

**Submission to the Committee of Ministers from the Committee on the
Administration of Justice (CAJ) in relation to the supervision of the cases
concerning the actions of the security forces in Northern Ireland**

Jordan v the United Kingdom, judgment final on 4 August 2001
Kelly and Ors v the United Kingdom, judgment final on 4 August 2001
McKerr v the United Kingdom, judgment final on 4 August 2001
Shanaghan v the United Kingdom, judgment final on 4 August 2001
McShane v the United Kingdom, judgment final on 28 August 2002
Finucane v the United Kingdom, judgment final on 1 October 2003

and

Hemsworth v UK, judgment final on 16 October 2013
McCaughey & Others v UK, judgment final on 16 October 2013

January 2023

Introduction

1. The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights (FIDH). Its membership is drawn from across the community.
2. CAJ has regularly made Rule 9 communications to the Committee of Ministers on the 'McKerr group of cases' concerning the actions of the security forces in the 1980s and 1990s in Northern Ireland.
3. These submissions have charted the evolution of the 'package of measures' agreed to by the UK further to the above judgments, and their proposed replacement with measures agreed by the UK and Ireland, and political parties in the Northern Ireland Executive, under the December 2014 Stormont House Agreement (SHA). The submissions also cover the unilateral departure by the UK from its commitment to implement the SHA on the 18 March 2020, the UK Command Paper of July 2021 and the consequent *Northern Ireland Troubles (Legacy and Reconciliation) Bill* (hereafter 'the Bill' introduced into the UK Parliament in May 2022.
4. This Rule 9 communication is for consideration at the 1459th meeting (March 2023) (DH). CAJ issued a lengthy Rule 9 Communication in July 2022, that provided a detailed critique of the Bill.¹
5. In October 2022 we issued a further Rule 9 Communication providing an update on the Bill, an addendum submission was added to this following the Second Reading general debate stage of the Bill having taken place in the upper chamber of the UK Parliament (House of Lords) on the 23 November 2022.² At this stage the Ministers set out general intentions in relation to amendments on the Bill which the addendum submission critiqued. No text of amendments was provided.
6. At the time of our addendum submission the UK had scheduled the substantive House of Lords Committee Stage of the Bill for the 12 and 14 December 2022. Shortly thereafter these dates were pulled. The Committee Stage is now scheduled for the 24 and 31 January 2023. The final stages of the bill could follow relatively soon thereafter.
7. Late in the evening of the 18 January 2023, shortly before the first session of the Committee stage Ministers published their intended amendments.
8. This Rule 9 Communication will critique these amendments. First it will briefly outline other developments, including the Committee of Ministers Decision of December 2022 and concurrent calls from UN Special Procedures Mandate Holders, the Council of Europe Commissioner for Human Rights, and the Northern Ireland Victims Commissioner for the UK to withdraw the Bill. Along with the opposition from devolved authorities to the bill. In relation to individual measures we will also provide an update in relation to *Finucane*.

¹ [https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD\(2022\)830E%22%5D%2C%22display%22:%5B%22%22%5D%2C%22EXEIdentifier%22:%5B%22DH-DD\(2022\)990E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD(2022)830E%22%5D%2C%22display%22:%5B%22%22%5D%2C%22EXEIdentifier%22:%5B%22DH-DD(2022)990E%22%5D%7D) and Addendum: [https://hudoc.exec.coe.int/eng#%7B%22display%22:%5B%22%22%5D%2C%22EXEIdentifier%22:%5B%22DH-DD\(2022\)990E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22display%22:%5B%22%22%5D%2C%22EXEIdentifier%22:%5B%22DH-DD(2022)990E%22%5D%7D)

² <https://bills.parliament.uk/bills/3160/stages/16831>

Summary of issues raised:

- The UK Bill is designed to close down all current mechanisms for conducting Article 2 compliant investigations into the NI conflict and instead provide for a de facto amnesty through a 'conditional immunity' scheme with a low threshold, and a time limited Independent Commission for Reconciliation and Information Recovery (ICRIR) to conduct limited 'reviews' of certain cases.
- The UK December 2022 Decision of the Council of Europe Committee of Ministers continued to express serious concerns regarding the UK legacy Bill and indicated the proposed areas of amendment did not allay concerns of ECHR incompatibility.
- At the end of 2022 both the Council of Europe Commissioner for Human Rights and UN Special Procedures mandate holders, separately called on the UK to withdraw the Bill, as did the NI Victims Commissioner.
- The UK declined to heed any of these calls, has not paused the Bill and has scheduled the substantive House of Lords Committee Stage for late January, with final stages to follow thereafter.
- The UK ultimately did not produce the text of amendments until the 18 January 2023, the late tabling of amendments was criticised by the UN High Commissioner for Human Rights who also called on the UK to reconsider the Bill.
- The UK Government amendments make no attempt at all to address any of the areas identified by the Committee of Ministers in relation to ECHR compliance including: the independence of the ICRIR relating to the Secretary of States roles; ICRIR disclosure powers; participation of victims, families and public scrutiny; reconsidering the 'conditional immunity' scheme; and reconsidering the prohibition on future civil claims and legacy inquests.
- Some of the amendments appear to be 'Window Dressing' to give the appearance of change (for example calls on NI legacy bodies to be internationally constituted; or have international involvement in appointments, appear to have been responded to by an amendment stating one ICRIR Commissioner could have 'international experience' which is not the same thing.)
- Some of the amendments make the provisions of the Bill even more concerning and enrench the extent to which impunity will be facilitated. This includes further provisions to prohibit the Police Ombudsman from any inquiry that touches on police actions during the conflict (beyond the existing prohibition in the Bill on dealing with future and current complaints from victims).
- Of particular concern is a new provision designed to 'incentivise' individuals to apply for the immunities scheme through the abolition of the Early Release Scheme introduced further to the peace agreements. These amendments appear to have the concerning purpose and effect of permanently putting suspects beyond the reach of any Article 2 compliant investigation.
- In relation to individual measures an update is provided for in *Finucane*, regarding a further finding an ECHR compliant investigation is yet to take place and UK undertaking to respond to the previous UK Supreme Court ruling.

Committee of Ministers (CM) Decision (December 2022)³

9. The CM Decision of December 2022 recalled previous concern at the UK's fundamental change of approach from the Stormont House Agreement 2014 and expressed growing concern that the Bill had continued to be progressed without being formally paused, and that the proposed amendments would not sufficiently allay the concerns of the CM set out in the September 2022 Decision.
10. The CM strongly reiterated calls on the UK, if it persisted with the Bill, to amend the Bill to ensure ECHR compatibility, including in a number of specific areas reiterated in the Decision. The CM also strongly reiterated their calls to reconsider the 'conditional immunity scheme' and the proposal to terminate pending inquests.
11. The CM sought from the UK detailed updated information by 15 January. At the time of writing this has not been published. The UK amendments were published on the 18 January.

Developments since the December 2022 Decision

Council of Europe Commissioner for Human Rights' call to withdraw legacy Bill

12. On the 9 December 2022 the Council of Europe Commissioner for Human Rights, Dunja Mijatović, released the report from her visit to the UK in June 2022.⁴
13. In this Report the Commissioner called upon the UK authorities to consider withdrawing the legacy Bill and urged a return to the previously agreed approach (the Stormont House Agreement).⁵
14. The Commissioner observed the widespread opposition to the Bill and raised concerns 'about the UK government's lack of genuine consultation with key actors ahead of the publication of the Bill' and as regards:

...a number of serious issues of compliance with the ECHR, including in relation to the independence and effectiveness of the mechanism for the review of Troubles-related incidents by the Independent Commission for Reconciliation and Information Retrieval (ICRIR), the closure of many important existing avenues for victims to seek truth and justice, and the conditional immunity scheme.⁶
15. Whilst alluding to the intention to amend the Bill, the Commissioner also noted her concerns related to 'fundamental elements of the Bill', and that "reconsidering the Bill in its entirety" would be preferable.⁷

Calls from UN Special Procedures Mandate holders for withdrawal of Bill

16. On the 15 December 2022 UN Special Procedures Mandate holders Mr. Fabián Salvioli, Special Rapporteur on the promotion of truth, justice, reparation and

³ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a93a84

⁴ <https://www.coe.int/en/web/commissioner/-/united-kingdom-commissioner-warns-against-regression-on-human-rights-calls-for-concrete-steps-to-protect-children-s-rights-and-to-tackle-human-rights-issues-in-northern-ireland>

⁵ As above, page 8.

