

CENTRE FOR MILITARY JUSTICE

BRIEFING ON THE NORTHERN IRELAND TROUBLES (LEGACY & RECONCILIATION) BILL

Introduction

1. The CMJ is a small, independent legal charity established in 2019 which undertakes educational and outreach work within the armed forces sector, promoting the rule of law, human rights and access to justice.¹ We also advise current and former members of the armed forces or their bereaved families who have suffered serious bullying, sexual harassment, sexual violence, other violence, racism or neglect.

Executive Summary

2. As recently as January 2020, this Government was promising the families of murdered British soldiers - and all the other families that lost loved ones during the Troubles - that there would be accountability and justice for those crimes. This was going to be delivered through the setting up of a long-promised 'Historical Investigations Unit' that would ensure the robust investigation of all unsolved murders, including murdered soldiers.
3. In what will not have been an isolated case, in 2015, the then Minister of State for the Armed Forces wrote to the MP of the family of a murdered soldier to offer the Government's assurance that it remained fully committed to bringing his killers to justice:

*'I know that (his) killers have never been brought to justice and this must be a cruel addition to (his mother's) grief. I would like to assure you and her that efforts to bring murderers from that period to justice are still very much alive. Under the Stormont House Agreement reached at the end of last year with the five political parties of the NI Executive and the Irish Government, the Government made a number of commitments. This included the establishment of an independent body, the Historical Investigations Unit, to be responsible for taking forward outstanding investigations into Troubles-related deaths. The HIU will take over this work from the Police Service of NI and will act as a designated resource for such investigations. I very much hope that it will be able to make progress on this and many other unsolved murders of British troops.'*²

4. All that changed on 17 May 2022, when the Government introduced the Northern Ireland Troubles (Legacy and Reconciliation) Bill.³ At a stroke, the Government proposes to bring to an end all criminal investigations, civil claims, inquests and police complaints concerning alleged unlawful killings and serious harms in the context of the Troubles. Although presented as designed to ensure that legacy issues are addressed comprehensively and fairly, at the Bill's heart is the objective of, as the Secretary of State for Northern Ireland put it, delivering on the Conservative Party's manifesto commitment to veterans so that they no longer have to live in 'perpetual fear of getting a knock at the door for actions taken in the protection of the rule of law many years ago'.⁴
5. The Bill creates, in place of criminal investigations, inquests and police complaints, a review body called the Independent Commission for Reconciliation and Information Recovery (the ICRIIR) that will be responsible for conducting reviews (not investigations) of deaths and other cases of harmful conduct (that are referred to it) and of publishing its findings in a report. It

¹ www.centreformilitaryjustice.org.uk

² Letter from Minister of State for the Armed Forces Penny Mordaunt to Mr Jim Fitzpatrick MP dated 15 September 2015

³ <https://bills.parliament.uk/bills/3160>

⁴ Secretary of State for Northern Ireland, Brandon Lewis, second reading debate.

will compile a historical record of all deaths caused by the Troubles; and a programme of memorialising the Troubles will be established.

6. In exchange for providing information to the ICIR, the Bill creates a conditional immunity scheme, providing immunity from prosecution for individuals that could otherwise be charged with Troubles-related offences. Future prosecutions would only be possible if immunity had not been granted, and following a referral to a prosecutor by the ICIR, the power of the police to make the referral having been removed.
7. Pte Tony Harrison was a 21 year-old British soldier who had served two tours of duty in Northern Ireland. He was murdered by the IRA in 1991. An IRA-RUC double-agent has admitted to being involved in the murder.⁵ A brief hour-long inquest (at which the family was not represented or permitted to ask questions) was held and one man was eventually convicted of a conspiracy offence (tipping off the IRA). The men that actually killed Pte Harrison were never officially identified⁶, properly investigated or charged. Pte Harrison's mother, Mrs Martha Seaman and her surviving son, Andy Seaman, have been seeking answers and accountability for Pte Harrison's death ever since. In 2016, the Police Ombudsman of Northern Ireland accepted the case for investigation, with a view to examining whether there had been any police misconduct or criminality connected to the death. This Bill, if passed into law, will close that file immediately and remove any realistic hope the family has that anyone will ever be properly investigated, charged or convicted of the killing.⁷
8. Pte Harrison's family is not alone. 722 service personnel were killed in paramilitary attacks like these in Northern Ireland during the Troubles. We now know from a Freedom of Information Act request that there are 225 cases still under or awaiting investigation where the victim was a member of the armed forces. This Bill now makes it incredibly unlikely that any unsolved murders of British soldiers in Northern Ireland will ever be solved. Bereaved military families whose loved ones were killed and never saw anyone brought to justice, and surviving veterans that lost much-missed and respected colleagues in Northern Ireland have nothing to gain from this this Bill and everything to lose.
9. There have been just six prosecutions brought against veterans since the Good Friday Agreement, almost 25 years ago. There has not been a single conviction. That is not a witch-hunt. In the handling of that tiny number of cases, there is evidence that decision-making by prosecutors has been poor, as evidenced when the trials of three former soldiers collapsed last year following very basic errors. Those prosecutorial failures should not be used now as an excuse by Government to stop all prosecutions, or render their prospect largely theoretical. Like any other defendant, veterans are entitled to the full protection of the criminal law, including special measures to protect and support them to give their best evidence if they are charged. They should not be subjected to multiple poor-quality investigations.
10. But, as one retired senior officer that had served six tours in Northern Ireland explained to the CMJ, there has been no attempt on the part of the Ministry of Defence to explore the extent to which senior officers may have been responsible for poor training, for briefing soldiers on the ground badly and as he put it, 'revving the soldiers up' before a deployment. There must be command accountability for those who failed to provide the necessary restraint and guidance to young soldiers having to make instant decisions in perilous situations - this applies to both commanders and the Ministry of Defence that tolerated or encouraged a poor culture or who failed to provide appropriate training and supervision. In many cases those officers and officials are no longer alive, which makes any examination harder, but not impossible. And in

⁵ '50 Dead Men Walking' is a book written by Martin McGartland, the double-agent involved in Pte Harrison's death, in which he admits his involvement in the murder.

