

# Criminal Justice Committee

**31st Meeting, 2022 (Session 6), Wednesday  
7 December 2022**

## Legislative consent memorandum

### Note by the clerk

#### Purpose of the paper

1. This paper invites the Committee to consider a Legislative Consent Memorandum (LCM) in relation to the following UK Government Bill:
  - [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#)
2. The Northern Ireland Troubles (Legacy and Reconciliation) Bill was introduced in the House of Commons on 17 May 2022. It is scheduled to have the first meeting of its committee stage in the House of Lords on 12 December 2022.

#### Legislative consent process

3. The process for considering consent to the relevant provisions in a UK Bill essentially commences with the publication, normally by the Scottish Government, of an LCM. This LCM relates to a Bill under consideration in the UK Parliament which contains what are known as “relevant provisions”. These provisions could:
  - change the law on a “devolved matter” (an area of policy which the UK Parliament devolved to the Scottish Parliament in the Scotland Act 1998); or
  - alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).
4. Under an agreement formerly known as the “Sewel Convention”, the UK Parliament will not normally pass bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament. The consent itself is given through a motion (a Legislative Consent Motion) which is taken in the Chamber – but the detailed scrutiny is undertaken by a Scottish Parliament committee on the basis of a memorandum. The motion must normally be decided on before the Bill

reaches its final amending stage at the UK Parliament in the House in which it was first introduced (although this can be as late as the last amending stage in the second house). On occasion, a memorandum is lodged which invites the Parliament to note that the Scottish Government does not intend to lodge a legislative consent motion on a particular bill.

5. The detailed procedure for scrutiny of Legislative Consent Memorandums and Motions is set out in [Chapter 9B](#) of the Parliament's Standing Orders.

## Northern Ireland Troubles (Legacy and Reconciliation) Bill

6. The Bill's purpose is to implement a range of measures to address the legacy of the Northern Ireland Troubles. The Bill:
  - establishes a new independent body, the Independent Commission for Reconciliation and Information Recovery (the ICRIR).
  - limits criminal investigations, legal proceedings, inquests and police complaints,
  - extends the prisoner release scheme in the Northern Ireland (Sentences) Act 1998, and
  - provides for experiences to be recorded and preserved and for events to be studied and memorialised.
7. The Scottish Government is of the view that the Bill (with the exception of clauses 18 to 22, 35, 36 and 42 and the clauses within Part 4) requires that a legislative consent memorandum be lodged in the Scottish Parliament.
8. The Scottish Government's reasons for this view are set out in paragraphs 5 to 67 of the LCM. The LCM can be found in **Annex A**.

## Scottish Government Legislative Consent Memorandum

9. A Legislative Consent Memorandum was lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, on 20 October 2022.
10. The Cabinet Secretary for Justice and Veterans is due to attend the Committee meeting on 7 December to answer any questions members may have on the LCM (rescheduled from 16 November).
11. After consideration of the proposed purpose of the Bill, and the clauses requiring Legislative Consent Motions, **Scottish Ministers have decided not to recommend to the Parliament that it passes a motion consenting to the Bill.**

12. The Scottish Government's reasons for not recommending consent are set out in paragraphs 72 to 75 of the LCM.

## **Consideration by the Delegated Powers and Law Reform Committee**

13. The Delegated powers and Law Reform Committee considered the powers to make subordinate legislation conferred on UK Ministers and Scottish Ministers in devolved areas in the Bill at its meeting on 8 November. The DPLR Committee agreed to write to the UK Government and to consider the Bill again at a future meeting.

14. The DPLR Committee subsequently wrote to the Rt Hon Chris Heaton-Harris MP, Secretary of State for Northern Ireland on 10 November. A copy of the letter can be found in **Annex B**.

15. The DPLR Committee also published its [report](#) on the LCM on 15 November. Of particular note is the conclusion at paragraph 19 that:

“The Committee’s position ... does not take a view on whether any particular powers in this Bill should in fact be conferred on Scottish Ministers (instead of or in addition to UK Ministers) or whether any particular powers in this Bill that are conferred on UK Ministers should be subject to a requirement for the Scottish Ministers’ consent, the Committee just draws to the attention of the lead committee that the Bill confers new powers in devolved areas which will be exercised by UK Ministers with no opportunity for scrutiny by the Scottish Parliament.”

## **Action**

**16. Members are invited to take evidence from the Cabinet Secretary for Justice and Veterans.**

**17. Members will then be invited to agree that the clerks produce a short, factual report, setting out their recommendations to the Parliament on the issue of legislative consent. The draft would be cleared by the Convener.**

**Clerks to the Criminal Justice Committee  
December 2022**

## Annex A

### Legislative Consent Memorandum

#### Northern Ireland Troubles (Legacy and Reconciliation) Bill

##### Background

1. This memorandum has been lodged by Keith Brown, Cabinet Secretary for Justice and Veterans, under Rule 9B.3.1(a) of the Parliament's standing orders, and is supported by Ash Regan, Minister for Community Safety. The Northern Ireland Troubles (Legacy and Reconciliation) Bill is a UK Government Bill that was introduced in the House of Commons on 17 May 2022, it was approved by that House 4 July 2022 and had its first reading in the House of Lords on 5 July 2022. The Bill can be found at [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill - Parliamentary Bills - UK Parliament](#).

