

NORTHERN IRELAND (STORMONT AGREEMENT AND IMPLEMENTATION PLAN) BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

MEMORANDUM BY THE NORTHERN IRELAND OFFICE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Northern Ireland (Stormont Agreement and Implementation Plan) Bill. The memorandum has been prepared by the Northern Ireland Office. On introduction of the Bill in the House of Commons, the Secretary of State made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.

Summary

2. The Bill makes provision in relation to a number of the measures in *A Fresh Start: the Stormont House Agreement and Implementation Plan* ("the Fresh Start Agreement") dated 17 November 2015¹:
 - a. draft budgets - the UK Government agreed to legislate, with Northern Ireland Assembly consent, to ensure that the Assembly cannot consider spending plans which exceed the Block Grant allocated by HM Treasury or the Northern Ireland Executive's borrowing limits, where planned spending relies on those funding sources;
 - b. measures aimed at dealing with continuing paramilitary activity:
 - i. changes to the Ministerial pledge of office to include additional commitments relating to ending paramilitary activity and tackling organised crime, and introduction of a corresponding undertaking for Members of the Legislative Assembly;
 - ii. the creation of an independent, international body, by agreement between the UK Government and the Government of Ireland, to report on progress towards ending paramilitary activity connected with Northern Ireland (the Independent Reporting Commission);
 - c. an extension to the time available to agree a Programme for Government and allocate Ministerial positions in the Northern Ireland Executive from 7 days to 14 days after the Assembly first meets following an election.

Independent Reporting Commission

3. Clauses 1 to 5 of the Bill make provision about the Independent Reporting Commission ("the Commission"), an independent body to be established by an international agreement between the UK Government and the Government of Ireland. Like the Independent Monitoring Commission ("IMC")² and the Independent Commission for the Location of Victims' Remains³, the Commission will be an international body which will be given the immunities and privileges of an international

¹ <https://www.gov.uk/government/news/a-fresh-start-for-northern-ireland>

² Established by Treaty between the UK Government and the Irish Government, and legislated for domestically in the Northern Ireland (Monitoring Commission etc.) Act 2003.

³ Established by Treaty between the UK Government and the Irish Government, and legislated for domestically in the Northern Ireland (Location of Victims' Remains) Act 1999.

organisation.

4. The overarching objective of the Commission will be to promote progress towards ending paramilitary activity connected with Northern Ireland (see clause 2(1) of the Bill). The Commission's functions, as expressed in paragraph 5.1 of Section A of the Fresh Start Agreement, are:
 - a. to report annually on progress towards ending continuing paramilitary activity connected with Northern Ireland (or on such further occasions as required);
 - b. to report on the implementation of the relevant measures of the three administrations [*the three administrations means the UK Government, the Government of Ireland and the Northern Ireland Executive*]; and
 - c. to consult the UK Government and relevant law enforcement agencies, the Irish Government and relevant law enforcement agencies and, in Northern Ireland, the Executive, PSNI [*Police Service of Northern Ireland*], statutory agencies, local councils, communities and civic society organisations.
5. As stated in the Fresh Start Agreement, the reports of the body will inform future Executive Programme for Government priorities and commitments through to 2021. The reports issued by the Commission will be made to the UK Government and Government of Ireland and to the Northern Ireland Executive, and will be made public.
6. It is expected that, in line with its function to consult the persons referred to in paragraph 4 c. above, the Commission will receive sensitive information about serious criminality. In order to ensure appropriate handling of such information and appropriate decisions regarding its potential disclosure, there will be the following important safeguards:
 - a. the Commission will be under a general duty not to do anything in exercising its functions which might prejudice the national security interests of the UK or Ireland, put at risk the life or safety of any person, have a prejudicial effect on the investigation or detection of crime, or have a prejudicial effect on any actual or prospective legal proceedings (clause 2(3) of the Bill);
 - b. the Secretary of State must issue (and publish) guidance to the Commission about the exercise of its functions in relation to information the disclosure of which might prejudice the national security interests of the UK or Ireland or put at risk the life or safety of any person (clause 2(5) to (8) of the Bill).
7. The current intention is that the Commission should exist for 5 years (implicit in the reference in the Fresh Start Agreement to its reports informing Executive policy through to 2021) but this period could be shortened or lengthened by agreement between the UK Government and the Government of Ireland.

Article 6: right to a fair trial

8. Article 6 is relevant in relation to clauses 3 and 5.
9. The immunity from suit and legal process conferred on the Commission under clause 3(1) and (2) means that decisions of the Commission will not be justiciable before a Court and so restricts access to a Court in relation to those who might wish to bring an action against the Commission in respect of their own civil rights and obligations. It will also be possible under clause 3(3)(b) for the Secretary of State to make regulations conferring privileges and immunities on members and staff of the Commission, and members of their families who form part of their households. The

privileges and immunities which may be conferred under this power include immunity from suit and legal process.