⁶ Though of course the double-agent and, it is suspected, the RUC knew who the killers were.

⁷ A short blog written by the brother of Pte Tony Harrison, Andy Seaman, explaining why he is so opposed to the legislation, is here: <https://centreformilitaryjustice.org.uk/no-impunity-for-murder-the-governments-proposals-for-northern-ireland-betray-my-brothers-legacy/>

any case the Government could acknowledge and accept that this is a large part of the picture that has been badly ignored to date.

11. But, regardless of seniority, as a matter of principle, soldiers are not entitled to immunity from prosecution where there is evidence to suggest serious criminality, any more than anyone else. To suggest otherwise severely undermines the Government's belated apologies for unlawful killings by soldiers revealed by recent inquests, and brings the armed forces into disrepute.
12. At the same time the Government must stop stoking the fears of the veteran community. 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. Those that served in the extremely difficult environment of Northern Ireland during Operation Banner and who acted reasonably and within the law and within the rules of engagement as they genuinely understood them to be have nothing to fear.
13. Much like the Overseas Operations Act that passed last year, this law is presented as in the interests of the armed forces but is nothing of the sort. All this Bill does is create the impression that the armed forces consider themselves to be above the law. This is fundamentally inconsistent with everything we know about the service personnel we support who expect and are entitled to be both bound by and protected by the law.

Background

Deaths

14. In total around 3,520 individuals lost their lives during the Troubles. This figure includes all civilians, paramilitaries, police and service personnel. 1,441 of those were service personnel. 722 of those service personnel were killed in paramilitary attacks.⁸ Between August 1969 and July 2007, more than 300,000 service personnel were deployed in Northern Ireland as part of Operation Banner.
15. According to the "Sutton Index of Deaths", at the Conflict Archive on the Internet (CAIN), the British military killed 307 people during this period. Of those, it has been reported that 51% were civilians; 42% were Republican paramilitaries; and 5% were loyalist paramilitaries.⁹
16. The Good Friday Agreement (GFA, or Belfast Agreement), was reached following multi-party negotiations and signed on 10 April 1998. The Good Friday Agreement did not include a mechanism for dealing with all the unsolved killings of the Troubles, either by terrorists, the police or the British Army. Nor did it provide an amnesty for crimes which had not yet been prosecuted.¹⁰
17. In 2006, a 'Historical Enquiries Team' (HET) was established within the Police Service of Northern Ireland (PSNI) in response to various court judgments that there had been serious shortcomings in the State's investigations into alleged unlawful killing in the context of the

⁸ <https://www.gov.uk/government/news/armed-forces-mark-50-years-since-the-start-of-operations-in-northern-ireland>

⁹ The CAIN Archive is a collection of information and source material on the Troubles and politics in Northern Ireland from 1968 to the present. CAIN is located in Ulster University and is part of ARK (the social policy hub established by Queens University Belfast and Ulster University) and the International Conflict Research Institute, INCORE. CAIN and INCORE developed the Accounts of the Conflict website here: <https://accounts.ulster.ac.uk/repo24/index.php>; <https://cain.ulster.ac.uk/sutton/crosstabs.html>.

¹⁰ The GFA included provisions for arranging the release of prisoners convicted of qualifying offences. Between 1998 and 2012, the Sentence Review Commission received 636 applications from prisoners, of which 506 applications were granted release. <https://commonslibrary.parliament.uk/research-briefings/cbp-8352/> p16. So called 'letters of comfort' that were issued at the time of the GFA to those suspected of paramilitary activity did not amount to an immunity from prosecution.

Troubles. The HET was to examine all deaths attributable to the security situation between 1968 and 1998.

18. Following serious criticism of the work of the HET from Her Majesty's Inspectorate of Constabulary, the HET was disbanded in 2014 and replaced with the smaller 'Legacy Investigations Branch' (LIB), also operating within the PSNI.
19. At the time of writing, the LIB continues to review all unsolved murder cases linked to the Troubles. The LIB inherited over 900 cases from the HET, involving nearly 1,200 deaths. In 2017, of the total 923 deaths in its caseload at the time, 609 were attributed to paramilitaries (379 to republicans, 230 to loyalists) and 283 to the security forces (military and Royal Ulster Constabulary) (and 31 unknown). The CMJ made a Freedom of Information Act request of the PSNI in June 2022, that confirmed it still had 1117 cases, which included 202 victims that were members of the armed forces. In a further 23 cases, the victim had been ex-forces. That is 225 unsolved cases where the victim had been in the armed forces.
20. Separately, Operation Kenova was set up to investigate the alleged criminal activities of a former British Army agent (code-named 'stake knife') and potential offences committed in the handling of that agent by members of paramilitary organisations and the British security forces. In total, 236 murders are currently being examined by the Operation Kenova team.

How many convictions of British soldiers have there been?

During the Troubles

21. During the Troubles themselves, there was a very small number of convictions of soldiers accused of unlawful acts. According to the Army, these 'were very few – a dozen or so serious cases, over more than 30 years'.¹¹ In the majority of cases referred to a prosecutor for a decision on charge, it was reported that the Director of Public Prosecutions for Northern Ireland directed that there was no case to answer, or the defendants were acquitted at trial. According to the Army's 2006 assessment: 'The basis on which these directions were given or acquittals made was, broadly, that the soldier had acted reasonably in the circumstances pertaining at the time; and this was the case even if the soldier had in fact been mistaken.'¹²
22. Multiple sources cite that six British soldiers were convicted of the crime of murder while on duty in Northern Ireland, arising from four incidents.
 - a. Pte Ian Thain (for the murder of Thomas Reilly);¹³
 - b. Pte Lee Clegg (for the murder of Karen Reilly) that was later overturned on appeal;¹⁴
 - c. Scots Guards Mark Wright & James Fisher (for the murder of Peter McBride);¹⁵
 - d. Sgt Stan Hathaway and John Byrne of the Argyll & Sutherland Highlanders (for the murders of Michael Naan and Andrew Murray).¹⁶

¹¹ British Army, Operation Banner: An Analysis of Military Operations in Northern Ireland, Army Code 71842, July 2006

¹² British Army, Operation Banner: An Analysis of Military Operations in Northern Ireland, Army Code 71842, July 2006

¹³ <https://www.britishpathe.com/video/VLVA641PYUIODO3PWLL948BNOPF19-NORTHERN-IRELAND-SOLDIER-JAILED-FOR-MURDER/query/murder>; the victim was the road manager for the pop group Bananarama and had been running away from a checkpoint where other youths had been shouting at the soldiers. He was unarmed. Giving judgment, the Judge stated he did not believe the accused genuinely thought he had been about to be shot at.