⁶ As above, page 8.

⁷ As above, paragraph 133.

guarantees of non-recurrence and Mr. Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions, issued a further statement calling on the UK to withdraw the legacy Bill.⁸ The experts warned that the Bill:

...fails to comply with the State's obligation to investigate serious human rights violations committed during the 'Northern Ireland Troubles' and denies truth and remedy for victims.

17. They held that "The Bill will substantially hamper victims' access to remedy before criminal and civil courts for the serious human rights violations and abuses suffered. It would further preclude information recovery and reparations for those victims who have for decades struggled to get justice and redress for the harm endured," and assessed the Immunity Scheme as the Bill as "tantamount to a de-facto amnesty scheme" in particular due to the "low threshold required for granting immunity and the lack of review mechanisms."

18. The Special Rapporteurs urged the UK to withdraw the bill and warned that:

If approved, the Bill would thwart victims' right to truth and justice, undermine the country's rule of law, and place the United Kingdom in flagrant contravention of its international human rights obligations.

19. The statement also records regret that the UK authorities had failed to respond to a previous communication on the Bill in July 2022.⁹ The UK opposition have tabled a question in the UK Parliament querying why a response has not been issued.¹⁰

Call from the NI Victims Commissioner to withdraw the Bill, and UK response

20. The NI Victims Commissioner Ian Jeffers has also called on the UK government to withdraw the legacy bill, raising concerns the bill "will not deliver truth recovery" and will "remove the opportunity for justice."¹¹

21. On the 3 January 2023, despite all of the above calls from the UN and Council of Europe Human Rights machinery and the NI Victims Commissioner (and previous calls from the NHRI, Irish Government, NI Political Parties and civil society groups), UK Ministers rebuffed the calls and have continued to press the bill, pointing to a Parliamentary majority.¹²

Commitment from the UK opposition to repeal the Bill

22. On Friday 14 January, the leader of the UK official opposition Labour Party Keir Starmer MP, responded during a public session in Queen's University Belfast to a question from Professor Kieran McEvoy with a public commitment that should he become Prime Minister, he would repeal the Bill.¹³

⁸ UK: Flawed Northern Ireland 'Troubles' Bill flagrantly contravenes rights obligations, say UN experts
<https://www.ohchr.org/en/press-releases/2022/12/uk-flawed-northern-ireland-troubles-bill-flagrantly-contravenes-rights>

⁹ As above.

¹⁰ <https://questions-statements.parliament.uk/written-questions/detail/2023-01-19/127845>

¹¹ <https://www.bbc.co.uk/news/uk-northern-ireland-64063077>

¹² As above.

¹³ <https://www.youtube.com/watch?v=SKZUoXoUMNA&feature=youtu.be>

British-Irish Intergovernmental Conference (BIIGC)

23. On the 19 January 2023 a Joint Communiqué was issued by the British and Irish Governments following a periodic meeting of the BIIGC, a mechanism created by the Good Friday Agreement. This included discussion on the UK legacy Bill, with the Irish government reiterating its concerns in relation to it.¹⁴

Intervention by UN High Commissioner for Human Rights Volker Türk

24. On the 19 January 2023 the UN High Commissioner for Human Rights Volker Türk issued a statement calling on the UK to reconsider its approach to the legacy Bill, raising concerns that the Bill would obstruct the rights of victims to effective remedies and will be incompatible with the UK's international human rights obligations.¹⁵

The Bill and justice powers transferred to Scotland and Northern Ireland

25. The UK legacy bill covers significant areas of justice competence that have been transferred to the Scottish Parliament and Northern Ireland Assembly. Whilst the UK Parliament retains powers to legislate on such matters, by constitutional convention it is not to normally do so unless consent is granted by these legislatures.¹⁶