##### Content of the Northern Ireland Troubles (Legacy and Reconciliation) Bill

2. The Bill does the following and has the following policy objectives:

- The Bill will establish a new independent body, the Independent Commission for Reconciliation and Information Recovery (ICRIR). When requested to do so, this body will conduct investigations into deaths and harmful conduct which resulted from conduct forming part of the Troubles. Clause 1 of the Bill defines "harmful conduct" as an act or omission which caused a person to suffer physical or mental harm of any kind. Clause 1 also defines "the Troubles" as events or conduct relating to the constitutional status of Northern Ireland or political or sectarian hostility between people in Northern Ireland that occurred between 1 January 1966 and 10 April 1998. Conduct forming part of the Troubles can therefore have taken place in Scotland or otherwise be subject to the jurisdiction of the Scottish courts.
- The ICRIR may also open an investigation into a death or into harmful conduct if an individual comes forward seeking immunity (see below) in relation to that specific death or harmful conduct, if it does not already have a live investigation ongoing.
- Certain State bodies will be under a duty to give the ICRIR full disclosure of all relevant material that is reasonably required for it to fulfil its functions. Other persons can also be compelled to provide evidence in person or in

writing to the ICRIR when acting in the course of its duties. The ICRIR can exercise its functions and investigate deaths or harmful conduct in or as regards Scotland.

- The Bill will introduce a conditional immunity scheme, allowing those who cooperate with the ICRIR to receive immunity from prosecution for offences resulting in or connected with Troubles-related deaths and harmful conduct. Individuals will be able to apply for immunity for conduct related to any relevant case where a decision to prosecute is yet to be made by prosecutors. These provisions will also apply to offences committed in or as regards Scotland.
- The Bill will bar investigations into Troubles related incidents by any organisation other than the ICRIR, and bar prosecutions for Troubles-related offences not involving death or harmful conduct, or which are not connected to offences involving death or harmful conduct. It will prevent criminal enforcement action from being taken against a person who has not been given immunity in respect of a serious or connected Troubles related offence, unless and until the ICRIR refers the matter to the Prosecutor. These provisions will apply to incidents and potential prosecutions in or as regards Scotland.
- The Bill also bars civil legal claims arising from conduct forming part of the Troubles where a claim had yet to be raised by 17 May 2022 (the date of the Bill's introduction). Those raised before the Bill's introduction may continue. These provisions will apply to civil claims in or as regards Scotland.
- The Bill will also amend early release provisions for prisoners serving sentences for Troubles related sentences in Northern Ireland. These provisions will apply to prisoners transferred to Northern Ireland from Scotland.
- The Bill will stop Fatal Accident Inquiries (FAIs) which relate to a death that resulted directly from the Troubles, and which have not yet reached the stage of a substantive hearing by 1 May 2023 or the date on which the ICRIR becomes operational (whichever comes first); substituting instead that such a death will be investigated by the ICRIR.
- As a matter of Northern Irish law, the Bill will require designated persons to carry out a programme of memorialisation work, including an oral history initiative. The aim is to provide a central place for people of all backgrounds to share their experiences and perspectives relating to the Troubles.

## **Provisions which require the lodging of a Legislative Consent Motion**

3. The Scottish Government is of the view that the Bill (with the exception of clauses 18-22, 35, 36 and 42 and the clauses within Part 4) requires that a legislative consent memorandum be lodged in the Scottish Parliament.
4. The Scottish Government is of this view for the following reasons.

### **Part 1 of the Bill (clause 1)**

5. This Part provides key definitions in support of the remainder of the Bill. Insofar as those definitions relate to the purpose of the Bill, and help define the functions of the ICRIR and other bodies affected by the Bill, and where such a purpose or function falls within the legislative competence of the Scottish Parliament, then a LCM is required to be lodged with regard to them. Insofar as those definitions relate to matters which modify the functions of the Scottish Ministers then a LCM is required to be lodged with regard to them.

### **Part 2 of the Bill (Clauses 2-33)**

6. This relates to the establishment and functions of the ICRIR. The ICRIR is to be a UK wide body with functions exercisable within or as regards Scotland. Where those functions are exercisable in or as regards Scotland then a LCM will require to be lodged where those functions relate to matters within the legislative competence of the Scottish Parliament.

## **Powers and functions of the ICRIR**

7. Clauses 2 – 6 and Schedule 1 – 7 of the Bill establish the ICRIR and make ancillary, general and foundational provisions relative to it and its functions. The ICRIR's functions fall within legislative competence of the Scottish Parliament as set out in the analysis of the clauses below, accordingly so do these provisions.
8. Clause 2 lists the ICRIR's functions and makes provisions as to ICRIR reporting and funding, it gives effect to schedule 1 of the bill which contains provisions as to Commissioners and officers of the ICRIR.
9. Clause 3 relates to officers of the ICRIR who will carry out the functions of the ICRIR and clause 4 provides limits to those functions. Clause 5 makes provision requiring 'relevant authorities' (as defined in clause 54) to make materials and information available to the ICRIR in connections with its functions. Those authorities include Police Scotland, the Police Investigations and Review Commissioner (PIRC) and the Scottish Ministers and this provision falls within the legislative competence of the Scottish Parliament where the authority in question provides information connected to a matter falling within legislative competence. In addition, by conferring a function on Scottish Ministers clause 5 alters the executive competence of the

Scottish Ministers and thus also requires a Legislative Consent Memorandum to be lodged in that regard.

