

LIBERTY

**LIBERTY'S BRIEFING ON THE NORTHERN
IRELAND TROUBLES (LEGACY AND
RECONCILIATION) BILL FOR SECOND
READING IN THE HOUSE OF LORDS**

NOVEMBER 2022

ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at libertyhumanrights.org.uk/policy.

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INTRODUCTION

1. At the outset, four things must be established about the Northern Ireland Troubles (Legacy and Reconciliation) Bill. The first and most obvious is that it will deny justice to victims and families. The Bill's new statutory body, the Independent Commission for Reconciliation and Information Recovery (ICRIR), will carry out 'reviews' of deaths and other harmful conduct forming part of the Troubles. It will be the only route to something approximating justice left open in Northern Ireland. All criminal investigations by the police into Troubles-related offences will cease, all future investigations not referred by the ICRIR to a prosecutor will be stopped, there will be no further inquests or complaints against the police, and civil claims will be banned from the date of this Bill's first reading. Those who have unlawfully killed or committed torture will be handed immunity from prosecution in return for almost nothing.
2. The second is that the new system is being imposed through a 'reconciliation bill' that excludes the people who are meant to be reconciled. The Bill was a unilateral action done without the inclusion of politicians in Northern Ireland and Ireland, and without the support of the groups of families it will affect. In bringing it forward, the Government has achieved the notable task of uniting Northern Ireland's various communities and political parties in opposition to their plans.
3. The third is the manner in which the new system is intended to operate at the will and whim of Westminster. The supposed 'Independent' Commission for Reconciliation and Information Recovery is nothing of the sort, with the Secretary of State for Northern Ireland empowered to dictate their work, control their resources, block their reporting, shut them down all together, and much else besides. Reconciling the legacy of Northern Ireland's past is not a task that can be tackled remotely from London.
4. Finally, the Bill ignores the United Kingdom's obligations under the European Convention on Human Rights (ECHR), including being incompatible with Article 2 – the right to life – and Article 3 – the prohibition of torture and inhuman and degrading punishment – and potentially breaches the Good Friday Agreement (GFA), which commits to "complete incorporation into Northern Ireland law of the European Convention on Human Rights, with direct access to the courts, and remedies for breach of the Convention".¹ Providing for proper investigations to take place into Troubles-related deaths is not only a moral imperative, but a legal obligation as well. This Bill, and the Bill of Rights Bill recently introduced to the House of Commons go hand-in-hand in their joint assault on the State's

¹ Good Friday Agreement.

obligations to its citizens. This Bill proposes to circumvent this duty; the Bill of Rights Bill proposes to ditch it all together.

5. The Northern Ireland Troubles (Legacy and Reconciliation) Bill is unworkable, undemocratic, and in breach of our international obligations. It will deny justice, threaten the Good Friday Agreement, and undermine the rule of law. This Bill was not introduced under this Secretary of State or this Prime Minister. What they have been bequeathed is not fit for purpose and should be taken no further. While the Northern Ireland Office has indicated willingness to amend the Bill, it is very difficult to see any way in which it could possibly be redeemed. Addressing the legacy of Northern Ireland's past demands great care and sensitivity. The victims and the families deserve better.

CLOSING OFF JUSTICE

6. The main effect of the Northern Ireland Troubles (Legacy and Reconciliation) Bill will be to close off the routes to justice that currently exist in the country, to be replaced by a single new body that may 'review' cases on request. Criminal investigations, civil cases, inquests and police complaints relating to the Troubles will all cease. What will replace them is clearly inadequate and places the UK at risk of non-compliance with Articles 6 and 13 of the ECHR (the rights to a fair trial and an effective remedy respectively). We cannot see any way in which justice may be served by the new regime.
7. Part 2 of the Bill creates the Independent Commission for Reconciliation and Information Recovery (ICRIR) to conduct reviews of deaths and other harmful conduct forming part of the Troubles, to produce reports on the findings of these reviews, to consider granting immunity from prosecution in relation to Troubles-related offences, to refer certain cases to prosecutors, and to produce a historical record of deaths caused during the Troubles. Clause 33 provides that the ICRIR be the only forum for criminal investigations into Troubles-related offences, and that from the day the section comes into force, no other criminal investigation of any Troubles-related offence may be continued or begun.
8. ICRIR 'reviews' are not investigations in the legal sense. While the Commissioner for Investigations will have the powers of a constable (and may bestow these on officers engaged by ICRIR), and relevant authorities will have a duty of disclosure (albeit with no sanction for failure to comply with this duty), this is all in service of the production of a report. There is no specific requirement as to what this report should contain. While a criminal investigation may then take place, this is far from certain. Under the Bill's provisions, criminal investigations may only proceed if a request has been made to the

ICRIR, the offence is ‘serious’ or ‘connected’,² the person in question has not been granted immunity from prosecution, and the Commissioner for Investigations has referred the conduct to a prosecutor. If an offence is not a ‘serious’ or ‘connected’ one, no criminal enforcement action may be taken. After five years of ICRIR’s existence have elapsed, no more requests may be made, and the Secretary of State may even close down ICRIR before that point has been reached.