26. Scottish Government Ministers and the relevant committee of the Scottish Parliament in a Report of the 10 January 2023, noting the human rights concerns, have declined to give consent to the Bill.¹⁷

27. The NI Assembly had unanimously backed a motion of opposition to the Legacy Bill.¹⁸ Before the removal of Ministers in October 2022, the Justice and Communities Ministers laid Memorandums of Understanding opposing the legacy bill and objecting to legislative consent.¹⁹

¹⁴ <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2023/january/british-irish-intergovernmental-conference-joint-communicue---19-january-2023.php>

¹⁵ <https://www.ohchr.org/en/press-releases/2023/01/uk-rights-victims-and-survivors-should-be-centre-legislative-efforts-address>

¹⁶ For further background information see: CAJ Rule 9 Communication July 2022, paragraphs 28-34. [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2022\)830E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2022)830E%22%5D%7D)

¹⁷ Legislative Consent Memorandum: Northern Ireland Troubles (Legacy and Reconciliation) Bill; <https://www.parliament.scot/-/media/files/legislation/bills/lcms/northern-ireland-troubles-legacy-and-reconciliation-bill/legislative-consent-memorandum.pdf> Report on the Legislative Consent Memorandum for the Northern Ireland Troubles (Legacy and Reconciliation) Bill (UK Parliament legislation) <https://digitalpublications.parliament.scot/Committees/Report/%20CJ/2023/1/10/e34e9a44-7b80-4466-a26f-ed1582969257#a80abf9c-8256-4849-a0bf-f90f8c71025d.dita>

¹⁸ CAJ Rule 9 Communication July 2022, paragraphs 28-34.

¹⁹ Northern Ireland Troubles (Legacy and Reconciliation) Bill –Memorandum Laid Before the Assembly Under Standing Order 42A (4)(b) Minister of Justice, 26 October 2022 and Minister for Communities, 27 October 2023.

28. However, the UK Government in its Delegated Powers Memorandum published with the Bill explicitly states it will ignore constitutional convention and legislate on these transferred powers. Remarkably the reason given is the opposition to the Bill.²⁰
29. In the case of both jurisdictions this is a breach of constitutional convention; in the case of Northern Ireland, it is also a breach of the provisions of the Good Friday Agreement.

House of Lords: Delegated Powers and Regulatory Reform Committee

30. A Parliamentary committee scrutinising technical aspects of the Bill has also released a Report highly critical of provisions of the Bill. This relates specifically to regulation of the powers it will vest in Ministers in relation to aspects of the proposed ICIR.²¹
31. The Committee is particularly critical of the broadly drawn power in clause 21 of the Bill which would allow the Secretary of State to issue guidance in relation to a broad number of aspects relating to the determination of applications for immunity under the Bill. This includes Guidance on how to consider a person's account is 'true to the best of their knowledge', whether something is 'criminal conduct' and guidance on whether a person should be granted 'specific' or 'general' immunity.
32. The Committee is critical that this Ministerial Guidance 'covers significant matters' but is not regulated by any parliamentary procedure at all (that would require its approval/publication etc.) The Committee describes Government's explanation for this (that details of the Guidance will only happen after the bill is law) as 'baffling' and urges reconsideration.²²
33. The Committee is also critical of Ministerial powers to define sexual offences, and the arbitrary power for Ministers to abolish the ICIR at any point, urging that this latter power be removed from the Bill entirely.²³

UK Government Amendments to the Bill²⁴

34. UK Ministers had set out the proposed areas of amendment to the Bill at the Second Reading debate on the 23 November 2023. The text of the amendments was not provided. Subsequently the Committee of Ministers in the Decision of December 2023 stated these areas of amendment did not allay the concerns that had been set out in detail in the September Decision.
35. The text of the amendments was finally published on the evening of the 18 January 2023. The UN High Commissioner for Human Rights Volker Türk criticised the late production of the amendments by the UK authorities stating:

The actual text of the proposed amendments has been made public only one week before the House of Lords committee stage. This gives the public and

²⁰ Delegated Powers and Regulatory Reform Committee: Northern Ireland Troubles (Legacy And Reconciliation) Bill, Memorandum by the Northern Ireland Office, paragraphs 6-9:
<https://bills.parliament.uk/bills/3160/publications>

²¹ <https://publications.parliament.uk/pa/ld5803/ldselect/lddelreg/55/5503.htm>

²² As above. Paragraphs 9-11

²³ As above, paragraphs 12-15.

