



Law Society
of Scotland

The Law Society of Scotland

Second Reading Briefing on the Northern Ireland Troubles (Legacy and Reconciliation) Bill with Draft Committee Stage Amendments Annexed.

13 September 2022



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.

General Comments

Our Constitutional Law and Human Rights Sub-committee has considered this bill and has the following comments to make in advance of the Bill's Second Reading debate in the House of Lords on 13 September. We also attach amendments which if the Bill receives a Second Reading may be useful in anticipation of Committee stage. 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 34(1) and (2) and 38(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 39); 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 PF 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, paragraph 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 paragraph 9(3)). In our view the bill should be amended to ensure the independence of the ICRIR by providing that the powers carried out by the Secretary of State under the current bill are performed by the Northern Ireland Judicial Appointments Commission. Alternatively, Secretary of State could be obliged to accept the advice of the relevant judge who is consulted on the appointment of the Commissioner under Schedule 1 paragraph 7.
- The 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 (clause 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 21(6), (7) and (8)) and which must be taken into account in determining what kind of immunity the person should be granted (clause 21(8));
- ICRIR does not issue any judicial determination. The Commissioner for Investigations may refer relevant conduct to a prosecutor (clause 23) or produce and publicise a historical record which gives an account of the circumstances in which the death occurred (clause 24).

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 section 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.

In the event of the Bill receiving a Second Reading you may find the amendments attached in the annex to this briefing helpful. They elucidate the points made and are intended to probe the Government's intention behind various clauses in the bill.

If you have any questions, please let me know.

Yours sincerely,

Michael

Michael P Clancy OBE, WS,
Director Law Reform,
The Law Society of Scotland

ANNEX

List of Amendments on the bill

Clause 13, page 11, line 9	after "out" insert "as far as possible in public"
Clause 14, page 12, line 12	add at end "and respond to any questions"
Clause 18, page 16, line 16	leave out "C" and insert "D"
Clause 18, page 16, line 35	add at end "() Condition D: The ICRIR is satisfied that the grant of immunity would be: i. compatible with convention rights, ii. comply with the rule of law; and iii. satisfy the interests of justice
Clause 18, page 16, line 36	leave out "C" and insert "D"
Clause 23, page 21, line 32	leave out "may" and insert "must"
Clause 34, page 28, line 10	leave out "continued or"
Clause 38, page 29, line 22	leave out "or continued"
Clause 39, page 30, line 5	leave out subsection (1)
Clause 39, page 30, line 8	leave out "on or after" and insert "three years after"
Clause 39, page 30, line 32	leave out subsection (7)

Clause 39, page 30, line 38	leave out “(1) or”
Clause 39, page 30, line 38	leave out “continued or”
Clause 39, page 30, line 40	leave out “continued or”
Clause 39, page 30, line 43	leave out “continued or”
Clause 52, page 40, line 37	leave out subsection (8).
Schedule 1, paragraph 6, page 50, line 34	leave out “Secretary of State” and insert “The Northern Ireland Judicial Appointments Commission”
Schedule 1, paragraph 7, page 50, line 37	leave out “Secretary of State” and insert “The Northern Ireland Judicial Appointments Commission”
Schedule 1, paragraph 7, page 51, line 4	leave out Secretary of State and insert “The Northern Ireland Judicial Appointments Commission”
Schedule 1, paragraph 9, page 52 line 33	leave out “Secretary of State” and insert “The Northern Ireland Judicial Appointments Commission”
Schedule 1, paragraph 9, page 52, line 37	leave out “Secretary of State” and insert “The Northern Ireland Judicial Appointments Commission”
Schedule 1, paragraph 9, page 52, line 38	leave out Secretary of State and insert “The Northern Ireland Judicial Appointments Commission”
Schedule 1, paragraph 9, page 52	line 39, leave out Secretary of State and insert “The Northern Ireland Judicial Appointments Commission”
Schedule 1, paragraph 10, page 53,	line 2, leave out “Secretary of State” and insert “The Northern Ireland Judicial Appointments Commission”
Schedule 1, paragraph 10, page 53, line 6	leave out Secretary of State and insert “The Northern Ireland Judicial Appointments Commission”
Schedule 1, paragraph 11, page 53, line 14	leave out Secretary of State and insert “The Northern Ireland Judicial Appointments Commission”
Schedule 1, paragraph 11, page 53, line 16	leave out Secretary of State and insert “The Northern Ireland Judicial Appointments Commission”
Schedule 1, paragraph 11, page 53, line 21	leave out Secretary of State and insert “The Northern Ireland Judicial Appointments Commission”

