government. It is therefore significant that the Irish government has strenuously objected to the content of the WMS.⁴ The SHA was completed after lengthy negotiations with the Northern Ireland political parties to establish new legacy structures, including an independent body to discharge the UK's duties to investigate unresolved conflict-related deaths in NI under Article 2 of the ECHR.

6. The government committed to introducing the SHA legislation in the December 2019 Queen's Speech, and before the Committee of Ministers of the Council of Europe.⁵ It was also part of the Agreement that led to the re-establishment of the devolved administration at Stormont in January 2020 following several years of collapse.⁶ The WMS signals that the UK will instead adopt an unclear alternative 'fast track' approach that would not adequately discharge the UK's duties to independently investigate conflict-related deaths under the ECHR.
7. The WMS on legacy in NI was explicitly linked to the introduction of the Overseas Operations Bill by the SOSNI and the government in its briefing notes on the Bill. Mr Brandon Lewis made clear the intent of this government U-turn was 'to ensure equal treatment of Northern Ireland veterans and those who served overseas'.⁷ This linkage between the Overseas Operations Bill and a new NI legacy bill, which departs from the terms of the SHA, was confirmed to parliament by Baroness Goodie on 20th July 2020.⁸

³ Northern Ireland Office, 'Addressing Northern Ireland Legacy Issues' (18 March 2020)

<https://www.gov.uk/government/news/addressing-northern-ireland-legacy-issues>

⁴ Department of Foreign Affairs and Trade, 'Statement by Tánaiste on UK Government Legacy Announcement' (18 March 2020) <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2020/march/statement-by-tanaiste-on-uk-government-legacy-announcement.php>

⁵ For further details see CAJ, 'Submission to the Committee of Ministers in relation to the supervision of the cases concerning the action of the security forces in Northern Ireland (January 2020)' (10 March 2020) <https://caj.org.uk/2020/03/10/submission-on-mckerr-cases-jan-20/>

⁶ The New Decade, New Approach Deal (2020) para 16. 'As part of the Government's wider legislative agenda, the Government will, within 100 days, publish and introduce legislation in the UK Parliament to implement the Stormont House Agreement, to address Northern Ireland legacy issues. The Government will now start an intensive process with the Northern Ireland parties, and the Irish Government as appropriate, to maintain abroad-based consensus on these issues, recognising that any such UK Parliament legislation should have the consent of the NI Assembly.'

⁷ Secretary of State for Northern Ireland, Addressing Northern Ireland Legacy Issues: Written statement - HLWS163 (18 March 2020)

⁸ House of Lords Hansard, 'British Overseas Troops: Civil Liability Claims' Vol 804 (20 July 2020)

<https://hansard.parliament.uk/Lords/2020-07-20/debates/3746196E-EFCF-4639-91BC-2D997F50E14A/BritishOverseasTroopsCivilLiabilityClaims>

Lord Dannatt (CB): My Lords, when does the Minister believe that Her Majesty's Government will extend legislation in the overseas operations Bill to cover operations in Northern Ireland?...

Baroness Goldie [V] Minister of State for Defence: ..., I assure him that, yes, a Northern Ireland Bill is coming forth to deal with similar issues; the Northern Ireland Office is currently in the process of preparing it. We expect more information in early course.

In addition, the government's guidance notes to the Overseas Operations Bill state clearly: 'The Bill does not apply to operations within the United Kingdom, including events which took place in Northern Ireland during the Troubles. However, the government is committed to bringing forward appropriate protections for all

8. In its determination to introduce the Overseas Operations Bill and to guarantee similar levels of protection from prosecution for soldiers who served in Northern Ireland, the government is in our view behaving in a reckless fashion, with little apparent regard for the impact of such actions on the peace process, the painstakingly negotiated compromises in the SHA, or indeed the rule of law in Northern Ireland. Moreover, while the WMS was vague and brief, and no further details have been forthcoming, it is difficult envisage how any 'swift' 'reviews' could discharge the UK government's procedural obligations under Article 2.⁹

The Risks of Amendments to the Overseas Operations Bill that would Directly Impact the Rule of Law regarding NI legacy prosecutions