²⁴ <https://bills.parliament.uk/bills/3160/stages/17158/amendments>

relevant stakeholders, including victims and survivors, insufficient time to scrutinize the amendments and participate meaningfully in this hugely significant legislative process.²⁵

36. The UK published a press statement concurrent with the tabling of the Government amendments.²⁶ This statement is misleading in general terms and also regarding the scope of specific amendments.

37. In general terms the UK statement claims the amendments will “address some of the principal concerns raised since the Bill’s introduction, including by victims and survivors.” In fact, the amendments make no attempt to address the areas of concern raised domestically and internationally including, as detailed below, the specific areas identified by the Committee of Ministers.

Amendments to the GFA Early Release Scheme²⁷

38. In relation to a specific amendment the statement claims that the amendments will disapply the post-conflict Early Release Scheme so that individuals who do not “tell the Commission [ICRIR] what they know” will serve full not reduced sentences.²⁸

39. The Early Release Scheme was a key outworking of the 1998 Good Friday Agreement (GFA) whereby persons with serious conflict-related convictions for offences committed before the GFA serve only a maximum of two years in prison before release on licence, rather than a full sentence – including life sentences.²⁹

40. The amendments would not have the effect the UK statement claims. As set out in the official explanatory notes provided by the Minister, the amendment in fact would abolish entirely the GFA-derived Early Release Scheme for new applicants as soon as the ICRIR immunities scheme becomes operational.³⁰ The explanatory notes also imply the rationale for this is that persons not wishing to do jail time should now apply to the immunities scheme instead, which will provide for zero jail time.³¹ Contrary to what is implied in the UK statement there remains no requirement for any form of full disclosure to the ICRIR to avail of immunity scheme. Rather the threshold remains conspicuously low, subjective and does not require applicants to provide any new information at all to the ICRIR, applicants do not have to tell the ICRIR “what they know” to avail of the amnesty.

²⁵ <https://www.ohchr.org/en/press-releases/2023/01/uk-rights-victims-and-survivors-should-be-centre-legislative-efforts-address>

²⁶ <https://www.gov.uk/government/news/government-tables-amendments-to-ni-troubles-legacy-legislation>

²⁷ <https://bills.parliament.uk/bills/3160/stages/17158/amendments/94291> ;
<https://bills.parliament.uk/bills/3160/stages/17158/amendments/94290>; and
<https://bills.parliament.uk/bills/3160/stages/17158/amendments/94289>

²⁸ <https://www.gov.uk/government/news/government-tables-amendments-to-ni-troubles-legacy-legislation>

²⁹ Under the Northern Ireland (Sentences) Act 1998

³⁰ New applicants in this context means, according to the amendments, persons either convicted on a date after the immunities scheme comes into force (with an exception for those whose prosecutions were already commenced and ongoing by that date.)

³¹ The Explanatory Notes state the effect of the amendments will be as follows: “This will prevent a prisoner from being released under the Northern Ireland (Sentences) Act 1998 if the prisoner is convicted after the ICRIR’s power to grant immunity from prosecution becomes exercisable (and so could have avoided conviction by obtaining immunity).”