¹⁴ <https://www.casemine.com/judgement/uk/5a8ff85a60d03e7f57ebeb0>; <https://www.theguardian.com/uk/1999/mar/12/johnmullin>

¹⁵ <https://www.theyworkforyou.com/ni/?id=2000-12-05.3.0>

¹⁶ <https://hansard.parliament.uk/commons/2001-11-19/debates/f43820ee-b65a-4db7-831d-f50195b660f7/MrJohnByrneAndMrStanHathaway>; <https://www.irishtimes.com/culture/books/catholic-farmer-s-killing-in-north-and-the-british-army-s-tribal-war-1.3442019>

23. Four of the convicted were reported by multiple sources to have been permitted to re-join the British Army upon their release from prison.

Since the Peace Process

24. Since the peace process, criminal charges have been brought against six former military personnel for offences committed during the Troubles, in five separate incidents, with no convictions, as follows:
- a. Soldiers A and C – charged with the murder of IRA Commander Joe McCann - were acquitted in 2021 when the court ruled that the central evidence in the cases - alleged admissions from 1972 - was inadmissible. The soldiers had made their alleged admissions not under caution, on the orders of a senior officer and without the benefit of independent legal advice. The judge in the case said, ‘the safeguards which were denied to the defendants in this case are exactly those which the law requires to be offered to suspects from every background – republicans, loyalists and all others. The fact that those defendants were soldiers does not mean that they get extra protection from the law but nor do they get less...’¹⁷
 - b. Similar reasoning led to the decision to halt proceedings against Soldier B, accused of murdering Daniel Hegarty, aged 15, in 1972.¹⁸
 - c. Soldier F was accused of murder and attempted murder during the events of Bloody Sunday. In relation to the other 18 suspects referred, no charges were brought on the grounds that the evidential test was not met. The case against Soldier F was thrown out following the decisions in Soldier A and Cs cases, above. The Public Prosecutors Service of Northern Ireland has since been ordered by the court to reconsider that decision which remains ongoing at the time of writing.
 - d. A further case against a former Grenadier Guardsman Daniel Holden accused of gross negligence manslaughter of Aidan McAnespie continues at the time of writing.
 - e. Dennis Hutchings, charged with the murder of Pat Cunningham, a young man with learning disabilities, who died before the trial concluded.¹⁹

Convictions of members of paramilitary organisations

25. It is hard to identify a figure for the number of convictions of members of paramilitary organisations for murder during the Troubles themselves. Sources refer to tens of thousands of republican and loyalists being jailed for crimes committed during the Troubles.²⁰
26. In April 2019 the Public Prosecutors Service of Northern Ireland announced that between 2011 and 2019, it took prosecutorial decisions in 26 legacy cases, 21 of which involved

¹⁷<https://www.judiciaryni.uk/sites/judiciary/files/decisions/The%20Queen%20v%20Soldier%20A%20and%20Soldier%20C.pdf>

¹⁸ <https://www.bbc.co.uk/news/uk-northern-ireland-57694417>

¹⁹ Denis Hutchings' wife has stated in an interview that her late husband did not support amnesties for British soldiers. 'He was determined to fight this. He knew he wasn't guilty and he wasn't going to let anyone say he was. When they said about having an amnesty, that infuriated him. 'He said, "They give you an amnesty if you're guilty, but I wasn't." He wanted to be in court. He wanted to fight the battle out there.' <https://www.dailymail.co.uk/news/article-10122123/Dennis-Hutchings-partner-26-years-reveals-raw-agony-sudden-lonely-death.html>

²⁰ <https://thedetail.tv/articles/new-figures-reveal-scale-of-unsolved-killings-from-the-troubles>

paramilitary personnel. That is 75% of the total. 12 resulted in prosecutions with 4 convictions with 5 still active at the time of publication.²¹

27. Despite widespread misreporting to the contrary, no paramilitary 'on-the-runs' were given grants of immunity upon the GFA being finalised. The system of providing letters of assurance to those that were on the run, that explained whether prosecution in their individual cases was justified or planned, was poorly understood (resulting in one high profile case against an alleged terrorist collapsing) but an independent review and successive governments have made clear, provided no amnesty to those accused of terrorist offences. Indeed, when explaining how the scheme worked, considerable emphasis has been placed upon the need to ensure that those that had committed crimes understood that they had no legal protection and should expect to be held to account.²²
28. All outstanding legacy police investigations and criminal prosecutions will cease once the Bill becomes law.

Legacy inquests

29. As of 2019, there were over 52 legacy inquests. A legacy inquest is one concerning a death involved with or relating to the Troubles.
30. One of the most-high profile legacy inquests of recent years was the Ballymurphy inquest which investigated the deaths of 10 civilians in August 1971. The Coroner found that all ten victims were entirely innocent of any wrongdoing and that nine of the ten victims were shot by the British Army. In all cases the coroner found that the Yellow Card (the applicable Rules of Engagement) had not been adhered to and there had been no adequate investigation by the Royal Military Police. The Government offered its profound regret and apologised for the events, for how the investigations had been handled and for the pain caused to the families. The findings have reportedly been sent to the public prosecutor.

The role of an inquest and why this will necessarily focus on state agents.

31. An inquest is a fact-finding process and is prevented from apportioning blame or assigning guilt. All it can do is produce a factual and neutral account of the death. It is important to understand the statutory purpose of an inquest and why it may appear that there has been, through this mechanism, a disproportionate focus on the actions of state agents (soldiers).²³
32. The European Convention of Human Rights (ECHR) - enshrined into the law of this country by the Human Rights Act 1998 - requires that the State should not violate the rights of its citizens, including their right to life (Article 2 of the ECHR). If there is an arguable case that the state has violated the right to life of an individual, then that death has to be properly investigated. Usually that is done through a criminal investigation and/or an inquest.

