

## **Briefing from the Queen's University School of Law and CAJ Model Bill Team Northern Ireland Troubles (Legacy and Reconciliation) Bill Second Reading, House of Lords, 23 November 2022**

1. This briefing was prepared by the 'Model Bill Team' based at Queen's University Belfast and the Committee on the Administration of Justice, Belfast.<sup>1</sup> Since 2013, this team has produced a range of technical briefings and reports designed to help inform public debates on dealing with the past, including Parliamentary evidence.<sup>2</sup>
2. This short briefing will cover some of the key issues with the Bill, namely:
  - *Compliance with the bilateral Agreements of the NI Peace Process:* the present Bill represents the first time that any Government has openly renounced one of the bilateral and multi-lateral agreements of the peace process – the 2014 Stormont House Agreement.
  - *Compliance with the UK's international obligations, including the ECHR:* International concerns have been raised by UN and Council of Europe experts that the present approach will facilitate impunity and be in 'flagrant violation' of the UK's international obligations.
  - *Amendments in the Commons to the Bill:* Whilst a Commons' amendment precludes an application for immunity under the Bill for sexual offences, the Bill still provides for a *de facto* amnesty for such offences, not least as it would still prohibit any criminal investigation of the same sexual offences.
  - *Oral History and Memorialisation as a Fig-Leaf for Impunity:* Whilst we welcome initiatives in this area we are concerned at the lack of independence of the proposals from Government and the privileging of this area in the Bill for the purpose of providing political and legal cover for impunity.
  - *Official contradictions over provisions in the Bill:* Ministers on the Parliamentary record and in the media have stressed that the purpose of the Bill is to end *investigations* against veterans and have implied that powers of arrest and questioning will no longer be used against veterans. At the same time Ministers have told the Council of Europe that the legacy body that the Bill will establish will conduct 'thorough investigations' using police powers in any case. Peers may wish to seek clarification as to which is the case.
3. The Model Bill Team has worked for almost a decade to find human rights compliant solutions to the legal and political challenges regarding UK government proposals for

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<sup>1</sup> The team consists of Professor Kieran McEvoy, Professor Louise Mallinder and Dr Anna Bryson (Queen's University Belfast, School of Law & Senator George J. Mitchell Institute for Global Peace, Security and Justice) and Daniel Holder, Brian Gormally and Gemma McKeown (all Committee on the Administration of Justice). The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation with membership is drawn from across the community in NI and beyond.

<sup>2</sup> This work has a dedicated website. <https://www.dealingwiththepastni.com/> Members of the team have also given written and oral evidence to the US Congress (2015 and 2022), the Defence Select Committee (2017), Northern Ireland Affairs Committee (2019, 2021, 2022), the Dáil Joint Oireachtas Committee on the Implementation of the Good Friday Agreement (2018, 2022).

dealing with the past in Northern Ireland. In this case, however, we have assessed the Northern Ireland Troubles (Legacy and Reconciliation) Bill ('the Bill') as irredeemable and unfixable.

4. We have expressed this position to UK and Irish Parliamentary Committees.<sup>3</sup> The breaches of human rights standards are so egregious and the principles of the Bill so conflictive to the rule of law, that we do not consider amendments through the current Parliamentary process could achieve human rights compliance. Instead, we urge government to return to its previous commitments and implement the 2014 Stormont House Agreement in an ECHR compatible manner.
5. The Model Bill Team [published a detailed initial response to the Bill when it was introduced into the House of Commons](#).<sup>4</sup>
6. More recently [we have produced a submission to the Council of Europe Committee of Ministers including detailed information on the background to the Bill and critiquing the mechanisms it will establish for ECHR compliance](#). This report includes information on the UN and Council of Europe responses and notes the lack of serious engagement on the substance of the Bill with key stakeholders, including victims.<sup>5</sup>
7. A formal Decision was issued by the Council of Europe Committee of Ministers in September 2022 urging the UK to, in essence, fundamentally rethink the Bill; to devote sufficient time *before* pursuing progression of the Bill to 'meaningful and effective engagement' with all stakeholders, and to only ultimately legislate in a manner compatible with the ECHR.<sup>6</sup>
8. This short briefing will cover some of the key issues with the Bill, starting with compliance with the agreements of the Northern Ireland peace settlement.