10. Clause 6 makes further provision relative to conferring the powers and privileges of a Scottish police constable upon the Commissioner for Investigations and other ICRIR officers for use in the carrying out of their functions; it also gives effect to schedule 2 which makes further provision in that regard and which also confers a function on Scottish Ministers to enter into an agreement with the Commissioner for Investigations with regard to the exercise by ICRIR officers of the powers and privileges of the constable. By conferring a function on Scottish Ministers, schedule 2 alters the executive competence of the Scottish Ministers and thus also requires a Legislative Consent Memorandum to be lodged in that regard.

## **Investigation of deaths**

11. Matters relating to the investigation of deaths in or as regards Scotland fall within the legislative competence of the Scottish Parliament. The functions of the ICRIR and the processes which relate to the investigation of certain Troubles related deaths in or as regards Scotland are set out in and governed by the following clauses and schedules.

12. Clause 7 makes modification to Scottish criminal procedure and the law on the admissibility of evidence in Scottish criminal proceedings where evidence was obtained by the ICRIR in certain circumstances in the carrying out of its functions, (including those relating to the investigation of deaths or harmful conduct). As such it falls within the legislative competence of the Scottish Parliament.

13. Clause 8 makes modification to the law on the admissibility of evidence in Scottish civil proceedings and in FAls where evidence was obtained by the ICRIR in certain circumstances in the carrying out of its functions, (including those relating to the investigation of deaths or harmful conduct). As such it falls within the legislative competence of the Scottish Parliament.

14. Clause 9 makes provision for close family members and other persons (such as a sheriff, a procurator fiscal and the Lord Advocate) to request a review of a Troubles related death and the circumstances under which such a request can be made. Clause 9 (and clause 15) also introduces schedule 3 which defines the close family members who can request reviews of certain deaths and which defines the relevant family members who will receive drafts of reports produced after such reviews (and prior to publication). Such deaths and their review relate to matters which can fall within the legislative competence of the Scottish Parliament.

15. Clauses 11-13 make further provision relative to the review of a Troubles related death by the ICRIR and as per the reasons set out in paragraph 11 of this memorandum, such further provisions also fall within the legislative competence of the Scottish Parliament.

16. Clause 14 introduces schedule 4 which makes provision about enforcement of notices which require the submission of evidence relative to the carrying out of the ICRIR's investigatory functions. Again as these are in connection with and supportive of the investigatory function of the ICRIR these provisions also fall within the

legislative competence of the Scottish Parliament for the reasons given in paragraph 11 of this memorandum.

17. Clauses 15 – 17 make provision as to the reports of the ICRIR that result from its review into Troubles related deaths. These provisions relate to the outcome of the ICRIR investigations into deaths and as such they also fall within the legislative competence of the Scottish Parliament for the reasons given in paragraph 11 of this memorandum.

18. Clauses 24 and 25 relate to the production and publication of a 'historical record' which gives an account of the circumstances of each Troubles related death that is not otherwise reviewed under clauses 13 – 33. While not connected to the investigation of deaths otherwise reviewed by the ICRIR in terms of clauses 13 -33 of the Bill, provisions with the purpose of creating such a historical record of Troubles deaths are not a reserved matter with regard to deaths occurring in or as regards Scotland and thus these provisions fall within the legislative competence of the Scottish Parliament.

19. Clauses 26 to 31 relate to the processing, holding and disclosure of information by the ICRIR that it has as it carries out its functions. As the ICRIR's functions require a LCM then these provisions, when governing those functions, also require a LCM.

20. Clause 26 (and schedules 5 and 6, which it introduces) relate to the disclosure of information held by ICRIR as it carries out its functions. The clause also makes clear that certain disclosures are not permitted, including (at clause 26(9)), those prohibited by Part 5 of the Investigatory Powers Act 2016 (police equipment interference warrant for the purpose of detecting and preventing serious crime). The prevention and detection of crime is a matter within the legislative competence of the Scottish Parliament and the application of the prohibition on disclosure in Part 5 of the 2016 Act also means that this provision requires a LCM as those provisions also relate to matters which fall within the legislative competence of the Scottish Parliament.

21. Clause 29 makes provision for the Secretary of State to give guidance to persons (including ICRIR, Police Scotland, the PIRC and the Scottish Ministers) about the identification of sensitive information (as defined in clause 54), to which those persons must have regard. Accordingly, in addition to relating to a matter within the legislative competence of the Scottish Parliament the clause confers a function on the Scottish Ministers and requires a LCM as it modifies the executive competence of the Scottish Ministers.

22. Clause 30 provides that the Secretary of State may make regulations concerning the holding and handling of information by the ICRIR. The subject matter of such regulations relates to matters such as the storage, destruction and notification about, information held by the ICRIR collected in the discharge of its functions. Such functions are within the legislative competence of the Scottish Parliament, and regulations making further ancillary and connected provisions in that regard also fall within that competence. This clause will also then require a LCM as it empowers the further regulation of matters falling within the Scottish Parliament's legislative competence.