²¹ <https://www.ppsni.gov.uk/news-centre/former-soldier-be-prosecuted-death-teenager-1972> 'Cases where a prosecution decision has been taken: We have identified 26 cases involving a large number of suspects which can be described as "legacy" in which the PPS has taken prosecutorial decisions since 2011. Half of all such cases (13) relate to alleged offences involving republican paramilitaries and there have been prosecutions in eight of these. Proceedings are still active in three of these cases. Of the five concluded cases, there were two convictions and two in which proceedings were discontinued, one following the death of the defendant. There was also one acquittal. Eight of the 26 cases related to alleged loyalist paramilitary activity. There were decisions to prosecute in four of these cases. Convictions have been secured in two cases while two others are currently active. A further five cases involved a number of former soldiers (22). This has resulted in a decision to prosecute six individuals for a range of serious offences. The final two cases involved police officers and both resulted in a decision not to prosecute.'

²² HC Deb 16 May 2019, c371 and c382, former Minister of State for Northern Ireland John Penrose, 'I hope the message will go out loud and clear from the Chamber that anyone who thinks they can swan around scot-free as a result of that does not have the legal protection that some people may have thought they did.'

²³ <https://www.thesun.co.uk/news/15040381/army-veterans-northern-ireland-inquest/>

33. Where a death comes about purely as a consequence of the actions of private actors (for example, as the result of a road traffic accident or a violent act between two private individuals), and the state is not involved, a criminal justice process and/or a short inquest may suffice for the purposes of securing sufficient accountability, justice and compliance with the rule of law.
34. But where there is an arguable case that the State has been involved: for example, because the person firing the shot was a soldier or an armed police officer; or where information may have been passed by a state agent to the person responsible for the killing; or where there may have been a police failure to prevent the death by acting appropriately on information, then Article 2 of the Convention will be engaged and a broader inquiry can be undertaken. These 'Article 2 inquests' can be very wide-ranging and entail a large number of witnesses and evidence, as the Ballymurphy inquest demonstrated. Outside the Northern Ireland context, bereaved military families regularly benefit from Article 2 inquests and such inquiries have been able to investigate the sudden deaths of young soldiers at Deepcut barracks amid allegations of bullying and abuse, military responses to allegations of rape and bullying in the Army, and the impact of PTSD on veterans and suicide risk.²⁴ Because the very purpose of an Article 2 inquest is to investigate potential state failings that may have caused or contributed to a death, it requires important questions to be asked of state agents that will simply not arise in the case of a death with no alleged state involvement.
35. Coroners have a very wide range of special measures that they can put in place to protect all witnesses - including service personnel and veterans - so that they are supported to give their best evidence and so that their identity cannot be revealed publicly in appropriate cases. With these kinds of arrangements in place, inquests in Northern Ireland and beyond have for many years performed a vital fact-finding function that have allowed families - including military families - to investigate state failings, understand what happened to their loved ones and produce important recommendations and policy changes that save lives.
36. All outstanding legacy inquests will cease once the Bill becomes law.

The Stormont House Agreement

37. The Stormont House Agreement (SHA) included an agreement that any approach to addressing Northern Ireland's past should:²⁵
 - (a) Promote reconciliation
 - (b) Uphold the rule of law
 - (c) Acknowledge the suffering of victims and survivors
 - (d) Facilitate the pursuit of justice & information recovery
 - (e) Be human rights compliant
 - (f) Be balanced, proportionate, transparent, fair and equitable.
38. It established a 'Historical Investigations Unit' (HIU) to take forward outstanding investigations into deaths during the Troubles.
39. As recently as 9 January 2020, the Government committed to implementing the SHA and to address legacy issues. It also committed to provide funding to support the implementation of the SHA proposals on addressing legacy.

²⁴ <https://centreformilitaryjustice.org.uk/human-rights-stories-no-4-deepcut-how-the-families-used-the-human-rights-act-to-get-access-to-the-states-evidence-about-their-children-and-to-get-fresh-inquests-exposing-abuse-ill-treat/>; <https://centreformilitaryjustice.org.uk/human-rights-stories-no-1-cpl-anne-marie-ellement/>; <https://centreformilitaryjustice.org.uk/human-rights-stories-no-3-having-my-veteran-husbands-suicide-recognised-as-caused-by-his-military-service/>

²⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf

Command Paper July 2021

40. In July 2021, a very different approach was announced. A Command Paper was published that proposed a statute of limitations that would apply to all Troubles-related incidents. The PSNI and Police Ombudsman of Northern Ireland would be statutorily barred from investigating Troubles-related incidents. This would bring an immediate end to all criminal investigations into Troubles-related offences and remove the prospect of prosecutions. All judicial activity in relation to Troubles-related incidents, including current and future civil cases and inquests would end.
41. Following widespread criticism of the Command Paper, this Bill now modifies some of those proposals.

WHAT DOES THE BILL DO?

42. The Bill only applies to the Troubles, which is defined as ‘the events and conduct that related to Northern Ireland affairs and occurred during the period between 1 January 1966, and 10 April 1998.’²⁶
43. The Bill creates the Independent Commission for Reconciliation and Information Recovery which replaces all other processes whereby serious unlawful acts committed in the context of the Troubles are investigated and/or prosecuted.²⁷ The functions of the ICRIR are:
- a. to carry out (upon request) reviews of deaths that were caused by conduct forming part of the Troubles;
 - b. to carry out (upon request) reviews of other harmful conduct forming part of the Troubles;
 - c. to produce reports on the findings of each of the reviews of deaths and other harmful conduct;
 - d. to determine whether to grant persons immunity from prosecution for serious or connected Troubles-related offences;
 - e. to refer deaths that were caused by conduct forming part of the Troubles, and other harmful conduct forming part of the Troubles, to prosecutors (if a grant of immunity has not been made); and
 - f. to produce a record (the ‘historical record’) of deaths that were caused by conduct forming part of the Troubles.
44. The Bill prohibits the ICRIR from doing anything which would risk prejudicing, or would prejudice, the national security interests of the United Kingdom.²⁸
45. A relevant authority ‘must make available’ to the ICRIR such information and documents as are requested by the ICRIR in the performance of its function.²⁹ The Commissioner for Investigations (of the ICRIR) may require the Chief Constable of the PSNI or the Police Ombudsman for Northern Ireland to give the ICRIR such assistance as is reasonable for the purposes of, or in connection with, the effective use of information, documents and other material.
46. The Commissioner for Investigations will have the powers and privileges of a constable and may delegate these powers to its officers.³⁰