9. It is for the Commissioner for Investigations to determine how and when reviews may be carried out and what steps should be taken, ensuring that the review does not do anything that duplicates any aspect of a previous investigation unless they believe it necessary. They can, however, only carry out reviews relating to deaths or incidents causing one of eight listed conditions amounting to “serious physical or mental harm”.³ Together this creates a situation that seems almost designed to produce investigations that breach the ECHR. The narrow definition of “serious physical or mental harm” will block investigations into violations of Article 3 – where torture has taken place and not resulted in one of eight specific conditions, ICRIR will not be allowed to investigate. Clause 10(2), which allows the Secretary of State to refer cases falling outside the definition to ICRIR is not an adequate safeguard as it relies entirely on the Secretary of State’s knowledge of and willingness to refer them. The broad discretion handed to the Commissioner for Investigations over the launching and nature of investigations raises real concern that these reviews will not reach the standard demanded by the Convention, and the requirement not to duplicate may see inadequate investigations denied revisiting in a manner compliant with the ECHR.
10. The Bill’s provisions relating to civil claims are even more restrictive. Clause 38 states that a relevant Troubles-related civil action that was brought on or after the day of the Bill’s first reading may not be continued on or after the day the Act comes into force. A relevant civil action is one that is to determine a claim arising out of conduct forming part of the Troubles; is founded on a cause of action under tort, delict, fatal accident legislation, or equivalent foreign law grounds; and the time limit for bringing the action was given in certain listed limitation legislation.⁴ Civil actions may be continued after the

² A Troubles-related offence is ‘serious’ if the offence – (i) is murder, manslaughter or culpable homicide, (ii) is another offence that was committed by causing the death of a person, or (iii) was committed by causing a person to suffer serious physical or mental harm. A Troubles-related offence is ‘connected’ if the offence – (i) relates to, or is otherwise connected with, a serious Troubles-related offence (whether it and the serious offence were committed by the same person or different persons), but (ii) is not itself a serious Troubles-related offence; and for this purpose, one offence is to be regarded as connected with another offence, in particular, if both offences formed part of the same event.

³ These are paraplegia, quadriplegia, severe brain injury or damage, severe psychiatric damage, total blindness, total deafness, loss of one or more limbs, or severe scarring or disfigurement (Clause 1(6)).

⁴ The Limitation (Northern Ireland) Order 1989; Foreign Limitation Periods (Northern Ireland) Order 1985; Limitation Act 1980; Foreign Limitations Periods Act 1984; Prescription and Limitation (Scotland) Act 1973; or section 190 of the Merchant Shipping Act 1995.

section comes into force if the court of first instance has already given a final judgment on the matter in dispute.

11. The exclusion of civil actions from the day of first reading (17 May) prompted panicked attempts by victims fearing they would be denied justice, with one Belfast law firm claiming they had that day in response to the news issued “76 emergency High Court actions against the State, alleging various torts including misfeasance (collusion), failure to investigate and extra judicial killings and executions. At the start of the day we had no inkling that a crude and unjust line would be drawn to guillotine any cases issued on the day of the first reading”.⁵ A sudden, retrospective cut-off of the possibility of bringing cases of that importance does not appear to be in the best interests of justice.
12. The Bill would likewise shut off the possibility of inquests. Clause 39 inserts four new sections into the Coroners Act (Northern Ireland) 1959, which would close all current inquests into Troubles-related deaths that had not already reached the stage of substantive hearing by May 2023 – expected to be about 18 inquests.⁶ A coroner who is dealing with an inquest that is in an advanced stage may make a request to ICIR for a review of the death, and adjourn or close their own inquest. Once the Bill comes into force, a coroner must not launch any new inquests into Troubles-related deaths, nor may one be ordered by the Attorney General or Advocate General for Northern Ireland. Not only will this close off another route to justice, the cessation of active inquests will break the promise given to mourning families, cruelly snuffing out the hope that had been given to them on the basis of an arbitrary cut off.
13. A great weight is being placed by this Bill upon the shoulders of the ICIR. This proposed body, with its limited powers, its particular scope, and its weighting in the State’s favour, will become the only official route to justice for the thousands of families so long denied. Should this Bill pass into law as written, in one fell swoop all of the – doubtless flawed – mechanisms for accountability and justice for conduct relating to the Troubles will be collapsed into the responsibility of one inchoate Commission. Certain things will be closed off entirely – criminal investigations for conduct that does not reach a high enough bar of seriousness, civil claims brought on or after 17 May that have not sufficiently progressed by when the Bill comes into force – and the rest will be put in the hands of between three and five Commissioners hand-picked by the Secretary of State. What is more, baked into