41. Ministerial correspondence to members of the House of Lords on the publication of the amendments openly frames the purpose of this particular amendment as designed to ‘incentivise’ individuals to ‘engage’ with the ICRIR, in reference to an application for immunity.³² The aim of the amendment is therefore to encourage and compel applications for the *de facto* amnesty provided by the conditional immunities scheme by abolishing the Early Release Scheme.
42. This creates a further entrenchment and exacerbation of the level of impunity the current Bill will provide for. The Early Release Scheme allowed for reduced jail time only. An Article 2 ECHR compliant investigation could still take place, along with a prosecution and trial. Indeed, the Early Release Scheme requires such an investigation, prosecution and trial to take place to secure a conviction in order to come into play. The Article 2 compliant investigation using full police powers against a suspect, and indeed a narrative verdict of a trial, can also play a significant role in information recovery and historical clarification. Under the model envisaged by the Stormont House Agreement, and current investigative processes such as that of the Police Ombudsman, this is accompanied by a comprehensive family report or public statement respectively, gathered through an Article 2 compliant investigation.
43. By contrast, with the conditional immunities scheme under the Bill, no Article 2 compliant investigation will take place, nor will there be a prosecution, trial or narrative verdict, or an obligation to produce a comprehensive family report.
44. Whilst the UK authorities continue to claim the ICRIR ‘reviews’ will be capable of Article 2 compliant investigations using full police powers, this is clearly not the case, in particular, for persons who avail of the immunities scheme. Police powers will not be exercisable against persons who cannot be subject to criminal proceedings for an offence as they have immunity for it. Indeed, the bill itself expressly restricts any criminal enforcement action against persons with immunity.
45. The amendments in question in providing a ‘stick’ to incentivise applications to the immunity scheme and increase its uptake have the concerning purpose and effect of permanently putting suspects beyond the reach of any Article 2 compliant investigation.

Criminal investigations and police powers of ICRIR

46. Whilst Ministers in the UK Parliament and elsewhere have given express reassurances to military veterans that if the Bill is passed they will both not be subject to any further ‘investigations’ and that police powers will not be used against them, they have also simultaneously argued to the international community that the ICRIR will be able to conduct investigations with police powers.³³
47. The current Government amendments include a provision to ‘make clear’ that the ICRIR Commissioner should consider whether there should be a criminal investigation as part of an ICRIR review.³⁴

³² Correspondence from Minister Lord Caine to All Peers, 17 January 2023.

³³ CAJ Rule 9 Communication July 2022, paragraphs 161-164.

³⁴ <https://bills.parliament.uk/bills/3160/stages/17158/amendments/94323> “Clause 13, page 11, line 18 at end insert—“(4A) In particular, the Commissioner for Investigations is to decide whether a criminal investigation is to form part of a review.”” “Member’s explanatory statement: This makes clear that the

48. The amendment is also entirely discretionary on the ICRIR as to whether a criminal investigation will be conducted regardless of whether evidential leads have been identified that could lead to the identification and punishment of a perpetrator in accordance with the *Brecknell* threshold.
49. The amendment does not address the barriers that would preclude the use of policing powers for a person who cannot be pursued for an offence they have immunity for, as it is difficult to see how the thresholds for the use of these powers would be met. This existing problem is compounded by the above provision in the Bill that seeks to incentivise applications to the immunity scheme, putting more persons beyond the reach of police powers.
50. In relation specifically to ‘criminal enforcement action,’ clause 35 of the Bill (as introduced to the House of Lords)³⁵ expressly provides that ‘criminal enforcement action (defined as arresting or detaining a person for the offence, prosecution and criminal proceedings)³⁶ cannot be exercised in relation to a person who has immunity for an offence.
51. A further amendment does deal with the clause regarding criminal enforcement action *against persons who do not have immunity*, with the express aim of empowering the ICRIR to arrest and charge a suspect with an offence.³⁷ This amendment implies, that despite previous claims, such police powers were not in fact exercisable by the ICRIR (or of course anyone else given the prohibition in the Bill on criminal investigations by others). This appears to further highlight the risk that individuals can put themselves beyond the reach of the ICRIR through the applications for immunity that Government amendments now further incentivise.
52. Elsewhere in the Bill the ICRIR was empowered to use a certain type of police powers available to current NI legacy investigations – namely investigatory powers. The current Government amendments would however strip these powers from the ICRIR.³⁸ No explanation is given for this.

Categories of Government Amendments

53. Government has tabled around 50 amendments. It is notable that none of the amendments address any of the concerns raised by the Committee of Ministers, this is further detailed in the next section.
54. What the Government amendments would do can be categorised in a number of ways. Some are technical and consequential in nature. Others appear to be designed

Commissioner for Investigations should consider whether there should be a criminal investigation as part of an ICRIR review.”