²⁶ Clause 1

²⁷ Clause 2

²⁸ Clause 4(1)(a)

²⁹ Clause 5

³⁰ Clause 6

47. Compelled material obtained from a person may not be used in evidence against that person in criminal or civil proceedings.³¹ If a person has made an application for immunity from prosecution, material provided by him in seeking a grant of immunity may not be used in evidence against him in civil or criminal proceedings.
48. A close family member and certain public authorities can ask the ICRIIR for a review into a death within 5 years of the ICRIIR being established. A request for a review into other 'harmful conduct' may also be made. After the ICRIIR has been in operation for five years, no more requests for reviews can be made.^{32 33}
49. In deciding what steps are necessary to conduct an investigation, the Commissioner for Investigations must take into account any investigation that has previously been carried out by any other person into the death or other harmful conduct, and must ensure that the ICRIIR does not do anything which duplicates any aspect of the previous investigation unless the duplication is necessary.³⁴
50. The Commissioner for Investigations may require a person to provide information and produce any documents or thing in the person's custody or under the person's control; and may require a person to provide evidence in the form of a written statement.³⁵ Failure to comply may result in a penalty notice and a fine not exceeding £1000.³⁶
51. The ICRIIR must produce a final report following a review and provide a copy to the person that requested the review, or who will be criticised, and give them an opportunity to comment upon it.³⁷ The report must be published.³⁸
52. A person is guilty of an offence if they alter or suppress evidence. A prosecution can only be brought with the permission of the Director of Public Prosecutions (for England & Wales or Northern Ireland). If convicted, a person may receive a fine or imprisonment up to 6 months (in Northern Ireland) or 51 weeks (England and Wales).³⁹
53. The ICRIIR must grant a person immunity from prosecution if 3 conditions are met: ⁴⁰
 - a. Condition A: the person has requested the ICRIIR to grant them immunity from prosecution.
 - b. Condition B: the immunity requests panel is satisfied that the ICRIIR is in possession of an account that has been given by the person, describes conduct by them which is, or includes, conduct forming part of the Troubles and is true to the best of that person's knowledge and belief.

³¹ Clauses 7-8

³² Clause 9

³³ Clause 10

³⁴ Clause 13

³⁵ Clause 14

³⁶ Schedule 4

³⁷ Clause 15

³⁸ Clause 16

³⁹ Schedule 4

⁴⁰ Clause 18

- c. Condition C: the immunity requests panel is satisfied that the person's disclosed conduct would tend to expose them to a criminal investigation of, or to prosecution for a Troubles-related offence.
54. The account may consist of or include information which has previously been given by the person (whether directly to the ICRIR or otherwise) if, or to the extent that, the immunity requests panel is satisfied that the information is true to the best of the person's knowledge and belief. ⁴¹
55. Immunity can be 'specific' or 'general'. An award of general immunity is said to be likely to be appropriate in most cases, according to the Explanatory Notes to the Bill, but the panel has the flexibility to grant specific immunity where, eg, an individual may have had a lesser role in a death or serious injury, or where the factual position is straightforward.
56. Immunity from prosecution may not be revoked.⁴²
57. A request for immunity has to be made within 5 years, unless after that time and when the request is made, the ICRIR is reviewing the person's conduct. ⁴³
58. A person may not seek immunity if they are currently being prosecuted for a Troubles-related offence, or if they have a conviction for a relevant Troubles-related offence.⁴⁴ (But they can if the ICRIR opens a review into their conduct).
59. The Secretary of State may make rules about the procedures for making requests for grants of immunity from prosecution; or for dealing with requests for grants of immunity from prosecution.
60. In forming a view on the truth of a person's account, the immunity requests panel must take into account any other information in the possession of the ICRIR that is relevant (including information which the person has previously given to someone other than the ICRIR). But in order to form a view on the truth of the account, the immunity requests panel is not required to seek information from a person other than the person giving the account and who is seeking the immunity. ⁴⁵
61. The ICRIR may refer a matter to a prosecutor.⁴⁶
62. There will be no criminal investigations except through ICRIR reviews. From the day on which the section comes into force, no criminal investigation of any Troubles-related offence may be continued or begun.⁴⁷
63. The Chief Constable of the PSNI and the chief officer of each police force in Great Britain must notify the Secretary of State of any criminal investigations of Troubles-related offences which, on the day before this section comes into force, their police force is carrying out.

⁴¹ Clause 18(4)

⁴² Clause 18(14)

⁴³ Clause 19

⁴⁴ Clause 19(1)

⁴⁵ Clause 20

⁴⁶ Clause 22

⁴⁷ Clause 33

64. There is a prohibition of criminal enforcement action where a grant of immunity has been made.⁴⁸
65. Where no grant of immunity has been made, criminal enforcement action may be taken against a person only if the Commissioner for Investigations has referred conduct by that person to a prosecutor.
66. No criminal enforcement action may be taken in relation to other Troubles related offences that are not serious or connected.⁴⁹ But this does not prevent investigations or prosecutions if the prosecution has commenced before these clauses come into force.⁵⁰
67. Troubles-related civil actions are brought to an end, as of the date that the Bill had its First Reading.⁵¹
68. Troubles-related inquests are brought to an end unless they are already at an advanced stage.⁵²
69. Police complaints relating to the Troubles are brought to an end.⁵³