⁵ ITV News, More than 70 emergency civil actions launched in response to Troubles legacy bill, 17 May 2022, <https://www.itv.com/news/utv/2022-05-17/more-than-70-emergency-civil-actions-in-response-to-troubles-legacy-bill>.

⁶ Sir Declan Morgan, Addressing the Legacy of Northern Ireland’s Past: The UK Government’s New Proposals, Northern Ireland Affairs Committee, HC 284, Q600, <https://committees.parliament.uk/oralevidence/10446/pdf>.

the new system will be a mechanism designed to allow people to escape responsibility for what they have done.

ACCOUNTABILITY DENIED

14. The Northern Ireland Troubles Bill follows in the wake of the Northern Ireland Office's July 2021 command paper, *Addressing the Legacy of Northern Ireland's Past*. By far the most controversial proposal in the paper was for a blanket statute of limitations to be applied to Troubles-related offences. The paper read: "Under such a proposal, the PSNI and Police Ombudsman Northern Ireland would be statutorily barred from investigating Troubles-related incidents. This would bring an immediate end to criminal investigations into Troubles-related offences and remove the prospect of prosecutions".⁷

15. Faced with strong opposition from all sides,⁸ the blanket immunity was dropped and replaced with a conditional one. As the background briefing to the Queen's Speech says:

"The Government has listened carefully to a range of views on the original proposal and it is clear that a model where immunity is only provided to individuals who cooperate with the new Commission provides the best route to give victims and their families the answers they have sought for years as well as giving our veterans the certainty they deserve. This still leaves open the route of prosecution if individuals are not deemed to have earned their immunity."⁹

16. To "earn their immunity" under clause 18 of the Bill, a person must meet three conditions. These are:

- a) That the person has requested immunity;
- b) That the immunity request panel is satisfied that the person's account is relevant, and true to the best of their knowledge and belief – even if the account is not new and had previously been given either to the ICIR or in another forum; and

⁷ Northern Ireland Office, *Addressing the Legacy of Northern Ireland's Past*, 14 July 2021, <https://www.gov.uk/government/publications/addressing-the-legacy-of-northern-irelands-past>, [34].

⁸ Shawn Pogatchnik, *Rare unity in Belfast to condemn UK plans to cap the Troubles*, Politico, 20 July 2021, <https://www.politico.eu/article/unity-northern-ireland-condemnation-uk-plans-troubles>.

⁹ Prime Minister's Office, *Queen's Speech Background Briefing*, 10 May 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1074113/Lobby_Pack_10_May_2022.pdf, p. 122.

- c) That the immunity request panel is satisfied that the disclosed conduct would tend to expose that person to a criminal investigation or prosecution for serious or connected Troubles-related offences.
17. If the immunity request panel is satisfied that a person meets all three conditions, the panel is *required* to grant them immunity from prosecution. Seeing as clause 36 of the Bill bars criminal enforcement action against people in relation to a Troubles-related offence that is not serious or connected, and condition A just relates to the person requesting immunity, the question as to whether a person has “earned their immunity” comes down to whether the panel believes the information they have offered to have been “true to the best of [their] knowledge and belief”.
18. Clause 20 outlines how the panel may form a view on the truth of an applicant for immunity’s account. The panel must take into account any other relevant information in their possession, but is not required to seek information from anyone other than the applicant. The panel may carry out a review based on the account received, but is not obliged to, and can grant a request for immunity without launching one if they choose. Importantly, the panel *must* take account of any guidance given by the Secretary of State about when conditions B and C are met.
19. A request for a grant of immunity will not be considered if a public prosecution of the person in question for a relevant offence has begun and is continuing, or the person has a conviction for a relevant Troubles-related offence. This restriction, however, does not apply to people involved in an ICRIR review, suggesting that it would be possible for a person facing the potential of being referred to a prosecutor to avoid this fate with a well-timed request. Indeed, it appears that this is a scenario that the Government is specifically looking to facilitate. Clause 19 limits requests for immunity to a period of five years from the beginning of ICRIR’s operation, except for in cases where ICRIR already has a review running that relates to conduct by the person applying for immunity.
20. This granting of immunity in return for ‘cooperation’ – even when hastily given in response to the prospect of prosecution – is justified as giving “victims and their families the answers they have sought for years”.¹⁰ This, however, is hard to square with the low bar that the provision presents. There is no requirement for accounts to be comprehensive, and they specifically may “consist of, or include, information which has previously been given” by the person in question to the ICRIR or otherwise. As grants of immunity from