Schedule 1, paragraph 11, page 53, line 23

leave out Secretary of State insert “The Northern Ireland Judicial Appointments Commission”

Schedule 1, paragraph 11, page 53, line 2

leave out Secretary of State and insert “The Northern Ireland Judicial Appointments Commission”

Amendments with Effects and Reasons

Clause 13, page 11, line 9

after “out” insert “as far as possible in public”

Effect

This amendment provides for transparency in the conduct of reviews by the ICRIR.

Reason

Clause 13(1) provides that the Commissioner for Investigations has operational control over the conduct of reviews by the ICRIR, whether they have been (a) requested under section 9 or 10, or (b) decided on by the ICRIR under section 12.

We believe that the reviews conducted by the Commissioner for Investigations should be transparent and accordingly this amendment is necessary.

Clause 14, page 12, line 12

add at end “and respond to any questions”

Effect

This amendment imposes a duty to respond to questions posed by the Commissioner for Investigations upon a person who has been required to submit information under clause 14.

Reason

Clause 14 sets out various requirements for the supply of information which can be set by the Commissioner for Investigations. Clause 14(2) provides that the Commissioner for Investigations may by notice require a person to attend at a time and place stated in the notice to provide information. There is however no power to require such a person to respond to questions asked about the information provided.

This is a gap in the powers of the Commissioner which needs to be filled. This amendment achieves that objective.

Clause 18, page 16, line 16

leave out “C” and insert “D”

Effect

This is a paving amendment for the amendment on the list which defines the content of Condition D.

Clause 18, page 16, line 35

add at end “() Condition D: The ICRIR is satisfied that the grant of immunity would:

- i. be compatible with convention rights,
- ii. comply with the constitutional principle of the rule of law; and
- iii. satisfy the interests of justice”

Effect

This probing amendment ensures that the ICRIR must consider whether granting immunity from prosecution would be compatible with convention rights, comply with the constitutional principle of the rule of law, and satisfy the interests of justice.

Reason

Clause 34 prohibits 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 34(1) and (2) and 38(3)).

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.

Paragraph 181 [Guide on Article 2 - Right to life \(coe.int\)](#) The European Court of Human Rights Court has considered that granting an amnesty in respect of the killing or ill-treatment of civilians would run contrary to the State’s obligations under Articles 2 and 3 of the Convention since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible (Marguš v. Croatia [GC], § 127).

The Government should explain how these proposals, which appear to depart from the constitutional principle of the rule of law, be incompatible with ECHR and contrary to the interests of justice, can be justified.

Clause 18, page 16, line 36

leave out “C” and insert “D”

Effect

Consequential amendment.

Clause 23, page 21, line 32

leave out “may” and insert “must”

Effect

This probing amendment requires the Commissioner for Investigations to inform prosecutors of any evidence of an offence by a named person which come to light during an investigation.

Reason

Clause 23 (2) provides that “The Commissioner for Investigations may refer relevant conduct to a prosecutor if the Commissioner considers that there is evidence that the relevant conduct constitutes an offence by an individual whose identity is known to the Commissioner (a “suspected offence”).

We are concerned that the Commissioner for Investigations is not obliged to inform a prosecutor if the Commissioner considers that there is evidence that a crime has been committed by a known person. Withholding such information which could lead to the prosecution of those responsible for a crime would appear to be contrary to Article 2 (Right to Life) of the ECHR. As the Guide on Article 2 of the European Convention on Human Rights [Guide on Article 2 - Right to life \(coe.int\)](#) states in Paragraph 1.B “Having regard to its fundamental character, Article 2 of the Convention also contains a procedural obligation to carry out an effective investigation into alleged breaches of its substantive limb (*Armani Da Silva v. the United Kingdom*.”. The following paragraphs from the decision in *Armani Da Silva v. the United Kingdom* are relevant:

“233. In order to be “effective” as this expression is to be understood in the context of Article 2 of the Convention, an investigation must firstly be adequate (see *Ramsahai and Others*, cited above, § 324, and *Mustafa Tunç and Fecire Tunç*, cited above, § 172). This means that it must be capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible (see *Giuliani and Gaggio*, cited above, § 301, and *Mustafa Tunç and Fecire Tunç*, cited above, § 172). This is not an obligation of result, but of means (see *Nachova and Others v. Bulgaria* [GC], nos. [43577/98](#) and [43579/98](#), § 160, ECHR 2005-VII; *Jaloud v. the Netherlands* [GC], no. [47708/08](#), § 186, ECHR 2014; and *Mustafa Tunç and Fecire Tunç*, cited above, § 173)...