### **Compliance with the bilateral Agreements of the Peace Process**

9. Northern Ireland will soon be marking 25 years from the Belfast/Good Friday Agreement. The Agreement is one of many bilateral international agreements of the peace process and includes a British-Irish treaty. Further bilateral agreements followed including at St Andrews Agreement 2006; and the Stormont House Agreement (SHA) of 2014, which agreed new mechanisms to deal with legacy, and included agreement of a bilateral UK-Ireland implementation treaty.
10. The policies outlined in the Written Ministerial Statement of March 2020 and developed further in the July 2021 Command Paper and the current Bill represent a significant new departure in the Northern Ireland Peace Process. Having previously worked closely with the main political parties in NI and the Irish government to achieve a measure of consensus on the way forward on legacy issues, the current UK government has openly and unilaterally departed from both the Good Friday Agreement and the Stormont House Agreement (SHA).

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<sup>3</sup> See Evidence to NIAC: <https://committees.parliament.uk/oralevidence/10402/html/> and Dáil select committee <https://www.oireachtas.ie/en/press-centre/press-releases/20220707-joint-committee-on-the-implementation-of-the-good-friday-agreement-to-discuss-british-government-legacy-proposals/>

<sup>4</sup> <https://www.dealingwiththepastni.com/project-outputs/project-reports>

<sup>5</sup> <https://caj.org.uk/wp-content/uploads/2022/08/Submission-to-CoM-JULY-2022.pdf>

<sup>6</sup> [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a831f5](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a831f5)

11. The departure from the SHA constitutes the first instance in which one of the State Parties has openly and unilaterally renounced one of the bilateral and multiparty agreements of the Northern Ireland peace process.
12. In abandoning the SHA, the Government also is in breach of commitments in the UK-Ireland New Decade, New Approach (NDNA) agreement that restored power sharing in 2020. NDNA committed to legislating for the SHA within 100 days. The Bill also conflicts with the Belfast/Good Friday Agreement in relation to both the duties to ensure incorporation of the ECHR in NI law with direct access to the courts and remedies for breaches, and the framework for the devolution of justice.
13. It is not the case that there is 'no alternative' to the present Bill. An agreement in the SHA already exists, which the present Government has abandoned.
14. It is also notable that the present Bill aims to shut down all existing investigative and judicial mechanisms into Northern Ireland legacy cases at a time when they have been able to deliver significant outcomes for victims and Northern Irish society.<sup>7</sup>

### **Compliance with the UK's international obligations, including the ECHR**

15. It is of serious concern that members of the present Government continue to raise the prospect of the UK following Russia out of the European Convention of Human Rights (ECHR). The Government also continues to pursue the prospect of domestic legislation diminishing the incorporation of the ECHR into domestic law. Any such move would endanger compliance with the Belfast/Good Friday Agreement but also with the ECHR itself. (This was the case with Russian constitutional amendments signed off by President Putin in 2020 that would have had the effect of limiting domestic impact of Strasbourg court rulings.)<sup>8</sup>
16. It should be noted that even in the alarming scenario of the Government deciding to remove the UK from the ECHR, in accordance with Article 58 of the ECHR, the UK *would still be bound and liable for its obligations under the ECHR for the time it was an ECHR party*. This includes the duration of the Northern Ireland Troubles.<sup>9</sup>
17. As set out below there has been considerable UN and Council of Europe criticism of the Government's approach to legacy in Northern Ireland since the abandonment of the SHA. This is grounded in concerns regarding the lack of compliance of the current approach with the ECHR and broader international obligations.

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<sup>7</sup> This is notable in recent legacy inquest decisions and in the 600+ pages of information recovery contained in two large scale Police Ombudsman legacy reports already in 2022. The 'Operation Kenova' independent police team (under the 'Call In' mechanism of General Measures) has also amassed over 50,000 pages of evidence and is poised to publish its own reports. Civil cases are also leading to reparations and information recovery. For further detail see paragraphs 60-95 of: <https://caj.org.uk/wp-content/uploads/2022/08/Submission-to-CoM-JULY-2022.pdf>

<sup>8</sup> For further detail see the Opinion 981/2020 of the Venice Commission:

[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)009-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)009-e)

<sup>9</sup> Article 58(2) "Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective."