¹⁰ Queen’s Speech Background Briefing, p. 122.

prosecution may be ‘specific’, ‘general’, or both,¹¹ with general immunity from prosecution “likely to be appropriate in most cases”,¹² and the revocation of this immunity not available, it would be possible for a person to submit an account to the panel that was already entirely in the public domain and receive an irrevocable immunity from prosecution to the benefit of no one.

21. While the Government has repeatedly cited South Africa’s Truth and Reconciliation Commission (TRC) as a model for this process, it should be made clear that this is a different proposition all together. Instead of accounts that are “true to the best of [the person’s] knowledge and belief”, the TRC demanded “full disclosure of all relevant facts” as a precondition for amnesty. Whatever flaws there may have been with the TRC, if the aim of the ICRIR is to provide information that may grant closure to grieving families, one would think that “full disclosure” would be the minimum requirement. The TRC ultimately accepted only 16% of its over 7,000 applications for amnesty. It is hard to see similar numbers failing to get over the low bar set by this Bill.

HUMAN RIGHTS CONCERNS

22. In collapsing all routes to justice into one body with a restricted scope and providing an open invitation for people who have committed the most serious crimes during the Troubles to avoid prosecution in return for very little, the Government is not just letting down victims, it is threatening to undermine some very fundamental human rights protections.

The right to life – investigations

23. Article 2 of the European Convention on Human Rights (ECHR), brought into our law by the Human Rights Act, bestows on the State the general obligation to protect by law the right to life, the prohibition of intentional deprivation of life (with exceptions), and a procedural obligation to carry out an effective investigation into alleged breaches of its substantive duties. For the procedural duty to be engaged, it is not necessary that the death came at the hands of an agent of the State, or that the victim was in State custody, although these are important considerations in themselves. Serious, life-threatening injury short of death has also been found to be covered by Article 2.

¹¹ Specific immunity from prosecution is immunity from prosecution for all of the identified possible offences. General immunity from prosecution is immunity from prosecution for all serious or connected Troubles-related offences which are within a description determined by the immunity requests panel.

¹² Northern Ireland Office, Northern Ireland Troubles (Legacy and Reconciliation) Bill, explanatory notes, <https://publications.parliament.uk/pa/bills/cbill/58-03/0010/en/220010en.pdf>, [105].

24. The Government acknowledges that the Bill will “restrict or prohibit the investigation and prosecution of offences arising out of Troubles-era deaths and life-threatening injuries, and therefore engage the UK’s obligations under Article 2 of the Convention”. It likewise admits that “Article 2 is also engaged in relation to the ICIR’s function of carrying out our reviews, as the Department considers such reviews will provide a means of discharging the procedural obligation, where it arises”,¹³ and that the effect of this Bill “is that there are historic deaths and conduct resulting in serious injury which could in principle trigger the Article 2 procedural obligation, but which may no longer be subject to a full criminal investigation, or result in prosecution or conviction, or be the subject of an inquest. That therefore raises the question of compatibility with Article 2.”¹⁴
25. While acknowledging that Article 2 is engaged, the Government argues that the Bill is not inconsistent with the State’s obligations. It claims that, where a police investigation or inquest is no longer available as a result of this Bill’s passage, “the ICIR will be capable of discharging that obligation, through the process of a review carried out under clauses 9 to 17, in a manner which complies with *most* of the requirements” of the Article 2 procedural duty (emphasis added).¹⁵
26. The Government’s claims that ICIR investigations that will be compliant with Article 2 are less than entirely convincing. While the circumstances of the case will to some extent determine what is required to satisfy the procedural obligation, there are certain minimum requirements that investigations must meet, namely that investigations must be independent, effective, prompt, open to public scrutiny, and involve the next of kin.
27. The lack of promptness can be excused in the particular circumstances of Troubles-related allegations, but there are serious concerns, expanded on below, about the independence of ICIR. While the Government states that ICIR reports will be made public, this will only automatically be true where the review was conducted following a request and publication would cause no ill effects. The Secretary of State may block reports on the basis of national security interests, and the panel itself has discretion over whether to public reports arising from requests for immunity. Notably, there will be no public hearings. The Joint Committee on Human Rights (JCHR) has furthermore raised concerns about the involvement of next of kin in ICIR reviews.¹⁶ The European Court of