UNLAWFUL, UNWORKABLE, UNFAIR

70. Criticisms of the Bill are wide-ranging, come from across the political spectrum in Northern Ireland and from all organisations and individuals concerned with the rule of law, accountability and justice, including senior former members of the armed forces.⁵⁴ A snapshot of some of the key objections is provided here:
 - a. The provisions for immunity from prosecution will mean that not everyone will be subject to the rule of law. As the Bingham Centre for the Rule of Law put it: 'If an IRA member planted a bomb in a town centre which killed and maimed, they can be granted immunity from prosecution. If a UVF member broke into a house and murdered a man in front of his family, they can be granted immunity from prosecution. If a soldier shot dead a civilian in cold blood, they can be granted immunity from prosecution.' To this list we would add: if a terrorist shot and killed a British soldier in cold blood, they can be granted immunity from prosecution.
 - b. The ICRIIR has no discretion on whether to grant immunity or not. If the criteria - which are easy to fulfil - are met, immunity *must* be granted.
 - c. Immunity can be granted in exchange for an account of the person's conduct that is true to the best of that person's knowledge and belief. All a person needs to do is confirm that they believe what they have said is true, regardless of the

⁴⁸ Clause 34

⁴⁹ Clause 36

⁵⁰ Clause 37

⁵¹ Clause 38

⁵² Clause 39

⁵³ Clause 40

⁵⁴ See for example, Committee on the Administration of Justice, 'Model Bill Team response to Northern Ireland Troubles Bill': <https://caj.org.uk/wp-content/uploads/2022/05/MBT-Initial-Response-to-Bill-May-22.pdf>; Bingham Centre for the Rule of Law, 'Northern Ireland Troubles (Legacy and Reconciliation) Bill: A Rule of Law Analysis' <https://binghamcentre.bjicl.org/publications/northern-ireland-troubles-legacy-and-reconciliation-bill-a-rule-of-law-analysis>; and Amnesty International: <https://www.amnesty.org.uk/press-releases/northern-ireland-legacy-bill-victims-rights-sacrificed-shield-perpetrators>

reasonableness of that belief. As the Bingham Centre put it, ‘this is subjective, not objective truth’.

- d. There are no requirements as to the scope of what should be given by way of an account, so a person may give as little or as much information as they see fit, as long as they say they believe it to be true. The seriousness of the alleged crime makes no difference at all. The bare minimum can be given. This differs starkly from the requirements of the Truth & Reconciliation Commission in South Africa, as we explain below.
- e. When deciding if the account given is true to the best of a person’s belief, the ICIR does not need to check with anyone other than the person themselves. There is no duty of enquiry beyond that.
- f. There is no need for the person to indicate regret or contrition or to apologise for the offence in exchange for the immunity.
- g. The family members or the victims or the survivors will not be given notice that an application for immunity has been made, nor will they be invited to make representations. Their views are wholly irrelevant.
- h. The prohibition of inquests makes a mockery of the Government’s stated commitment to a ‘robust information recovery process’. A ‘robust information recovery process’ is exactly what an inquest is. We have explained above how vital inquests are to the establishment of the facts of a death and what benefits they can bring to the bereaved, including military families and wider society. If the Government was genuinely committed to robust information recovery it would provide greater resources to support the coroners service generally (and particularly in Northern Ireland).
- i. The ending of all civil claims retrospectively appears to amount to a blatant violation of Article 6 of the ECHR, the right to a fair trial, including the right of access to a court.⁵⁵
- j. The ending of all criminal investigations into Troubles-related crimes including murder and replacing them with a review body mechanism which can grant a complete immunity amounts to a denial of justice. The 225 unsolved cases of alleged murder and other serious crimes committed against soldiers and other members of the armed forces - that are currently held by the PSNI LIB - will all close.
- k. The ending of all police complaints arising out of the Troubles including those investigating allegations of police collusion with paramilitary activity (such as in the example given below of Pte Harrison’s case) removes a vital source of information from those seeking to understand how their loved ones came to die and undermines justice.
- l. The bar on the ICIR duplicating any aspect of a past investigation (unless it determines that duplication is necessary, which is a high bar) means that any past investigation - however flawed - is potentially going to prevent or place limitations on the ICIR looking again at those matters. When you consider how brief and cursory some of the inquests and police investigations have been in relation to Troubles-related deaths, this is very concerning.
- m. Vital procedural concerns arise about the functioning of the ICIR. All it can do is ‘review’ a death. It is not empowered to investigate it. The ICIR will not be:
 - i. taking evidence on oath;
 - ii. victims’ families will not be invited to ask questions;

⁵⁵ https://www.echr.coe.int/documents/convention_eng.pdf

- iii. victims' families will not be legally represented;
 - iv. there will be no cross-examination of those giving information to the ICRIR;
 - v. reviews will not be held in public;
 - vi. and no notice will be given to the family of an application for immunity.
- n. One senior retired Army officer that had served six tours in Northern Ireland expressed concern to the CMJ at the lack of any mechanism for examining and determining the role of senior commanders who were responsible for training and preparing soldiers for the maelstrom they faced, in any of the proposals or Government messaging around this issue. As he put it, 'in many cases the commanders played up an aggressive culture, rather than restrain and dampen down these instincts of the soldiers, instincts necessary for warfighting – which this was not. While there can never be the 'Nuremberg Justification' for acts of criminality, there must be some recognition of the importance of command accountability, *jus in bello*, an examination of how soldiers fought and the preparation and supervision they received. Soldiers facing serious criminal allegations should have them tested in a court of law, as no one in the British Army is above the law. However, there must also be command accountability for those who failed to provide the necessary restraint and guidance to young soldiers having to make instant decisions in perilous situations, for commanders and a Ministry of Defence that tolerated or encouraged a poor culture or who failed to provide appropriate training and supervision. In most cases those officers and officials are no longer alive, which makes any examination harder, but not impossible.'⁵⁶
- o. The former Command Legal Adviser for the British Army in Iraq, (now) Reverend Nicholas Mercer - who has discussed the proposals with a number of former senior officers who agree with him - states that it is unconscionable for any former commanding officer to argue that alleged killing should go unpunished. As he put it, 'British soldiers should be held to a higher standard than terrorists'.