23. Clause 31 provides that the Secretary of State may make regulations that prevent the destruction of biometric materials and allow the use of same by the ICRIR in the carrying out of its functions (which functions are subject to a LCM). The purpose of the provision is the support of the ICRIR functions and thus the clause falls to similarly require a LCM. Further the power to override the destruction provisions set out in section 18(3) to (5) of the Criminal Procedure (Scotland) Act 1995 as applied by schedule 4 of the International Criminal Court (Scotland) Act 2001, relate to ICC crimes, and as such do not relate to a reserved matter; thus such a modification falls within the legislative competence of the Scottish Parliament. The United Kingdom Government indicated in its explanatory notes to the Bill that this clause did not require a LCM. The United Kingdom Government have now accepted that an LCM will in fact be needed for the reasons set out above.

24. Clause 32 provides for a review of the performance of the functions of the ICRIR by the Secretary of State. Where those functions relate to a matter within the Scottish Parliament's legislative competence, then so does a provision providing for such a review. Clause 33 sets out an enabling power for the Secretary of State to make regulations concerning the winding up of the ICRIR, if satisfied that the need to exercise its functions has ceased. It relates to the termination of the ICRIR as it exercises functions which do not relate to a reserved matter, this clause therefore makes provision that falls within the legislative competence of the Scottish Parliament.

## **Investigation of harmful conduct (including criminal conduct and conduct which may attract a claim in civil proceedings)**

25. Matters relating to the investigation and prosecution of criminal offences and which relate to general criminal procedure fall within the legislative competence of the Scottish Parliament. Matters which relate to the justiciability of harmful conduct in civil proceedings in Scotland also fall within the legislative competence of the Scottish Parliament. The functions of the ICRIR and the processes which relate to the investigation of harmful conduct in or as regards Scotland are set out in and governed by the following clauses and Schedules.

26. Clause 7 makes modification to Scottish criminal procedure and the law on the admissibility of evidence in Scottish criminal proceedings where evidence was obtained by the ICRIR in certain circumstances in the carrying out of its functions, (including those relating to the investigation of deaths or harmful conduct). Scots criminal law and the law on the admissibility of evidence in Scottish criminal proceedings fall within the legislative competence of the Scottish Parliament.

27. Clause 8 makes modification to the law on the admissibility of evidence in Scottish civil proceedings and in FAs where evidence was obtained by the ICRIR in certain circumstances in the carrying out of its functions, (including those relating to the investigation of deaths or harmful conduct). The law relating to the admissibility of evidence in Scottish civil proceedings and in FAs falls within the legislative competence of the Scottish Parliament.

28. Clause 10 empowers any person who suffered serious physical or mental harm due to Troubles related harmful conduct to request that the ICRIR carry out a review of that conduct. It also empowers the Secretary of State to request a review into any Troubles related harmful conduct. Such conduct and its review relates to matters (such as Scots criminal and civil law, and the investigation of criminal conduct) which fall within the legislative competence of the Scottish Parliament.

29. Clauses 11-13 make further provision relative to the review of Troubles related harmful conduct by the ICRIR and as per the reasons set out in paragraph 25 of this memorandum such further provisions also fall within the legislative competence of the Scottish Parliament.

30. Clause 14 introduces schedule 4 which makes provision about enforcement of notices which require the submission of evidence relative to the carrying out of the ICRIR's investigatory functions. Again as these are in connection with and supportive of the investigatory function of the ICRIR these provisions also fall within the legislative competence of the Scottish Parliament for the reasons given in paragraph 25 of this memorandum.

31. Clauses 15 – 17 make provision as to the reports of the ICRIR that result from its review into Troubles related harmful conduct. These provisions relate to the outcome of the ICRIR investigations into harmful conduct and as such they also fall within the legislative competence of the Scottish Parliament for the reasons given in paragraph 25 of this memorandum.

32. Clauses 26 to 31 relate to the processing, holding and disclosure of information by the ICRIR that it has as it carries out its functions. As the ICRIR's functions require a LCM then these provisions, when governing those functions, also require a LCM.

33. Clause 26 (and schedules 5 and 6, which it introduces) relate to the disclosure of information held by ICRIR as it carries out its functions. The clause also makes clear that certain disclosures are not permitted, including (at clause 26(9)), those prohibited by Part 5 of the Investigatory Powers Act 2016 (police equipment interference warrant for the purpose of detecting and preventing serious crime). The prevention and detection of crime is a matter within the legislative competence of the Scottish Parliament and the application of this prohibition on disclosure in Part 5 of the 2016 Act also means that this provision requires a LCM as those provisions also relate to matters which fall within the legislative competence of the Scottish Parliament.

34. Clause 29 makes provision for the Secretary of State to give guidance to persons (including ICRIR, Police Scotland, the PIRC and the Scottish Ministers) about the identification of sensitive information (as defined in clause 54), to which those persons must have regard. Accordingly, in addition to relating to a matter within the legislative competence of the Scottish Parliament the clause confers a function on the Scottish Ministers and requires a LCM as it modifies the executive competence of the Scottish Ministers.