¹³ Northern Ireland Office, Northern Ireland Troubles (Legacy and Reconciliation) Bill, ECHR memorandum, https://publications.parliament.uk/pa/bills/cbill/58-03/0010/ECHR_Memo_%20NI_Troubles_17-05-22.pdf, [13].

¹⁴ ECHR memorandum, [21].

¹⁵ ECHR memorandum, [22].

¹⁶ Joint Committee on Human Rights, Legislative Scrutiny: Northern Ireland Troubles (Legacy and Reconciliation) Bill, sixth report of session 2022-23, 19 October 2022, <https://committees.parliament.uk/publications/30491/documents/175903/default>, [40-45].

Human Rights (ECtHR) has held that the State cannot solely rely on the next of kin to initiate investigations, but rather “authorities must act of their own motion, once the matter has come to their attention”,¹⁷ and yet the explanatory notes anticipate that reviews will be primarily initiated by next of kin, rather than the State.¹⁸ Most of all, it is unclear just how ‘effective’ an ICIR review can be said to be, considering the weakness of the body’s powers and the immunity provisions in the Bill.

The right to life – amnesties

28. The Government argues that the conditional immunity scheme in clauses 19 to 21 “can be justified as an exception to the requirement to punish those identified as being responsible for a death or life-changing injury, as a proportionate means of achieving and facilitating truth recovery and reconciliation in Northern Ireland”.¹⁹ There are two major issues with this: whether the conditional immunity scheme will actually be an effective means of achieving and facilitating truth recovery and reconciliation (as covered above), and whether amnesties may be accepted at all under the ECHR.

29. The Government acknowledges that previous amnesty schemes launched without reconciliation processes have been found to undermine Article 2, citing *Ould Dah v France* and the Court’s finding that “an amnesty is generally incompatible with the duty incumbent on the states to investigate such acts”.²⁰ Yet it suggests that it is unclear in the case law whether amnesties will be incompatible in all cases. The ECHR memorandum reads:

“The ECtHR has countenanced the possibility of an amnesty being compatible with Article 2 in some particular circumstances, including where a reconciliation process is in existence (*Margus*). It is therefore an open question as to whether the Court would find an amnesty to be compatible with the Article 2 procedural obligation where there are alternative procedures that allow for investigation, information recovery and reconciliation.”²¹

30. An ‘open question’, where a ‘possibility’ has been ‘countenanced’ is hardly a ringing endorsement of the Government’s legal position, and indeed in that same judgment cited by the Government above, the Court held that “granting an amnesty in respect of the killing or ill treatment of civilians would run contrary to the State’s obligations under

¹⁷ *Jordan v the United Kingdom* (2001), 24746/94, [105]

¹⁸ Explanatory notes, [25].

¹⁹ ECHR memorandum, [22].

²⁰ *Ould Dah v France* (2013) 56 EHRR SE17.

²¹ ECHR memorandum, [47].

Articles 2 and 3 of the Convention since it would hamper the investigation of such acts and necessarily lead to impunity to those responsible”.²² Nor is one of the other cases cited in support of the Government’s position – *Dujardin v France* – a convincing example either, seeing as it predates the development of the procedural obligation to undertake effective investigations under Articles 2 and 3. As the JCHR points out, the Government’s use of the Commission’s observations in that case “does not therefore hold much, if any, weight”.²³

Freedom from torture

31. Article 3 ECHR establishes the right not to be subjected to torture, inhuman or degrading treatment or punishment, carrying a similar positive obligation to that of Article 2. The United Kingdom is also a party to the UN Convention Against Torture (UNCAT), although only two of its articles are incorporated into our domestic law. Article 14 UNCAT reads:

“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”

32. The Government has acknowledged that, as the prohibition on civil actions will remove an avenue for pursuing tortious claim for damages in respect of torture, the right to redress and compensation under this article is “potentially engaged”, although only in relation to acts committed by representatives of the State between ratification of UNCAT in December 1988 and the signing of the Good Friday Agreement in April 1998.

