



Law Society
of Scotland

Northern Ireland Troubles (Legacy and Reconciliation) Bill

Second Reading Briefing

May
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Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our comments

The Law Society of Scotland's Constitutional Law and Human Rights Subcommittee has considered this bill and has the following comments to make. The Bill raises three constitutional questions:

1 Do the Bill's provisions conform with the rule of law?

The Bill, if passed, will:

- prohibit any criminal prosecution or investigation of a Troubles-related offence being started or continued after a certain date and any criminal enforcement action against any person in respect of the offence unless a prosecution had begun before that date (clauses 33(1) and (2) and 37(3));
- prohibit any civil action being brought after a certain date arising out of conduct forming part of the Troubles, whether founded on delict or a cause of action arising under Fatal Accident Inquiry (FAI) legislation and any such civil action which was raised on or after the First Reading of the Bill may not be continued after that date unless a court of first instance has finally determined the matter under dispute (clause 38); and
- prohibit the Lord Advocate on and after a certain date from initiating any FAI to be held into a death which resulted directly from the Troubles and, if such an inquiry was started before that date, the sheriff must discontinue it and the procurator fiscal must discontinue any investigation into the death (Schedule 10 Part 2).

These provisions would have the effect of removing certain persons' civil and criminal liability for their actions and prevent victims from obtaining any legal remedy. They also prevent the police and the Lord Advocate from investigating and the courts from adjudicating such deaths.

The Government should explain how these proposals, which appear to depart from the constitutional principle of the rule of law, can be justified.

2 Do the Bill's provisions comply with Article 2 of ECHR (Right to Life)?

The Government argues that its obligations under that Article 2 would be met by its proposals for the Independent Commission for Reconciliation and Information Recovery (ICRIR). However,

- The Commissioners are appointed by the Secretary of State who determines their terms and conditions. Nothing is said about how long they hold office – they continue until they resign (Schedule 1, para 9). There is no provision for pension rights but there is provision for compensation payments when they cease office but only at the discretion of the Secretary of State (Schedule 1 para 9(3)). In our view the bill should be amended to ensure the independence of the ICRIR;
- ICRIR does not investigate every death but only those deaths which they are requested to review (clause 9). Those who may make such a request include the Secretary of State and the Lord Advocate where the Lord Advocate is prohibited from initiating an FAI (clause 9(6)(f)). The conduct of such reviews (including how they are to be carried out) is a matter for the Commissioner for Investigations (clause 13). The Bill should be amended to make provision for ICRIR reviews to be held in public and for witnesses to be subject to cross examination;
- ICRIR may grant a person immunity from prosecution if that person applies for immunity and certain conditions are met (section 18). The Secretary of State issues guidance which must be taken into account by the immunity requests panel as to whether these conditions are met (clause 20(6),(7) and (8)) and which must be taken into account in determining what kind of immunity the person should be granted (clause 20(8));
- ICRIR does not issue any judicial determination. The Commissioner for Investigations may refer relevant conduct to a prosecutor (clause 22) or produce and publicise a historical record which gives an account of the circumstances in which the death occurred (clause 23).

ECHR Article 2 requires that “Everyone’s right to life shall be protected by law”. The Government should explain how the proposals for the ICRIR (which is created to recover information about a death or serious injury but does not provide any legal remedy) are compatible with its ECHR obligations under article 2.

3 Do the Bill's provisions comply with the Scotland Act 1998.

The Bill's provisions limit the Lord Advocate's constitutional position “as head of the system of criminal prosecution and investigation of deaths in Scotland” (Scotland Act 1998 s. 29(2)(e)). The system of criminal prosecution and civil liability are matters which are devolved to the Scottish Parliament and the Bill's provisions engage the Legislative Consent Convention. They, therefore, in our view require the consent of the Scottish Parliament.

For further information, please contact:

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