257. Although the authorities should not, under any circumstances, be prepared to allow life-endangering offences to go unpunished, the Court has repeatedly stated that the investigative obligation under Article 2 of the Convention is one of means and not result..”

The Government should explain how the discretionary power given to the Commissioner for Investigations complies with Article 2.

Clause 34, page 28, line 10

leave out “continued or”

Effect

This probing amendment deletes “continued or” from clause 33(1)

Reason

Clause 34(1) provides that “On and after the day on which this section comes into force, no criminal investigation of any Troubles-related offence may be continued or begun.”.

This means that criminal investigations in process when Clause 34 come into force must be stopped. This would appear to be contrary to ECHR Article 2 (Right to Life).

As the Guide on Article 2 of the European Convention on Human Rights [Guide on Article 2 - Right to life \(coe.int\)](#) states in Paragraph 1.B “Having regard to its fundamental character, Article 2 of the Convention also contains a procedural obligation to carry out an effective investigation into alleged breaches of its substantive limb (*Armani Da Silva v. the United Kingdom*.”. The following paragraphs from the decision in *Armani Da Silva v. the United Kingdom* are relevant:

“233. In order to be “effective” as this expression is to be understood in the context of Article 2 of the Convention, an investigation must firstly be adequate (see *Ramsahai and Others*, cited above, § 324, and *Mustafa Tunç and Fecire Tunç*, cited above, § 172). This means that it must be capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible (see *Giuliani and Gaggio*, cited above, § 301, and *Mustafa Tunç and Fecire Tunç*, cited above, § 172). This is not an obligation of result, but of means (see *Nachova and Others v. Bulgaria* [GC], nos. [43577/98](#) and [43579/98](#), § 160, ECHR 2005-VII; *Jaloud v. the Netherlands* [GC], no. [47708/08](#), § 186, ECHR 2014; and *Mustafa Tunç and Fecire Tunç*, cited above, § 173)..”

257. Although the authorities should not, under any circumstances, be prepared to allow life-endangering offences to go unpunished, the Court has repeatedly stated that the investigative obligation under Article 2 of the Convention is one of means and not result..”

Clause 39, page 30, line 8

leave out “on or after” and insert “three years after”

Effect

This probing amendment ensures that a Troubles related civil action can be brought up to three years after the coming into force of clause 38.

Reason

Clause 38(2) provides that “A relevant Troubles-related civil action may not be brought on or after the day on which this section comes into force”. This amounts to a new limitation on the raising of court actions which supplants the existing provisions under the various limitations laws applicable in the UK which are listed in clause 38(6).

We consider that this may be contrary to Article 2 ECHR. Accordingly, we propose that there should be a period of three years from the coming into force of Clause 38 in which such court actions may be raised. This follows the precedent set in Section 18 of the Prescription and Limitation (Scotland) Act 1973 which provides that: “(2) Subject to subsections (3) and (4) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after — (a) the date of death of the deceased...”

Clause 39, page 30, line 32

leave out subsection (7)

Effect

This amendment is consequential upon the previous amendment.

Clause 39, page 30, line 38

leave out “(1) or”

Effect

This amendment is consequential upon the previous amendment.

Clause 39, Page 30, line 38

leave out “continued or”

Clause 39, page 30, line 40

leave out “continued or”

Clause 39, page 30, line 43

leave out “continued or”

Effect

These amendments are consequential upon a previous amendment.

Clause 52, page 40, line 37

leave out subsection (8).

Effect

This amendment deletes clause 52(8).

Reason

The Explanatory Notes state at paragraph 226 that “Subsection (8) allows the Secretary of State to make regulations to replace any reference in this Bill to the commencement of a provision of the Bill or the date of First Reading with the actual date on which the provision comes into force. This will enable a person reading the Bill to have a clear idea of whether the provision is currently in force”.