18. This criticism should also be seen in the context of the international precedent that would be set by the UK pursuing the present Bill and the risk of it being replicated.
19. In summary, after the issuing of the July 2021 Command Paper, UN special procedures experts raised 'grave concerns' regarding the proposals which they assessed as providing for 'blanket impunity' and placing the UK in 'flagrant violation of its international obligations'.<sup>10</sup>
20. In September 2021, the Council of Europe Commissioner for Human Rights, Dunja Mijatović, raised concerns that the Command Paper proposals would 'lead to impunity' and conflicted with obligations under the ECHR.<sup>11</sup>
21. Whilst the current Bill largely follows the July 2021 Command Paper there were some changes in response to widespread public criticism. These changes, however, appear largely presentational rather than of substance. One prominent example is the move away from a blanket unconditional amnesty (that was broader in scope than that introduced by General Pinochet in Chile) to a system of 'conditional immunity', which has a conspicuously low threshold for the provision of information and lacks robust verification mechanisms. In practice, conditional immunity designed in this manner may produce a similar level of impunity to an unconditional amnesty for all who apply. (Under the current proposals, immunity *must* be granted on the basis of a subjective test where the person seeking immunity does not have to provide new information and only has to themselves think they are telling the truth). These and other changes have not abated international concerns.
22. The Council of Europe Commissioner for Human Rights, Dunja Mijatović, has continued to raise concerns that the 'low evidentiary bar' for immunity could lead to impunity and query how the Bill can be compatible with ECHR standards on effective and independent investigations. The Commissioner, following her UK visit, also raised concerns about the distress caused to victims by the Bill and queried the notion that it could contribute to reconciliation given its almost universal rejection.<sup>12</sup>
23. Further to a report to the UN Human Rights Council on the Command Paper, UN special procedures experts have produced a lengthy critique of the Bill. This expresses concerns at the shutting down of existing mechanisms and replacing them with a new legacy body under "significant levels of government control" as well as the Bill appearing "to conflate reconciliation with impunity as well as oppose legal

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<sup>10</sup> UK: UN experts voice concern at proposed blanket impunity to address legacy of "the Troubles" in Northern Ireland 10 August 2021 <https://www.ohchr.org/en/press-releases/2021/08/uk-un-experts-voice-concern-proposed-blanket-impunity-address-legacy>

<sup>11</sup> UK government's legacy proposals must not undermine human rights and cut off victims' avenues to justice in Northern Ireland <https://www.coe.int/en/web/commissioner/-/northern-ireland-legacy-proposals-must-not-undermine-human-rights-and-cut-off-victims-avenues-to-justice>

<sup>12</sup> "The virtually unanimous, cross-community rejection of the proposals also casts doubt over their potential to contribute to reconciliation in Northern Ireland. The proposals fail to put victims at the heart of legacy: unilaterally shutting down options that many victims and families value greatly as part of their way of dealing with the past ignores their needs and wishes, and is causing many of them deep distress", said the Commissioner. <https://www.coe.int/en/web/commissioner/-/united-kingdom-backsliding-on-human-rights-must-be-prevented>

accountability, an essential pillar of transitional justice processes, to truth, information recovery and reconciliation.”<sup>13</sup>

24. Domestically the Northern Ireland Human Rights Commission (NIHRC), established further to the Belfast/Good Friday Agreement, gave the following assessment on the bill to the Joint Committee on Human Rights: “The NIHRC is clear that the Bill is incompatible with Articles 2 (right to life) and 3 (freedom from torture) of the European Convention on Human Rights (ECHR). This Bill is fatally flawed, it is not possible to make it compatible with the ECHR.”<sup>14</sup>
25. The Joint Committee on Human Rights (JCHR) has also raised concerns that the Bill “risks widespread breaches of human rights law”.<sup>15</sup> JCHR has also concurred over the lack of ECHR compatibility of the bill and urged Government to “reconsider its whole approach” and instead bring forward legislation which provides for ECHR compliant investigations.<sup>16</sup>

### **Amendments in the Commons to the Bill**

26. One opposition driven amendment was conceded by the Government in the House of Commons. This related to excluding conflict-related sexual offences from the scope of the immunity provisions of the Bill.<sup>17</sup> However, it should be stressed that while under the current version of the Bill, a suspect cannot get immunity for conflict-related sexual offences, *the prohibition on any criminal investigation of the same sexual offences* that the Bill would introduce remains intact. Coupled with the time-limited and non-ECHR complaint nature of ICIR ‘reviews’, this in lay terms will still lead to a ‘de facto’ amnesty for such sexual offences.<sup>18</sup> Furthermore individuals who have committed sexual offences are not otherwise barred from the immunity process for other offences.