35. Clause 30 provides that the Secretary of State may make regulations concerning the holding and handling of information by the ICRIR. The subject matter of such regulations relates to matters such as the storage, destruction and notification about,

information held by the ICRIR collected in the discharge of its functions. Such functions are within the legislative competence of the Scottish Parliament, and regulations making further ancillary and connected provisions in that regard also fall within that competence. This clause will also then require a LCM as it empowers the further regulation of matters falling within the Scottish Parliament's legislative competence.

36. Clause 31 provides that the Secretary of State may make regulations that prevent the destruction of biometric materials and allow the use of same by the ICRIR in the carrying out of its functions (which functions are subject to a LCM). The purpose of the provision is the support of the ICRIR functions and thus the clause falls to similarly require a LCM. Further the power to override the destruction provisions set out in section 18(3) to (5) of the Criminal Procedure (Scotland) Act 1995 as applied by schedule 4 of the International Criminal Court (Scotland) Act 2001, relate to ICC crimes, and as such do not relate to a reserved matter; thus such a modification falls within the legislative competence of the Scottish Parliament. The United Kingdom Government indicated in its explanatory notes to the Bill that this clause did not require a LCM. The United Kingdom Government have now accepted that an LCM will in fact be needed for the reasons set out above.

37. Clause 32 provides for a review of the performance of the functions of the ICRIR by the Secretary of State. Where those functions relate to a matter within the Scottish Parliament's legislative competence, then so does a provision providing for such a review. Clause 33 sets out an enabling power for the Secretary of State to make regulations concerning the winding up of the ICRIR, if satisfied that the need to exercise its functions has ceased. It relates to the termination of the ICRIR as it exercises functions which do not relate to a reserved matter, this clause therefore makes provision that falls within the legislative competence of the Scottish Parliament.

## **Grant of immunity from prosecution and passing of information to prosecutors**

38. Clauses 18 – 22 of the Bill make provision empowering the ICRIR to grant immunity from prosecution to a person who applies to it in respect of a non-sexual offence which relate to serious conduct forming part of the Troubles. Immunity is dependent upon the exercise of discretion by the ICRIR, relative to its views on the truthfulness of the account given by the perpetrator of his/her conduct to which the application for immunity relates. In coming to that decision, the ICRIR must take account of any guidance issued by the Secretary of State. This means that immunity from prosecution is not conferred by automatic operation of law, but rather by an independent decision maker acting under the law. In terms of clause 36, the Lord Advocate would not be permitted to prosecute any person in respect of whom immunity was granted.

39. The Scottish Government is of the view that while these provisions represent a modification of Scottish criminal procedure and the Scottish prosecution system, (by introducing a new decision maker into the prosecution process), they also modify the position provided for in section 48(5) of the Scotland Act 1998. Section 48(5) is modified because the decision making of the Lord Advocate, in her capacity as head of the system of criminal prosecution and investigation of deaths in Scotland, would

be ultimately subject to the independent discretion of the ICRIR panel, in their decision to grant immunity from prosecution.

40. As such, these clauses relate, at least in part, to a matter outwith the legislative competence of the Scottish Parliament. Section 48(5) is a “protected enactment” by virtue of paragraph 4(1) of schedule 4 of the Scotland Act and thus these provisions, in modifying that section, fall outwith the legislative competence of the Scottish Parliament.

41. In addition, while the change represents a modification of the functions of a Scottish Minister, the modifications are limited to the Lord Advocate’s retained functions as the head of the system of the investigation of crime and the investigation of deaths in Scotland, and not her functions generally as a Scottish Minister. As such an LCM is not required on that ground.

42. The UK Government is of the view that the effect of the clause is not to modify section 48(5) however, and as such they are of the view that this clause does require an LCM because it falls within the legislative competence of the Scottish Parliament.

43. Clause 12 relates to a review into a death caused by the person requesting immunity, or in consequence of their conduct, with clause 23 making provision about the passing of information about conduct which may constitute an offence to the Lord Advocate from the ICRIR. These provisions do modify and relate to Scots criminal law and criminal proceedings as they apply to such conduct and offences, and therefore fall within the legislative competence of the Scottish Parliament.

## **Part 3 of the Bill (Clauses 34 - 42)**

44. This Part of the Bill, while also conferring functions on ICRIR, makes particular provision with regard to: criminal investigations and enforcement, immunity from prosecution, actions in delict (and under the Damages (Scotland) Act 2011), and to FAls carried out under the Inquiries into Fatal Accidents Sudden Deaths etc. (Scotland) Act 2016. These matters generally fall within the legislative competence of the Scottish Parliament and will require a LCM. This Part also includes changes to the law on prisoner release in Northern Ireland, which has an effect on the executive competence of Scottish Ministers in relation to prisoners transferred from Scotland to Northern Ireland.

## **Criminal investigation/enforcement and the effect of immunity**

45. Clause 34 modifies the way in which all Troubles related criminal offences can be investigated in Scotland by preventing their investigation. As such it requires a LCM as it modifies Scottish criminal procedure by automatic operation of law, and thus falls within the legislative competence of the Scottish Parliament.