10. It is possible to interfere with the right of access to a court under Article 6(1) of the ECHR provided that the limitations do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.
11. Immunity from suit and legal process is routinely given to international organisations (see Schedule 1 to the International Organisations Act 1968), and the European Court of Human Rights has had occasion to consider the relationship between the right of access to a court on the one hand and the immunity of international organisations on the other in a number of cases. In *Waite and Kennedy v Germany* (Application no. 26083/94) and *Beer and Regan v Germany* (Application no. 28934/95) the European Court of Human Rights concluded that upholding the immunity of an international organisation was justified and proportionate, and not in violation of the right to access to court – “*the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments*” (*Waite and Kennedy v Germany*, para. 63).
12. The Commission’s independence from the UK Government and the Government of Ireland will be essential to its successful functioning and credibility. Freedom from suit and legal process helps to protect the Commission’s independence from either Government. It also protects it from challenge from others who may be the subject of its reports (e.g. the paramilitary groups whose activities the Commission will monitor progress to tackle). Absent these immunities, there would be a risk that the Commission would become bogged down in litigation and be unable fully to discharge its functions which are intended to be carried out, at least initially, over a limited period of time.
13. The immunities from suit and legal process also serve to make sure that the Commission is able to receive the information it needs to accurately assess progress towards ending paramilitary activity connected with Northern Ireland, and therefore are central to the fulfilment of its functions. A body such as the Commission cannot operate if contributors perceive a risk of the information they contribute, or the identity of its source, being disclosed from the archive – and disclosure in some form would be a necessary corollary of amenability to suit and legal process. If contributors decline to engage with the body, this would have a detrimental effect on the ability of the Commission to perform its functions successfully as it would not be able to obtain the full picture in relation to progress towards ending paramilitary activity with a connection with Northern Ireland.
14. In *Re: Owens* ([2015] NIQB 29)⁴, the High Court in Northern Ireland considered a challenge in relation to a decision of the Secretary of State not to release information from the IMC’s archive to the Coroner. The High Court recognised that the promise of confidentiality was key to the IMC’s functioning. It cited at paragraph 62 of its judgment part of the IMC’s final published report in which the IMC said, in summary, that the immunities conferred on the IMC enabled it to ensure the confidentiality of both the information provided to it and the source of that information; and that the IMC considered that essential to enable people to be forthcoming so that it would have access to the range of information it needed. The High Court in *Owens* also relied on the fact that the confidentiality guarantees given by the IMC were given pursuant to an international agreement to further the Article 2 ECHR imperative of ending communal violence in Northern Ireland. The court also noted (paragraph 65) that the legislation giving effect to the IMC (as is

⁴ This case is being appealed with the appeal to be heard at the end of May 2016.

the case with clause 2(3) of the Bill in relation to the Commission) established a duty on the IMC not to do anything which might put at risk the life or safety of any person and that maintaining confidentiality in order to protect the lives of those who assisted the IMC reflects the proper discharge of the State's substantive positive obligation pursuant to Article 2 of the Convention.

15. Although the functions and focus of the IMC were different to those of the Commission, it is considered that similar arguments apply in relation to the Commission. The overarching objective of the Commission is to promote progress towards ending paramilitary activity connected with Northern Ireland. For the reasons outlined above, assuring contributors of confidentiality of their information and its source is as important to the work of the Commission as it was to the work of the IMC. Like the IMC, the Commission will be subject to a general duty not to do anything which might put at risk the life or safety of any person.
16. Finally, it should be noted that, under the Bill's provisions, the Commission will have the power to waive its immunity from suit and legal process and the inviolability of its archive (see clause 3(1) and (2)). This goes to the proportionality of the immunities. Operation of the waiver would allow the Commission to permit, for example, the ventilation of disputes in domestic courts or tribunals. It is anticipated that this power could be used by the Commission in a case whose determination would not require disclosure of confidential information relating to paramilitary activity connected with Northern Ireland, for example, an employment dispute or accident at work.
17. A decision whether to confer immunity from suit and legal process on members and staff of the Commission in secondary legislation using the power in clause 3(3)(b) will be taken having assessed carefully whether, and to what extent, such immunities are justifiable in view in particular of the ability of the Commission to fulfil its functions (see above). That decision will be made in the light of further discussions with the Government of Ireland about the detail of the treaty and in the light of an assessment of the circumstances existing when the Commission is to start its work, which is expected to be later in 2016. (By way of background, it is noted that immunity from suit and legal process was conferred on members and staff of the IMC, in respect of things done or omitted to be done by them in the course of the performance of their official duties, although it was possible for members and staff to waive those immunities (see the Northern Ireland (Monitoring Commission etc.) Act 2003 (Immunities and Privileges) Order 2003).)
18. The power to make regulations under clause 5 (which may include the requirement to destroy information) must, if exercised, be exercised in a way that is compatible with Convention rights.
19. The Government is satisfied that clauses 3 and 5 are compatible with the requirements of Article 6 of the ECHR.