This subsection is therefore designed to bring clarity to the bill by enabling the Secretary of State to change various clauses to “enable a person reading the Bill to have a clear idea of whether the provision is currently in force”. This raises the question which the Government should be able to answer: why not ensure that the bill is clear from the start rather than require subsequent amendment to introduce clarity? The Government should amend the provisions to which clause 52(8) refers and obviate the need for this regulation making power.

Schedule 1, paragraph 6, page 50, line 34

leave out “Secretary of State” and insert “The Northern Ireland Judicial Appointments Commission”

Effect

This and subsequent probing amendments remove the Secretary of State from various roles in connection with the appointment and holding office of Commissioners.

Reason

The Government argues that its obligations under that Article 2 ECHR 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 Commissioners hold office – they continue until they resign (Schedule 1, para 9). Furthermore, 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)).

This and subsequent amendments remove the Secretary of State from various roles in connection with the appointment and holding office of Commissioners. They replace the Secretary of State with the Northern Ireland Judicial Appointments Commission (NIJAC).

NIJAC's functions include to select and appoint and recommend for appointment to judicial offices up to and including High Court Judge, to recommend applicants on the basis of merit, to engage in a Programme of Action to secure that appointments to judicial offices reflect the community in Northern Ireland. These functions equip NIJAC well for setting terms of appointment and pay and dealing with the resignation of Commissioners.

Accordingly, NIJAC is accustomed to appointing those who fulfil statutory requirements and are of good character and have integrity. Furthermore, the link between the ICRIR and the judiciary is embedded in the bill as the Chief Commissioner must be a person who holds or has held high judicial office. In our view NIJAC would provide the requisite level of independence to fulfil the statutory requirements under the bill in relation to ICRIR.

Schedule 1, paragraph 7, page 50, line 37 leave out "Secretary of State" and insert "The Northern Ireland Judicial Appointments Commission"

Effect

This amendment is consequential upon the related amendment.

Schedule 1, paragraph 7, page 51, line 4 leave out "Secretary of State" and insert "the Northern Ireland Judicial Appointments Commission"

Effect

This amendment is consequential upon the related amendment.

Schedule 1, paragraph 9, page 52, line 33 leave out "Secretary of State" and insert "The Northern Ireland Judicial Appointments Commission"

Effect

This amendment is consequential upon the related amendment.

Schedule 1, paragraph 9, page 52 line 37 leave out "Secretary of State" and insert "The Northern Ireland Judicial Appointments Commission"

Effect

This amendment is consequential upon the related amendment.

Schedule 1, paragraph 9, page 52, line 38

leave out Secretary of State and insert “The Northern
Ireland Judicial Appointments Commission”

Effect

This amendment is consequential upon the related amendment.

Schedule 1, paragraph 9, page 52, line 39

leave out Secretary of State and insert “The Northern
Ireland Judicial Appointments Commission”

Effect

This amendment is consequential upon the related amendment.

Schedule 1, paragraph 10, page 53, line 2

leave out “Secretary of State” and insert “The Northern
Ireland Judicial Appointments Commission

Effect

This amendment is consequential upon the related amendment.

Schedule 1, paragraph 10, page 53, line 6

leave out Secretary of State and insert “The Northern
Ireland Judicial Appointments Commission”

Effect

This amendment is consequential upon the related amendment.

Schedule 1, paragraph 11, page 53, line 14

leave out Secretary of State and insert “The Northern
Ireland Judicial Appointments Commission”

Effect

This amendment is consequential upon the related amendment

Schedule 1, paragraph 11, page 53, line 16

leave out Secretary of State and insert “The Northern
Ireland Judicial Appointments Commission”

Effect

This amendment is consequential upon the related amendment

Schedule 1, paragraph 11, page 53, line 21

leave out Secretary of State and insert “The Northern
Ireland Judicial Appointments Commission”

Effect

This amendment is consequential upon the related amendment

Schedule 1, paragraph 11, page 53, line 23

leave out Secretary of State and insert “The Northern
Ireland Judicial Appointments Commission”

Effect

This amendment is consequential upon the related amendment

Schedule 1, paragraph 11, page 53, line 25

leave out Secretary of State and insert “The Northern
Ireland Judicial Appointments Commission”

Effect

This amendment is consequential upon the related amendment



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For further information, please contact:

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