46. Clause 35 prevents criminal enforcement action from being taken in Scotland against a person who has been granted immunity under clause 18 in respect of a serious or connected Troubles related offence. As this clause is incidental and

consequential on the effect of clauses 18-22, which are not within the legislative competence of the Scottish Parliament, then the Scottish Government is of the view that a LCM is similarly not required with regard to this clause. The Scottish Government therefore disagrees with the UK Government's view that a LCM is required in relation to this clause.

47. Clause 36 prevents criminal enforcement action from being taken, including in Scotland, against a person who has not been given immunity in respect of a serious or connected Troubles related offence, unless and until the ICRIR refers the matter to the relevant prosecutor (the Procurator Fiscal or the Lord Advocate in Scotland). The Scottish Government is of the view that these provisions represent a modification of Scottish criminal procedure and the Scottish prosecution system, (by introducing a new requirement to be met prior to prosecution). The clause also creates the potential for conflict were the Lord Advocate to wish to commence a prosecution against an individual in respect of whom immunity had not been granted by the ICRIR: she would be prevented from doing so, unless and until the ICRIR took the decision to refer the case to the prosecutor, which they have no obligation to do. The Scottish Government are of the view that this clause has the potential to impact on the independence of the Lord Advocate, as provided for in section 48(5) of the Scotland Act 1998.

48. As such, this clause does not relate to a matter within the legislative competence of the Scottish Parliament. Section 48(5) is a "protected enactment" by virtue of paragraph 4(1) of schedule 4 of that Act and thus this provision in modifying that section falls outwith the legislative competence of the Scottish Parliament.

49. In addition, while the change represents a modification of the functions of a Scottish Minister, the modifications are limited to the Lord Advocate's retained functions as the head of the system of the investigation of crime and the investigation of deaths in Scotland, and not her functions generally as a Scottish Minister. As such an LCM is not required on that ground.

50. The UK Government is of the view that the effect of the clause is not to modify section 48(5). As such, the UK Government is of the view that this clause does require a LCM, because it falls within the legislative competence of the Scottish Parliament.

51. Clause 37 modifies the way in which enforcement action can be taken against all other Troubles related criminal offences in Scotland (i.e. those not classed as a serious or connected offence), by automatically preventing any enforcement action from being taken. Accordingly, it modifies Scottish criminal procedure and requires a LCM. Clause 38 makes further provisions with respect to the operation of clauses 34 to 37 and thus insofar as it relates to clause 34 and 37, requires a LCM.

## **Civil law actions**

52. Clause 39 prevents all new civil actions (actions of delict or actions arising under section 4 of the Damages (Scotland) Act 2011) from being brought in Scotland regarding Troubles related conduct. It also gives effect to Schedules 8 and 9 of the Bill which make further provisions in this regard, including permitting the Secretary of State to be notified by the sheriff or by the Court of Session (as the case may be) and to intervene on the question of whether the civil action concerned will contravene the

effect of clause 39. This clause, and schedules 8 and 9, make a modification to Scots private law as it applies generally and thus falls within the legislative competence of the Scottish Parliament and requires a LCM.

## **Fatal Accident Inquiries**

53. Clause 40 of the Bill introduces schedule 10. Part 2 of schedule 10 removes the investigation of certain Troubles related deaths in Scotland from the ambit of FAIs via amendments to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016. This amendment reflects the taking over of the role of the investigation of these deaths by the ICRIR. It has the effect of automatically preventing current investigations, and those inquiries which are not at an advanced stage, from being progressed under the 2016 Act. It further prevents new inquiries from being raised under the Act. These provisions relate to matter within the legislative competence of the Scottish Parliament and require a LCM.

54. The schedule also provides that for an inquiry at an advanced stage (where proceedings have begun before the earlier of 1 May 2023 or the date of commencement of the provision), that the sheriff may request that the death be considered by the ICRIR under clause 9 of the Bill, adjourn the inquiry and then subsequently either resume or discontinue the inquiry. This provision has the effect of permitting the sheriff to bring a 'live' FAI to an end prior to the end of the proceedings.

## **Prisoner release in Northern Ireland**

55. Clause 42 gives effect to schedule 11 which changes Northern Irish prisoner release law as it applies to those who committed offences related to the Troubles. It removes the requirement to serve a minimum part of the sentence and extends the cohort of prisoners who may be subject to release for those offences to include those whose sentence relates to offences committed between 1 January 1966 and 7 August 1973. (Those who committed offences after that date but before 11 April 1998 are already included in the release scheme).

56. Prisoners can be transferred from Scotland to a Northern Irish prison to serve the remainder of their sentence. Scottish Ministers have the function of approving such a transfer and can choose to do so on a restricted basis. A restricted transfer means the prisoner's release, supervision and recall remain subject to Scots law and thus Scottish Ministers retain powers over that prisoner.

57. A prisoner who is transferred to Northern Ireland for a Troubles-related offence can apply to the Sentence Review Commissioner for release; and if agreed they cease to be a restricted transfer prisoner and are no longer under the control of the Scottish Ministers.