33. The ECHR memorandum for the Bill attempts to make an argument that the civil aspects of the Bill – which would in effect institute a limitation period for torture claims – would not be inconsistent with the UK’s obligations under UNCAT. It does this by emphasising that the rejection of limitation periods for torture comes in Committee Against Torture (CAT) general comments, rather than in the text of UNCAT itself, and quoting Lord Bingham in *Jones v Saudi Arabia* referring to general comments as “no more than a recommendation”.²⁴ This is a somewhat tenuous attempt to make a narrow legal point about something on which international legal thought is so united – the prohibition of torture and the need for accountability when it arises. It may have been of more use for

²² *Margus v Croatia*, 4455/10, (2014), [181].

²³ JCHR, Northern Ireland Troubles (Legacy and Reconciliation) Bill, [57].

²⁴ ECHR Memorandum, [144].

the Government to quote Bingham in *A & Ors v SSHD (No 2)*, where he wrote that “there can be few issues on which international legal opinion is more clear than on the condemnation of torture”,²⁵ quoting at length from the International Criminal Tribunal for the Former Yugoslavia in opposition to States granting perpetrators immunity:

“It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.”²⁶

34. It is of course the intention of the Government to in effect do just this. Not only is there no carveout that would exclude torture from the eligible offences for someone seeking immunity, on the contrary, the offence committed must at the least have caused someone “serious physical or mental harm”. Article 3 ECHR and Article 6 UNCAT both require the State to undertake an inquiry into credible allegations of torture. In trading immunity for information, the Government’s plans run the risk of breaching both.

The Bill of Rights Bill

35. It is illuminating to read this Bill in the context of another currently in front of Parliament. The undermining of the positive obligations under Articles 2 and 3, the cavalier approach to breaching the Convention, and the willingness to test the Court on compatibility of amnesties and the implementation of judgments all make more sense in the context of the Government’s plans to replace the Human Rights Act with a new so-called ‘Bill of Rights’. The Bill seeks to repeal the Human Rights Act, to make it harder for courts to ensure compatibility of legislation with the Convention, and to cause a divergence between the meanings of rights enjoyed domestically and those on the European level, forcing more people to Strasbourg for justice.²⁷

36. Clause 5 of the Bill of Rights Bill seeks to narrow positive obligations in two ways: prohibiting the adoption of new positive obligations, and restricting the application of those which already exist. The Bill specifies that one of the criteria that a court must give ‘great weight’ to in deciding whether to require a public authority to comply with a positive

²⁵ *A v Secretary of State for the Home Department (No 2)* [2005], UKHL 71, [2006], 2 AC 221, [33].

²⁶ *Prosecutor v Furundzija* [1993] ICTY 3, [1988], [155].

²⁷ See Liberty and 122 other organisations’ Joint Civil Society Briefing on the Bill of Rights Bill for Second Reading in the House of Commons, September 2022, <https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Joint-Civil-Society-Briefing-on-the-Bill-of-Rights-Bill-for-Second-Reading-in-the-House-of-Commons-September-2022.pdf>.

obligation is the need to avoid applying an interpretation that would “require an inquiry or other investigation to be conducted to a standard that is higher than is reasonable in all the circumstances”. This should be seen as an attempt to apply broadly what this Bill seeks to do in the specific circumstances of cases arising from the Troubles – to deny justice, accountability, and the opportunity for learning and reform where there have been deaths involving some level of State responsibility, whether it is the families of the 97 people killed during the Hillsborough disaster, Zahid Mubarek (who was killed by a racist cellmate at a Youth Offenders’ Institute), Christopher Alder (who was killed in police custody), or many others.

37. The difference between the approach of the Northern Ireland Office (NIO) to positive obligations and that of the Ministry of Justice (MOJ), however, is that rather than directly attack and disapply them as the MOJ does, the NOI here proclaims their importance while legislating to ignore and circumvent the duty they impose. The weak justification for the Government’s professed belief that their immunity from prosecution plans would be found compatible with the Convention likewise makes more sense in the context of a Bill of Rights Bill that proposes both diverging from the case law of the European Court of Human Rights and ignoring its imposition of interim measures.²⁸ With the explicit intention of the Government being to move away from the European Court in its jurisprudence and its actions, the question as to whether it would find the provisions in this Bill to be compatible or not begins to seem less important – if not to the victims let down by a system that denies them justice.