South Africa's Truth & Reconciliation Commission

- p. Much has been made by advocates of the Bill of the experience of the Truth & Reconciliation Commission (TRC) in South Africa. However, the terms on which applicants were granted immunity from prosecution before the TRC were far more exacting and onerous than are proposed in this Bill.
- q. In South Africa, the Committee on Amnesty (part of the TRC) had the power to grant an amnesty in respect of any act, omission or offence to which the particular application for amnesty related, *provided that the applicant concerned made a full disclosure of all relevant facts and provided that the relevant act, omission or offence was associated with a political objective committed in the course of the conflicts of the past*. The South African law containing the amnesty provisions comprised very detailed provisions pertaining to what were considered to be acts "associated with a political objective":⁵⁷

"Whether a particular act, omission or offence contemplated in subsection (2) is an act associated with a political objective, shall be decided with reference to the following criteria:

⁵⁶ The senior officer needs to remain anonymous. It is also important to note that no currently serving service person is permitted to communicate publicly with Parliament or the press on any defence matter (including in relation to expressing an opinion on matters such as are contained in this briefing) without first seeking the consent of the MoD press office. In this way, service personnel that are concerned about the proposals are not permitted to let the public know of their concerns. This policy is presently the subject of threat of judicial review: <https://www.gov.uk/government/publications/defence-instruction-contact-with-media-and-public/contact-with-the-media-and-communicating-in-public>

⁵⁷ Promotion of National Unity & Reconciliation Act 1995, S20(3) https://www.gov.za/sites/default/files/gcis_document/201409/act34of1995.pdf

- a. the motive of the person who committed the act, omission or offence;
- b. the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;
- c. the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;
- d. the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;
- e. whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and
- f. the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued;

but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted;

- i. for personal gain...; or
 - ii. out of personal malice, ill-will or spite, directed against the victim of the acts committed.
- r. No such detailed provisions are made within this Bill. Further, as others have noted, the TRC enjoyed the support of most of the country's political leaders of the time and enjoyed a far greater degree of democratic support from the wider community than this Bill. In addition, for serious offences, the Amnesty Committee held televised public hearings in which victims could be present; victims were legally represented; their legal representatives could cross-examine the amnesty applicant; and victims could provide impact statements.

The right to life - Article 2 of the European Convention on Human Rights

71. All of these serious shortcomings mean that the proposed scheme is almost certainly unlawful. The right to life requires the State to establish and maintain a framework of laws and regulations that protect life, which includes having a system in place to ensure that unlawful killing is investigated and, where the evidence and the public interest requires it, prosecuted. Traditionally that legal obligation has been fulfilled by a combination of criminal investigations, prosecutions, inquests, police complaints and civil claims. The folding of all those mechanisms into one single review body that can produce reports and grant immunity in exchange for very little, is unlikely to meet the requirements of Article 2. In order to meet the requirements of Article 2, an investigation needs to involve the next of kin, be independent, effective, reasonably prompt and accessible to the public. That is not entailed by these proposals.
72. The Government acknowledges that amnesties are generally incompatible with the State's duty to investigate unlawful killing under Article 2. The Government will argue that the present proposals are not an amnesty, as had been originally proposed in the Command Paper with its proposal for a statute of limitations for all Troubles-related crimes. Following those proposals, the Council of Europe's Commissioner for Human Rights wrote to the Government saying the UK's proposals appeared to be indistinguishable from an unconditional amnesty for those not yet convicted: 'I am concerned about these proposals, which might bring the United Kingdom into conflict with its international obligations, notably the European Convention on Human Rights. The blanket, unconditional nature of the amnesty in your proposal effectively means that none of those involved in any serious violations will be held to

account, leading to impunity. Beyond the impact on justice for victims and their families ... this is also deeply problematic from the perspective of access to justice and the rule of law.’⁵⁸

73. The Bill now seeks to address those criticisms but fails to do so adequately. Quite apart from the various serious shortcomings listed above, the fact that the ICIR will not be able to receive requests for a review after 5 years, and its power to refer a matter to a prosecutor for prosecution (in a case where immunity has not been sought or granted) being dependent on it having carried out a review, means that after five years, no further cases will be prosecuted.⁵⁹ Some may consider that amounts to an amnesty in all but name.

The late Pte Tony Harrison

74. Pte Tony Harrison was a 21 year old paratrooper who had served two tours in Northern Ireland. He had formed a relationship with a local young woman and they were engaged to be married. On 19 June 1991, while off duty and visiting his fiancée at her home in East Belfast, two members of the IRA forced their way into the house, restrained his fiancée, her young niece and her mother, and shot him five times as he watched television.⁶⁰
75. In 1992, BBC’s Inside Time reported that a member of the IRA that was also acting as an RUC informant (later revealed by the Sunday Express to be a man named Martin McGartland) had taken part in the murder, acting as the getaway driver. McGartland appeared to have admitted as such during the interview. It was also claimed that McGartland had subsequently identified the other men involved, including those that had shot and killed Pte Harrison. Martin McGartland later published a book that was made into a film (‘50 Dead Men Walking’), admitting his involvement.
76. Another man, Noel Thompson, admitted to notifying the IRA that he had driven Pte Harrison in a taxi to the house where he was killed and was convicted of conspiracy to murder and communicating information useful to terrorists.
77. A very brief inquest into Pte Harrison’s death was held on 10 November 1993. It lasted around an hour and Pte Harrison’s parents were not permitted to ask any questions.
78. In 2015, the Harrison family wrote to their then MP (Jim Fitzpatrick MP) about the lack of an investigation the murder and the fact that no-one had ever been held accountable for it. The family pointed out that Martin McGartland had stated years before that he knew who was responsible and had told the authorities. The family could not understand why there had been no arrests after so long and questioned whether the killers were still being protected after all these years. Their letter was passed on to the Minister of State for the Armed Forces. On 7 September 2015, the Minister, Penny Mordaunt, replied. She said:

‘I know that Pte Harrison’s killers have never been brought to justice and this must be a cruel addition to Mrs Seaman’s grief. I would like to assure you and her that efforts to bring murderers from that period to justice are still very much alive. Under the Stormont House Agreement reached at the end of last year with the five political parties of the NI Executive and the Irish Government, the Government made a number of commitments. This included the establishment of an independent body, the Historical Investigations Unit, to be responsible for taking forward outstanding investigations into Troubles-related deaths. The HIU will take over this work from the Police Service of NI and will act as a designated resource for such investigations. I

⁵⁸ <https://www.theguardian.com/uk-news/2021/sep/23/uk-plan-to-end-troubles-prosecutions-could-breach-international-law>

⁵⁹ Clause 22

⁶⁰ Pte Harrison’s younger brother Andy Seaman has written about the killing and his thoughts about the Bill here: <https://centreformilitaryjustice.org.uk/no-impunity-for-murder-the-governments-proposals-for-northern-ireland-betray-my-brothers-legacy/>

very much hope that it will be able to make progress on this and many other unsolved murders of British troops.'

79. The family was then visited by two investigators from the Police Ombudsman for Northern Ireland (the Ombudsman) in 2016 who assured the family that a case had been accepted by the 'Historical Investigations Directorate' within the Ombudsman's office, a case file had been opened and the matter would in due course progress to investigation. In due course, it was explained, the matter might be affected by the establishment of the Historic Investigations Unit that had been envisaged by the Stormont House Agreement, which would enable the investigation to progress more quickly, however no details were available.
80. In subsequent letters over the years, the Ombudsman has written essentially the same letter to the family - explaining that, due to funding constraints, their son's case, along with many others, had not been able to be progressed. Requests for additional funding had been made but had not been successful. At the present time therefore the case's status remains the same - opened but not yet actioned.

Immediate Issues of Concern to the Family

81. The Bill would immediately result in the closure of the Ombudsman's case-file into Pte Harrison's death.
82. If the Bill passes in its present form, the ICRIR would not be informed about Pte Harrison's case.
83. However, the family could ask the ICRIR to conduct a review - not an investigation - into the killing. A review is a very different thing to an investigation.
84. Then Pte Harrison's case for review would sit with all the other outstanding criminal cases, inquests and police complaints investigations that are outstanding and that had been referred for review. That is likely to build in an extreme delay. Pte Harrison's mother is elderly. His father is already deceased, having died as a consequence of the loss of his son years ago.
85. There is no information about the resources the ICRIR will have. There is nothing to indicate that it will have the vast resources that will be needed if it is to take over a review of all existing criminal cases, inquests and police complaints into unlawful killing or other serious conduct.
86. There is nothing to indicate that the ICRIR will have the specialist experience and expertise that the Ombudsman currently brings to the investigation of police malpractice/corruption/collusion.
87. Even if the ICRIR does have plenty of resources and specialism, Pte Harrison's killers can seek an immunity from prosecution if they are eligible. There is nothing to indicate that the family would be given notice of such an application being received by the ICRIR.
88. Even if the family was given notice that an application for immunity had been received by the ICRIR, the family would have no right to be heard/make representations as to why a grant of immunity might not be appropriate in this case.
89. And even if the ICRIR did agree to receive the family's representations, in any event it has no discretion about whether to grant immunity. As long as the statutory criteria are met, immunity *must* be granted so any representations opposing immunity made by the family would appear to be worthless.
90. Because an applicant for immunity's account could consist entirely of information they have previously provided, the family fears that Martin McGartland's published self-serving, untested account could constitute his account, in an application for immunity. The family would have no way to challenge his account.

91. The family is very afraid that the inevitable result of this Bill will be that Pte Harrison's death and the extent of RUC/state collusion in the killing and its aftermath will never be investigated; and that, even if an ICRIR review were to take place, to make it subject to a potential condition that no-one will be prosecuted for such a terrible crime is wholly unacceptable to them. The prospect of prosecution contained within the Bill appears to be entirely theoretical.

Conclusion

Just as the Overseas Operations Bill did last year, this Bill undermines the fundamental legal principle of fairness and equality before the law. In the same way that there were many principled voices against those proposals in the Overseas Operations Bill, the same must apply here.

Those accused of serious crimes from any quarter must not be able to escape justice by virtue of the passage of time. Given what we have learned about the poor quality of prosecutorial decision making in some of the more recent cases, it is clear that this is an area that needs to be significantly improved. The revelation that veterans were being charged on the basis of statements they had been forced to make years before and under pressure from their own chain of command, and without access to legal advice, is shocking. It is, with hindsight, no surprise that those trials collapsed. Those veterans were badly let down by the very institution they had sworn to serve. The answer is to improve prosecutorial decision-making and ensure veterans are able to access the same criminal defence rights as anyone else prior to making a charging decision. And if a person is too elderly or vulnerable to stand trial then, as in all criminal cases, there are important measures that are available and which can be applied to support and protect them.

At the same time the Government must stop stoking the fears of the veteran community. Since the peace process there have been just six prosecutions, and no convictions. At the moment there are just two ongoing criminal cases. 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. Those that served in the extremely difficult environment of Northern Ireland during Operation Banner and who acted reasonably and within the law and within the rules of engagement as they genuinely understood them to be have nothing to fear.

David Cameron said, 'You do not defend the British Army by defending the indefensible. We do not honour all those who have served with such distinction in keeping the peace and upholding the rule of law in Northern Ireland by hiding from the truth.'⁶¹ The armed forces must acknowledge and accept the implications of the findings of Bloody Sunday and Ballymurphy, the impugning of innocent people that went on for so long and the disinclination on the part of the authorities to investigate those deaths properly. This Bill is just another manifestation of that. The armed forces can only improve by being honest with itself - things were done that were contrary to law and which violated the human rights of individuals and their families.

And soldiers were the victims of terrible human rights violations too. Like many victims in Northern Ireland, lots of military families never had justice either. Pte Harrison's right to life was violated. His family's right to family life was shattered on 19 June 1991. Hundreds of other military families will be in the same position.

This Bill delivers absolutely nothing for them.

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⁶¹ House of Commons Hansard 15 June 2010 Vol 511 Col 789.