58. Schedule 11's extension of the period for which early release may be applied for, means that a prisoner who committed a Troubles-related offence in or in relation to Scotland, between 1966 and 7 August 1973, who is transferred to Northern Ireland, will now be able to apply for release under the amended scheme, cease to be a restricted transfer prisoner, and Scottish Ministers will lose their control over

their release. The inclusion of such prisoners will mean that Scottish Ministers' powers over such prisoner can now be removed via the prisoner's application to the Sentence Review Commissioner. This modification of Scottish Ministers' powers requires there to be a LCM for this provision.

59. The United Kingdom Government indicated in its explanatory notes to the Bill that these provisions did not require a LCM. The United Kingdom Government have now accepted that a LCM will in fact be needed for the reasons set out above.

## **Part 5 of the Bill (Clauses 52 - 58)**

60. Part 5 sets out final provisions which apply to the above mentioned Bill provisions, to the extent that they apply, they fall within the legislative competence of the Scottish Parliament and require a LCM. Clauses 52 to 54 and 57 require particular explanation.

61. Clause 52 introduces schedule 12 which makes modification to enactments in consequence of the effect of the Bill; insofar as the modification is consequential on a matter within the legislative competence of the Scottish Parliament, then so is the amendment. The schedule does so as follows.

62. Paragraph 4 amends the Regulation of Investigatory Powers Act 2000, to bring the actions of the ICRIR within the remit of the Investigatory Powers Tribunal. Insofar as the remit of the ICRIR falls within the legislative competence of the Scottish Parliament so will the modification of the jurisdiction of the Tribunal. While not referred to in the explanatory notes to the Bill the United Kingdom Government have accepted that a LCM will be needed for this reason.

63. Paragraph 6 amends the Investigatory Powers Act 2016, this also falls with the legislative competence of the Scottish Parliament insofar as it is done in consequence of the effect of clause 26 (see above discussion on that clause).

64. Paragraph 8 modifies the Prescription and Limitation (Scotland) Act 1973 to make it subject to the effect of clause 39, this modification is within the legislative competence of the Scottish Parliament.

65. Clauses 52 and 53 together confer a power on Scottish Ministers enabling them to make consequential regulations, in respect of the Bill and make provisions about those regulations. This modifies the executive competence of the Scottish Ministers and thus requires to be subject to a LCM.

66. Clause 54 sets out the meaning of words and expressions in the Bill and insofar as they support the other provisions of the bill that require a LCM they also require one.

67. Clause 57 confers a power on Scottish Ministers enabling them to make transitory, transitional or saving provisions within regulations in connection with the coming into force of any provision of the Bill. This modifies the executive competence of the Scottish Ministers and thus requires the clause to be subject to a LCM.

## Consultation

68. The UK Government does not appear to have undertaken a public consultation for this Bill; however, the then Secretary of State for Northern Ireland, The Rt Hon Brandon Lewis CBE MP, presented a policy paper to the UK Parliament, entitled *Addressing the Legacy of Northern Ireland's Past*, laying out their intentions for the Bill in July 2021.

69. The Scottish Government only received sight of the text of the Bill upon the Bill being introduced to the House of Commons on 17 May 2022. UK Government consultation with the Scottish Government prior to the introduction of the Bill has been limited with only minimal information regarding the aims of certain clauses of the Bill shared prior to the Bill's publication. As such, the Scottish Government has not had the opportunity to conduct any consultation in relation to this Bill.

## Financial implications

70. There will be no new expenditure by the Scottish Government associated with this Bill. The UK Government expects that, during the five year period of operation of the ICRIR, the Secretary of State for Northern Ireland will spend (on average) £35 to £50 million per year in providing resources to the ICRIR and to the designated persons carrying out memorialisation activities. The ICRIR will be wholly funded by the Secretary of State using that power. After the period of operation of the ICRIR, the Secretary of State is expected to incur some continuing costs in providing resources to the designated persons, but those costs are not expected to be substantial.

## Consent not recommended

71. After consideration of the proposed purpose of the Bill, and the clauses requiring Legislative Consent Motions, Scottish Ministers have decided not to recommend to the Parliament that it passes a motion consenting to the Bill.

## Reasons consent is not recommended

72. The Government is of the view that the Bill, as currently drafted, is incompatible with the Scottish Government's views that those who have suffered during the Troubles are able to obtain justice and that those who committed offences during that time are appropriately held to account/punished.

73. Further, the Bill makes novel and unwelcome changes to the functions and responsibilities of the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland, and whose independence is articulated in section 48(5) of the Scotland Act 1998. In particular, the power of the ICRIR to refuse to refer appropriate cases to the Lord Advocate, even where immunity has not been granted by the ICRIR impacts on the independence of the Lord Advocate, which is a fundamental cornerstone of our criminal justice system. While the provisions which make such changes in conflict with section 48(5) do not require consent, the provisions which do require consent perform a fundamental role in support of that impact as part of the larger framework created by the Bill relative to the general investigation,

outcomes and consequences of deaths and conduct connected to the Troubles (which are within legislative competence). Consequently the Scottish Government cannot recommend consent to such measures where they will contribute towards such an outcome.

74. Finally the Scottish Government is cognisant of the views of persons such as the Commissioner for Human Rights at the Council of Europe<sup>1</sup>, and the Northern Ireland Human Rights Commission<sup>2</sup> who have expressed concern that the Bill casts doubt upon the UK's compliance with the UK's duties under the European Convention on Human Rights.