THE HAND OF WESTMINSTER

38. When the Bill was published, Irish Foreign Affairs Minister Simon Coveney reacted with disappointment at the manner in which the UK Government had introduced the Bill. He said:

“I want to be clear that it is disappointing that the UK Government have chosen to unilaterally introduce legislation, when our starting point was the need for an agreement to be reached between both governments and the parties, and with the needs of victims and survivors at the heart of the process.

²⁸ Bill of Rights Bill, Clauses 3 & 39.

"We know, from long experience, that lasting progress is best achieved through finding an agreed way forward based on engagement and sufficient consensus. We already had the basis for that in the Stormont House Agreement.

"We had strongly urged the British Government to come back to the table and find a way forward together, and it is regrettable that they have not done so. We remain open to that."²⁹

39. In the Dáil, Sinn Féin leader Mary Lou McDonald went further, likening the UK Government to a "rogue state" and bemoaning how "they refuse to work in partnership with anybody, with the Irish Government".³⁰

40. While this may be a 'Northern Ireland Bill' in title and in focus, it is explicitly one that is directed by Westminster. This is not just true in the exclusion of stakeholders in Northern Ireland and Ireland alike in the introduction of the Bill, but in the deep vein of political interference that runs through the legislation.

41. ICRIR – the *Independent* Commission for Reconciliation and Information Recovery – stands a chance of working only if it is seen to be independent in its operation. And yet the Secretary of State has powers to:

- Control ICRIR's funding;
- Request reviews from ICRIR;
- Appoint Commissioners to ICRIR, and decide how many Commissioners will make up the Commission;
- Make rules about the procedure for making and dealing with requests for immunity from prosecution; give guidance (that must be taken account of) about considering whether a person's account is truthful, whether their conduct is eligible, and what form of immunity can be offered;

²⁹ Department of Foreign Affairs, Statement by the Minister for Foreign Affairs and Minister for Defence Simon Coveney on the publication of the UK Government's "Northern Ireland Troubles (Legacy and Reconciliation) Bill", 18 May 2022, <https://www.gov.ie/en/press-release/7d622-statement-by-the-minister-for-foreign-affairs-and-minister-for-defence-simon-coveney-on-the-publication-of-the-uk-governments-northern-ireland-troubles-legacy-and-reconciliation-bill>.

³⁰ Rebecca Black, Government introduces Troubles 'amnesty' legislation amid opposition, Belfast Telegraph, 17 May 2022, <https://www.belfasttelegraph.co.uk/news/northern-ireland/government-introduces-troubles-amnesty-legislation-amid-opposition-41659968.html>.

- Give guidance (that must be taken account of) about the identification of sensitive information to ICRIR, police forces in Great Britain and Northern Ireland, Northern Ireland departments, Scottish Ministers and more;
- Give guidance (that must be taken account of) about whether a review might prejudice the “national security interests of the United Kingdom”;
- Review and give or withhold permission for the disclosure of sensitive information by ICRIR;
- Make provision about the holding and handling of information by ICRIR by regulations subject to the negative procedure that may (among other things) make provision about the destruction or transfer of information, confer functions on the Secretary of State or any other person, or create criminal offences;
- Provide for biometric material not to be destroyed, and preserved material to be retained, by regulations subject to negative procedure;
- Review, and if satisfied that it is no longer needed, wind up ICRIR by regulations subject to the affirmative procedure that may also make provision for the transfer of property, rights and liabilities.

42. This is an extraordinary amount of control held by the Secretary of State over a supposedly independent body, extending even to shutting it down entirely. The Delegated Powers and Regulatory Reform Committee has expressed its concern over this last clause, reminding the Government that “what Parliament has created should be for Parliament to abolish”,³¹ and concluding that the clause is “inappropriate and should be removed from the Bill”.³² While this is an important point in itself, we should also remember when reading this substantial list of powers for Government interference and control over ICRIR, that independence is a necessary requirement in order to comply with the procedural requirements under Articles 2 and 3 of the Convention.

43. With civil actions, the Secretary of State is entitled to be given notice of any Troubles-related civil action that it appears might contravene the prohibition. The Secretary of State (or a person nominated by the Secretary of State) then has the right to be joined

³¹ Delegated Powers and Regulatory Reform Committee, Northern Ireland Troubles (Legacy and Reconciliation) Bill, 9th Report of Session 2022–23, 19 July 2022, <https://committees.parliament.uk/publications/23152/documents/169396>, [12].

³² Ibid, [15]

as a party to the action and take part in proceedings to determine the question of whether the prohibition applies.