9. No member of the security forces has yet been convicted in a NI legacy case since the GFA, but there have been a small number of recent conflict-related prosecutions. Since January 2012, the DPPNI has initiated legacy prosecutions in 17 cases. Eight prosecutions have been initiated against alleged republican paramilitaries, four against alleged loyalists and five against British Army personnel (six soldiers in total, one case involves two soldiers). Nine cases are currently before the courts (two suspected republicans, two suspected loyalists and five British Army personnel).¹⁰ As a result of some of these cases, MPs and others have been lobbying for various forms of military amnesty for a number of years.
10. Clause 1(2) of the Bill contains a provision whereby a relevant prosecutor making a decision 'as to whether any proceedings against a person for a relevant offence *should be continued*' (emphasis added) would be bound by the presumption against prosecution and other limitations in the Bill. If the Bill were amended to apply to Northern Ireland, there is a risk that this provision after commencement could be invoked in relation to decisions to continue prosecutions in proceedings that have already been initiated. If the UK government were to interfere in ongoing prosecutions in this jurisdiction in order to prevent soldiers from possibly being held to account for past crimes, this would constitute a direct infringement on the separation of powers, undermine the devolution of justice arrangements, and undoubtedly lead to a political crisis in Northern Ireland. If such interference were directed only at ongoing prosecutions involving soldiers (and not paramilitaries), it would also undoubtedly be challenged under the Article 14 non-discrimination provisions of the ECHR.

service personnel and veterans. The government will introduce separate legislation to address the legacy of the past in Northern Ireland in a way that focuses on reconciliation, delivers for victims, and ends the cycle of re-investigations into the troubles that has failed victims and veterans alike, ensuring equal treatment of Northern Ireland veterans and those who served overseas.'

<https://www.gov.uk/government/publications/overseas-operations-service-personnel-and-veterans-bill>

⁹ For a more detailed critique as well as an outline of SHA and Article 2 compliant options for dealing with the legacy of the past in Northern Ireland, see The Model Bill Team (2020) *Prosecutions, Imprisonment, and the Stormont House Agreement* <https://caj.org.uk/wp-content/uploads/2020/04/Prosecutions-Imprisonment-the-SHA-LOW-RES.pdf>

¹⁰ Letter from Director of Public Prosecutions to Professor Kieran McEvoy, 10th January 2020.

The Overseas Operations Bill will Breach the Good Friday Agreement Provision on ECHR incorporation into NI Law

11. The 1998 GFA includes a UK-Ireland international treaty deposited with the UN that creates legally binding obligations for the UK. Among the provisions of that Agreement are that: ‘The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention...’¹¹ This commitment was legislated for through the Human Rights Act 1998. **The commitment to incorporate the ECHR is not qualified to events in Northern Ireland.**
12. Clause 11 of the Overseas Operations Bill would amend the Human Rights Act 1998 to limit direct access to the NI courts and remedies for breaches of the ECHR in relation to proceedings in connection with overseas operations. Clause 11 would limit the courts’ powers of discretion over time limits for bringing claims, both by proscribing time limits and otherwise setting additional factors to which the court must have regard, which will have the purpose and effect of limiting access to the courts and remedies for victims.

Recommendations

13. On the basis of these points, we recommend that the Joint Committee:
 - Reject this Bill as being incompatible with binding legal obligations under Article 2 and 3 of the European Convention of Human Rights.
 - Include in its deliberations the direct relationship between the introduction of this Bill and the unilateral abandonment of the Stormont House Agreement; the potential breach of the Good Friday Agreement provisions on the incorporation of the ECHR; and the real risk to the rule of law in Northern Ireland if there are any attempts to extend the remit of this Bill to include soldiers or other members of the security forces who served in Northern Ireland.
 - We are fully alive to the political pressures at Westminster with regard to addressing the needs of veterans. In recent evidence to the Northern Ireland Affairs Committee, we proposed a range of options premised on the implementation of the SHA. These include provisions to reduce the current maximum sentence of two years for anyone convicted of conflict-related offences (both soldiers and paramilitaries) to zero in ways that are compliant with the SHA, GFA, and the ECHR.¹² If the Joint Committee wishes to address the issue of veterans who served during Operation Banner, we strongly recommend benchmarking any measures introduced towards that end against the SHA, GFA, and ECHR. This is the only way to ensure that the rule of law is upheld in Northern Ireland.

¹¹ Good Friday Agreement (1998) Section on ‘Rights, Safeguards and Equality of Opportunity’, paragraph 6.

¹² Written Evidence submitted by the members of the Model Bill Team to the Northern Ireland Affairs Committee (June 2020) *Addressing the Legacy of Northern Ireland’s Past: The UK Government New Proposals*.