³⁵ https://publications.parliament.uk/pa/bills/lbill/58-03/037/5803037_en_4.html#pt3-pb1-l1g35

³⁶ Clause 38(2) Bill as introduced House of Lords.

³⁷ <https://bills.parliament.uk/bills/3160/stages/17158/amendments/94315>

³⁸ <https://bills.parliament.uk/bills/3160/stages/17158/amendments/94287> Page 89, line 16, leave out paragraph 4” Member’s explanatory statement “This removes the amendment of the Regulation of Investigatory Powers Act 2000 (which would have made the ICRIR subject to the jurisdiction of the Investigatory Powers Tribunal, something no longer needed as the ICRIR will no longer have investigatory powers by virtue of amendment in the Minister’s name to leave out paragraph 6(3) of Schedule 12).”

as ‘window dressing’ – i.e. to give the impression some concerns are being addressed. Others are harmful in further providing for impunity as a result of the Bill.

55. An example of ‘window dressing’ is found in an amendment relating to the appointment of Commissioners. There has long been discussion that legacy bodies in NI should have an international element, either through being established as international bodies; through figures of international standing chairing them (both were planned in relation to the SHA) or through involving international figures in the appointments process to strengthen independence. In seeming response to these issues, one Government amendment provides that if possible one of the five ICIR commissioners should have some ‘international experience’ (defined as experience outside the UK).³⁹ This is clearly not the same as any of the above suggestions. A further amendment on appointments does not change the vesting of the sole power of appointment in the Secretary of State, but rather states that the Secretary of State may ‘consult’ any other person of his or her choice before making the appointment. The amendment also allows the Secretary of State to appoint a retired judge to run the ICIR rather than a serving judge.⁴⁰
56. In relation to amendments that further entrench the harms of the Bill, an example is provided by Government further seeking to restrict the Police Ombudsman for Northern Ireland in engaging in any inquiry at all that touches on conflict-related human rights violations by police. At present the bill would prohibit the Ombudsman from dealing with any complaints from families regarding grave and exceptional police misconduct (which has to date been interpreted as relating to police conduct in relation to a death). The Amendment would take this much further to ban the Ombudsman from engaging in *any* form of formal investigation that touches on the actions of the Police during the conflict.⁴¹ This is relevant to powers for example of thematic inquiry.

Assessment of the Government Amendments against the CM Decision

57. In Decisions in September and December the CM urged the UK authorities, if the Bill was progressed at all to amend the Bill in order to comply with the ECHR *including* in the following areas:
- ensuring that the Secretary of State for Northern Ireland’s role in the establishment and oversight of the ICIR is more clearly circumscribed in law in a manner that ensures that the ICIR is independent and seen to be independent;
 - ensuring that the disclosure provisions unambiguously require full disclosure to be given to the ICIR;
 - ensuring that the Bill adequately provides for the participation of victims and families, transparency and public scrutiny;
 - reconsider the conditional immunity scheme in light of concerns expressed around its compatibility with the European Convention;

³⁹ <https://bills.parliament.uk/bills/3160/stages/17158/amendments/94305>

⁴⁰ <https://bills.parliament.uk/bills/3160/stages/17158/amendments/94304>

⁴¹ <https://bills.parliament.uk/bills/3160/stages/17158/amendments/94312> there is now some transitional provision regarding the Ombudsman: <https://bills.parliament.uk/bills/3160/stages/17158/amendments/94313>

58. The CM also urged the UK authorities to reconsider provisions of the Bill that would prevent new civil claims and legacy inquests from continuing.

59. We will consider these areas in turn against the amendments tabled by UK ministers.

Independence of ICRIR

60. The CM urged that the UK amend the Bill to ensure the *“Secretary of State for Northern Ireland’s role in the establishment and oversight of the ICRIR is more clearly circumscribed in law in a manner that ensures that the ICRIR is independent and seen to be independent.”*

61. The areas of concern in relation to the ICRIR not meeting ECHR procedural requirements relating to independence include: the level of the Secretary of State’s control over the resources of the ICRIR; control over the caseload of the ICRIR; powers to redact all reports emerging from the ICRIR; powers to terminate the work of ICRIR at any point; the issuing of Guidance that will structure and constrain the work of the ICRIR, and the Secretary of State directly appointing all of the ICRIR Commissioners.