75. For these reasons the Scottish Government recommends that the Scottish Parliament withhold consent for the provisions of this Bill which impact on devolved competencies.

## **Conclusion**

76. Under Rule 9B.3.3(d) of the Parliament's Standing Orders, if a member of the Scottish Government does not propose to include a draft motion in the Memorandum, the Memorandum must explain why not. Paragraphs 72 to 75 set out the Scottish Government's reasons for not including a draft motion in this Memorandum for the purposes of that rule; the Government does not support the Bill as it currently stands.

Scottish Government  
October 2022

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<sup>1</sup> [Submission by the Council of Europe Commissioner for Human Rights under Rule 9.4 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in the group of cases of McKerr v. the United Kingdom \(coe.int\)](#)

<sup>2</sup> [JCHR-Legacy-Briefing-NIHRC.pdf](#)

## Annex B

### Letter from the Convener, Delegated Powers and Law Reform Committee to Rt Hon Chris Heaton-Harris MP, Secretary of State for Northern Ireland

10 November 2022

Dear Secretary of State

#### **Northern Ireland Troubles (Legacy and Reconciliation) Bill**

I'm writing in relation to the consideration by the Scottish Parliament's Delegated Powers and Law Reform Committee of the [Legislative Consent Memorandum](#) ("LCM") for the Northern Ireland Troubles (Legacy and Reconciliation) Bill.

The remit of the Committee, under [rule 6.11.1\(b\) and \(c\)](#) of the Scottish Parliament's Standing Orders, includes considering and reporting on proposed powers to make subordinate legislation in particular bills or other proposed legislation as well as general questions relating to powers to make subordinate legislation.

The Explanatory Notes set out that the UK Government is seeking the Scottish Parliament's legislative consent for all the clauses of the Bill except for clauses 31, 41, 42 and Part 4. However, the Scottish Government states in the LCM that the UK Government now agrees with it that clauses 31 and 42 also require consent. The Scottish Government also states in the LCM that, in its view, legislative consent is not required for clauses 18-22, because they modify section 48(5) of the Scotland Act 1998, which it would be outwith competence for the Scottish Parliament to do.

The Committee considered the delegated powers in the Bill that are exercisable within devolved competence in the Bill at its meeting on 8 November.

#### Relevant delegated powers

The Committee is interested in the following clauses of the Bill which contain regulation-making powers that appear to be exercisable within devolved competence:

- clauses 52(2) and clause 57(4), which confer powers concurrently on the Scottish Ministers and UK Ministers, and
- clauses 30(1), 31(1) and 33(1) which confer powers on UK Ministers

The Committee notes that there is no requirement in the Bill that the UK Ministers obtain or seek the consent of the Scottish Parliament or Scottish Ministers before exercising the powers in the Bill within the Scottish Parliament's devolved competence. There does not appear to be any commitment in the accompanying documents that UK Ministers will seek such consent. In the absence of a consent requirement, the Scottish Parliament has no ability to scrutinise the decision to exercise these powers in relation to matters that are within its competence.

The Committee's previous position in relation to powers in UK bills conferred on UK Ministers in devolved areas has been as follows:

1. a. The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
2. b. Where such powers are exercised by the Secretary of State in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.
3. c. Powers conferred on the Secretary of State should be subject to a requirement for the Scottish Ministers' consent when exercised within devolved competence.
4. d. As a minimum, powers when exercised by the Secretary of State in devolved areas should be subject to the process set out in the [SI Protocol 2](#) where the power is within the scope of that protocol.

The Committee [wrote](#) to the UK Government on 12 July 2022 regarding the scrutiny of delegated powers in UK Parliament bills conferred on UK Ministers in devolved areas and the application or otherwise of SI Protocol 2. The Secretary of State for Levelling Up, Housing and Communities [responded](#) on 14 August indicating that the "UK Government takes into account a variety of factors when seeking delegated powers in devolved areas." The Secretary of State also indicated that "[w]hether or not to include statutory consent requirements is considered on a case-by-case basis as each policy area has a different legislative context."

The Committee would be grateful for a specific explanation in relation to each of the powers identified above as to:

- 1. The reasons why the UK Government considers it appropriate, in the particular policy context of this Bill, that the power has been conferred so that it is exercisable independently by the Secretary of State in relation to devolved matters; and**
- 2. The reasons why the UK Government considers it appropriate, in the particular policy context of this Bill, that when the power is exercised independently by the Secretary of State in relation to devolved matters:**
  - (a) there is no requirement to obtain the consent of the Scottish Ministers, and separately**
  - (b) there is no requirement to consult the Scottish Ministers.**

I would be grateful if you were able to provide a response to these questions by **24 November**.

I am copying this letter to the Rt Hon Alister Jack MP, Secretary of State for Scotland; Keith Brown MSP, Cabinet Secretary Justice and Veterans, and to the Convener of

**CJ/S6/22/31/1**

the Criminal Justice Committee, which is the Scottish Parliament's lead committee for the LCM.

I look forward to hearing from you.

Yours sincerely

Stuart McMillan MSP  
Convener of the Delegated Powers and Law Reform Committee