44. Clause 51 creates a Henry VIII power that would allow not only the Secretary of State but also the Department of Justice in Northern Ireland or the Scottish Ministers to make any amendment to primary or secondary legislation, whenever passed, that is consequential on the provisions in the Bill. The power of the devolved administrations is limited to matters within devolved competence, but there is no such fetter on the Secretary of State. Schedule 2 sets out further consequential provisions that the appropriate national authority may make under Clause 51, including such provision as it considers appropriate in consequence of designated ICRI officers having the powers and privileges of a constable. This may include conferring functions upon them, exempting them from penalties, or applying legislation, although this is explicitly not an exhaustive list of the provisions that may be made under this broad power.
45. The Westminster Government is aware that the Secretary of State holds a great deal of power in relation to the operation of this Bill, and especially in the making of regulations. Many of the powers conferred on the Secretary of State relate to matters which are transferred under the Northern Ireland devolution settlement, and the Bill does not contain provision for the consent of the Northern Ireland Assembly to be sought in respect of those matters. The delegated powers memorandum acknowledges this, and states that “the Bill takes this approach for a number of reasons”:

“Legacy matters are highly controversial, politically charged and divisive in Northern Ireland. A vast number of issues remain unresolved as a result of political and societal impasse and there is no single accepted or agreed way to address them. The provisions in this Bill represent the UK Government’s view on how these matters should be progressed and resolved, but they are not universally condoned. There is a very real prospect that providing the Northern Ireland Assembly with the power of veto in relation to delegated powers could frustrate the purpose and application of the provisions in the Bill, which in the Government’s view is necessary to achieve progress and reconciliation in Northern Ireland.”³³

46. This remarkable paragraph explicitly lays out that the Government in Westminster has decided to exclude the elected representatives of the people of Northern Ireland from important decisions relating to legacy and reconciliation for the reason that they may not

³³ Northern Ireland Office, Northern Ireland Troubles (Legacy and Reconciliation) Bill, Delegated Powers Memorandum, [https://publications.parliament.uk/pa/bills/cbill/58-03/0010/Delegated_Powers_Memo_%20NI%20Troubles_%20\(Legacy_and_Reconciliation\)_Bill_17-05-2022.pdf](https://publications.parliament.uk/pa/bills/cbill/58-03/0010/Delegated_Powers_Memo_%20NI%20Troubles_%20(Legacy_and_Reconciliation)_Bill_17-05-2022.pdf), [8].

agree with what is being imposed from London. Running roughshod over the views and concerns of the communities affected does not appear to be the most fruitful route to reconciliation.

CONCLUSION

47. The Northern Ireland Troubles (Legacy and Reconciliation) Bill is an exercise in denying justice. Cutting off civil claims, inquests and complaints against the police, restricting criminal investigations and adding more barriers, and handing out immunities for what seems sure to be little benefit. At the same time, it takes a sledgehammer to the basic principles that we have a right to life, and to be free from torture, and that the State has a role in ensuring that. It does all this while embedding a representative of the Government in all parts of the new system, taking what should be an independent – and indeed, a Northern Irish – process and running it from London. It is not fit for purpose.
48. The grand denial of justice that this Bill represents has been justified as stemming a tide of ‘vexatious claims’ against British soldiers. This is despite the fact that in the nearly 25 years since the Good Friday Agreement, only half a dozen prosecutions of veterans have been brought. As the Centre for Military Justice points out, “that is not a witch hunt, and it is irresponsible of Government to encourage veterans to ‘live in perpetual fear of getting a knock at the door’. The function of Government should not be to pour fuel on the fire of tabloid campaigns and elderly men’s fears”.³⁴
49. The Bill is bad for veterans, it is bad for justice and for human rights, and it is bad most of all for the thousands of people who lost someone they loved during the Troubles. The Ministry of Defence’s statement on the introduction of the Bill hailed it as “introducing a process that provides answers for families”.³⁵ If the families’ question, as it has been for so many, is whether they will ever see justice for their loved ones, the answer this Bill offers is no.

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³⁴ Centre for Military Justice, The Northern Ireland Troubles (Legacy & Reconciliation) Bill, June 2022, <https://centreformilitaryjustice.org.uk/wp-content/uploads/2022/06/Briefing-on-the-NI-Bill-Final-pdf.pdf>.

³⁵ Ministry of Defence, Statement on the introduction of the Northern Ireland Legacy Bill, 18 May 2022, <https://www.gov.uk/government/news/statement-on-the-introduction-of-the-northern-ireland-legacy-bill>.