62. Ministers do not propose any amendments to address any of these areas of concern.

Disclosure provisions

63. The CM urged the UK to ensure “that the disclosure provisions [in the Bill] unambiguously require full disclosure to be given to the ICRIR.”

64. The UK authorities do not propose any amendments to address this issue.

65. The Government amendments do include a provision to increase the fine in the relation to an individual who refuses to comply with a notice to cooperate with the ICRIR (from £1,000 GBP to £5,000 GBP) (clause 14).⁴² However, this is entirely separate to the duties on public authorities to disclosure information (clause 5) which remain unamended and without any sanction for non-compliance.

Participation of victims and families

66. The CM urged the UK to ensure “that the Bill adequately provides for the participation of victims and families, transparency and public scrutiny”.

67. The UK authorities do not propose any amendments to address this issue.

Conditional Immunity Scheme

68. The CM urged the UK to reconsider the conditional immunity scheme given the concerns of ECHR incompatibility.

69. The UK authorities do not propose any amendments to reconsider the conditional immunity scheme.

70. The UK authorities also do not propose any amendments to address the conspicuously low threshold that will allow an applicant to be granted immunity, without even offering any new information at all.

⁴² <https://bills.parliament.uk/bills/3160/stages/17158/amendments/94293>

71. In relation to former members of the security forces it is worth reiterating that it is foreseeable that veterans will be granted immunity from prosecution (and any prospect of an ECHR compliant investigation) by simply providing copies of original statements given at the time of conflict-related incidents and declining to give any further information. This is despite the misgivings about the reliability and accuracy of such statements.⁴³ Provision of such statements would however meet the currently low threshold for immunity envisaged in the current Bill. Whilst this option would not facilitate information recovery and not be an option open to non-state actors, it is consistent with the immunities scheme having been designed entirely around facilitating impunity for state actors and the undertakings given by Ministers to military veterans that they will no longer face investigation following the passage of the Bill.
72. The Government amendments do create an offence and potential revocation of immunity for persons who intentionally or recklessly mislead the ICIR. The original Bill had left open the potential for individuals to deliberately give false and misleading information to the ICIR and benefit from immunity regardless. The very low threshold of an applicant providing even information that is already in the public domain, or past statements, will remain unaffected by this.

Civil claims and legacy inquests

73. The CM had urged the UK to “reconsider provisions of the Bill that would prevent new civil claims and legacy inquests from continuing.”
74. The UK authorities do not propose any amendments to address the concerns over civil claims and legacy inquests.
75. This includes not even reconsidering the termination of the many legacy inquests and civil claims that have already been opened before the courts.
76. One amendment does exclude family proceedings from the scope of civil proceedings that touch on the conflict that will be prohibited under the new Bill.⁴⁴ It appears the original provision had been drafted so broadly it had, presumably inadvertently, captured family proceedings.

Individual Measures: Finucane

77. There was a further decision in the High Court of Northern Ireland on 21 December 2022, finding that the UK remained in breach of its legal obligations to ensure an ECHR compliant investigation into the killing of human rights lawyer Pat Finucane.⁴⁵ This follows the earlier decision of the UK Supreme Court in *Re Finucane* [2019] UKSC 7.
78. We understand that the Secretary of State has committed to communicating a further decision on or before the 31 March 2023 on the response of the UK

⁴³ Statements taken from soldiers by the internal Royal Military Police following military shootings in the early part of the conflict, where no police investigations at all took place, in particular have been found incompatible with the procedural requirements of Article 2 ECHR.

⁴⁴ <https://bills.parliament.uk/bills/3160/stages/17158/amendments/94324>

⁴⁵ <https://madden-finucane.com/2022/12/21/geraldine-finucane-v-secretary-of-state-ni-full-judgment-delivered-by-the-high-court-this-morning/>

government to the Supreme Court Decision. The Secretary of State has been ordered to pay the applicants costs to 21 December; but is resisting an application for damages for a continued breach of the ECHR from December 2020 (the date of a previous order of damages.)

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