Article 2: right to life

20. Article 2 is relevant to clauses 3 and 5.
21. There is an argument that by establishing the Commission with immunities and archival inviolability, the state hampers its own investigative obligation under Article 2 because it may not be able to recover information potentially relevant to its own Article 2 investigations from the Commission and such information is out of the reach of law enforcement authorities.
22. The Government is clear that the Commission itself is not a body capable of discharging any of the state's investigative obligations under Article 2. It will be an independent, international body wholly separate from the criminal justice system whose role is to monitor progress towards ending paramilitary activity and measures taken by the UK Government, Government of Ireland and Northern Ireland Executive to this end, not the criminal investigation of such activity. As such

it is not one of the bodies upon which the state would rely to discharge its investigative obligation under Article 2.

23. There is also no interference, in the creation of the Commission, with the state's Article 2 investigative obligations. No amnesty will be conferred on the contributors of information or any other person. The clauses operate only to protect information when given to the Commission. They do not prevent other bodies (or individuals) from separately gathering the same information from sources other than the Commission.
24. There is a discrete question as to whether the archival inviolability provided under clause 3 potentially impinges on a Coroner's own Article 2 investigation, should these measures have the effect of restricting the Coroner's access to any potentially relevant information that might be contained in the Commission's archive. *Owens*, referred to above is instructive in assessing the Court's likely approach to a claim that information from the Commission's archive must, in reference to Article 2, be put before the coroner in these circumstances. In *Owens*, it was rejected that the Secretary of State was bound to release information from the IMC's archive in order to ensure that any enhanced investigative obligation into the death arising under Article 2 was met. In addition, the Court noted that disclosure to the Coroner, in the first instance, of archived information may ultimately result in disclosure on a wider scale with resulting prejudice to the contributors' Article 2 rights (paragraph 66 of the judgment).
25. The power to make regulations under clause 5 (which may include the requirement to destroy information) must, if exercised, be exercised in a way that is compatible with Convention rights.
26. The Government is satisfied that clause 3 is compatible with the requirements of Article 2 of the ECHR.

Article 8: right to respect for private life

27. Article 8 is relevant to clauses 1, 2.
28. The Commission will necessarily hold some personal data as a result of its role in gathering information. In some circumstances, the Commission may decide to release such data in a report.
29. The Commission is not a public authority within the meaning of section 6(3)(b) of the Human Rights Act 1998 and so is not subject to section 6 of that Act. It is instead an international body independent of the state which has been charged with specific functions pursuant to an international agreement.
30. In any event, in practice the Commission's scope for receiving and disclosing personal data is limited and it is further circumscribed by the duties upon it not to cause prejudice to life, national security, legal proceedings or the prevention, investigation or detection of crime at clause 2(3), and by the requirement at clause 2(6) for it to have regard to the statutory guidance to be issued about information that would prejudice national security or cause a risk to the life or safety of a person.
31. To the extent that information collected by the Commission or contained in one of its reports included personal data the holding or disclosing of which, notwithstanding these safeguards, arguably interfered with Article 8 rights, then the Government is satisfied that any interference with the Article 8 rights of the data subject would be justified as necessary in a democratic society in the interests of public safety in Northern Ireland, the objective being to promote progress towards ending paramilitary activity connected with Northern Ireland.

32. The Government is satisfied that the provisions of clauses 1 and 2 are compatible with the requirements of Article 8 ECHR.

Ministerial pledge of office and MLA undertaking

Ministerial pledge of office

33. The Northern Ireland Act 1998 (“the 1998 Act”), at sections 16A, 16B, 18 and 19, requires that a Northern Ireland Minister, including First Minister, deputy First Minister and junior Minister (as those terms are defined under the 1998 Act) shall not take up office until such person has confirmed the pledge of office. The wording of that pledge is set out in full at Schedule 4 to the 1998 Act.

34. As set out at paragraph 2.6 of Section A of the Fresh Start Agreement, it has been agreed to add seven new pledges against paramilitarism to the existing Ministerial pledge of office. These additional pledge commitments will be implemented, through clause 7, as an addition to the existing pledge wording at Schedule 4 to the 1998 Act.

MLA undertaking

35. Paragraph 2.7 of Section A of the Fresh Start Agreement provides that the seven new pledges that will be added to the Ministerial pledge of office, and which are outlined at paragraph 2.5 of Section A of the Fresh Start Agreement, will “*form the basis of a new undertaking, in Assembly standing orders, for each Member of the Legislative Assembly analogous to the previous obligations on those in local government.*” Clause 8 and Schedule 2 make provision to this effect.

Article 10

36. Article 10 of the ECHR is relevant to clauses 7 and 8.

37. To the extent it could be argued that the requirements of clauses 7 and 8 fetter the Ministers’ or MLAs’ discretion over their form of expression by imposing a positive requirement that they actively call for the disbandment of all paramilitary organisations and their structures, the Government is satisfied that any restriction of right under Article 10(1) is justified. It is necessary in a democratic society in the interests of public safety in Northern Ireland, to support the continued transition to a peaceful and stable society, a stable devolved Government, and to promote progress towards ending paramilitary activity in Northern Ireland. Any restriction is proportionate to this aim, as the requirement to take the pledge and undertaking only bind a limited population of individuals (MLAs and Ministers), and the scope of the pledge and undertaking are construed narrowly.

38. The Government is satisfied that clauses 7 and 8 are compatible with the requirements of Article 10 of the ECHR.