### **Oral History and Memorialisation as a Fig-Leaf for Impunity**

27. Whilst the Model Bill Team in principle welcomes the commitment in the Bill to memorialising the Troubles, we are concerned that the proposed oral history work and academic research is not sufficiently independent of government. We are furthermore concerned that the privileging of this work in the name of ‘reconciliation’ is a sinister attempt to provide a measure of legal and political cover for impunity.<sup>19</sup>

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<sup>13</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=27416>

<sup>14</sup> Written evidence from the Northern Ireland Human Rights Commission (NIB0003), to Joint Committee on Human Rights, Paragraph 1.2 <https://committees.parliament.uk/writtenevidence/109473/html/>

<sup>15</sup> <https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/173874/northern-ireland-troubles-bill-risks-widespread-breaches-of-human-rights-law/>

<sup>16</sup> <https://committees.parliament.uk/publications/30491/documents/175903/default/>

<sup>17</sup> See new clause 19 of the Bill as brought from the House of Commons to the House of Lords: [https://publications.parliament.uk/pa/bills/lbill/58-03/037/5803037\\_en\\_3.html#pt2-pb4-l1g19](https://publications.parliament.uk/pa/bills/lbill/58-03/037/5803037_en_3.html#pt2-pb4-l1g19)

<sup>18</sup> For further detail see our supplementary written evidence to the Northern Ireland Affairs Committee of the UK Parliament. <https://committees.parliament.uk/writtenevidence/109448/html/>

<sup>19</sup> These concerns are further set out in paragraphs 187-200 of the following submission to the Council of Europe: <https://caj.org.uk/wp-content/uploads/2022/08/Submission-to-CoM-JULY-2022.pdf>



## Official contradictions over provisions in the Bill

28. There are some notable differences in the messages that Ministers have given to the international community on the Bill to those articulated to Parliament and otherwise domestically.
29. For example, a further difference between the Command Paper and the Bill was the addition of the possibility of the new legacy body being able to use police powers in its 'reviews' of Troubles-related cases. *Reviews* into Northern Ireland legacy cases have been long understood as largely paper-based reviews of documents, which can then lead to an actual criminal *investigation* using police powers. The Bill presently makes reference only to the new legacy commission conducting 'reviews'.
30. Submissions to the Council of Europe, led by the then Secretary of State for Northern Ireland Brandon Lewis MP, stated that the new legacy body can use 'full policing powers' to conduct 'thorough investigations' and that the reference to 'reviews' in the Bill should be read as investigations.<sup>20</sup>
31. By contrast the then Secretary of State in introducing the Bill to Parliament expressly linked the purpose of the Bill to *ending investigations* against military veterans.<sup>21</sup> It was also implied that police powers such as arrest and questioning would not be used against former members of the security forces. Parliament was told veterans, as a result of the Bill would no longer have to fear such a 'knock on the door.' The then Secretary of State put this position more clearly in an article for Conservative Home stating that as a result of the impact of the current Bill "no longer will our veterans be hounded and hauled in for questioning about events that happened decades ago."<sup>22</sup>
32. It is difficult to read these statements as anything other than an assertion that police powers will *not* be used by the new legacy body. It is also difficult to see how police investigative powers could be deployed against a suspect who has immunity.
33. Peers may wish to clarify which position accurately reflects the intention of the Bill.

**Model Bill Team**

**November 2022**

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<sup>20</sup> [https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD\(2022\)831E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD(2022)831E%22%5D%7D) and [https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD\(2022\)579E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD(2022)579E%22%5D%7D)

<sup>21</sup> "No longer will our veterans, the vast majority of whom served in Northern Ireland with distinction and honour, have to live in perpetual fear of getting a knock at the door for actions taken in the protection of the rule of law many decades ago. With this Bill, our veterans will have the certainty they deserve and we will fulfil our manifesto pledge to end the cycle of investigations that has plagued too many of them for too long." Official Record (Hansard) House of Commons Tuesday 24 May 2022 Northern Ireland Troubles (Legacy and Reconciliation) Bill Volume 715: debated on Column 115 [https://hansard.parliament.uk/commons/2022-05-24/debates/9A7C93DC-8187-47B9-8786-CA602DA2BB39/NorthernIrelandTroubles\(LegacyAndReconciliation\)Bill#256](https://hansard.parliament.uk/commons/2022-05-24/debates/9A7C93DC-8187-47B9-8786-CA602DA2BB39/NorthernIrelandTroubles(LegacyAndReconciliation)Bill#256)

<sup>22</sup> <https://conservativehome.com/2022/06/09/brandon-lewis-my-northern-ireland-legacy-plan-no-longer-will-our-veterans-be-hounded-for-about-events-that-happened-decades-ago/>