

Northern Ireland Troubles (Legacy and Reconciliation) Bill

1.0 Purpose

This paper, although not a detailed clause by clause review of the Bill, is intended to highlight the operational implications of the proposed legislation. In preparing this paper Kenova has reviewed the Bill, the Queens University of Belfast Model Bill Team initial response to the Bill, noted comments by Alyson Kilpatrick BL Chief Commissioner of the Northern Ireland Human Rights Commission, and observed and digested the entire second reading of the Bill at the House of Commons.

The paper also benefitted from reviewing the first day (Tuesday 7th June) of the Northern Ireland Affairs Committee hearing evidence about the Bill. Those providing evidence being; Session 1. Chief Commissioner of the Northern Ireland Human Rights Alyson Kilpatrick, Dr Hannah Russell Senior Policy and Research Officer for the Commission; Session 2 Ian Jeffers Commissioner for the Commission for Victims and Survivors Northern Ireland, Sandra Peake Chief Executive Officer for Wave Trauma Centre, Peter Murtagh Advocacy Support Manager for the South East Fermanagh Foundation.

2.0 Summary of the Bill and Commentary

2.1 Establishment of an Independent Commission for Reconciliation and Information Recovery (ICRIR) to conduct reviews into deaths and serious injuries resulting from conduct during the Troubles. The ICRIR will produce and publish a report on its findings in each case.

Comment: The Bill and the Explanatory Notes use the words 'Investigation' and 'Review' interchangeably. Indeed the Secretary of State (SoS) spoke mainly of 'investigations' during his introduction of the Second Reading. In stipulating that the ICRIR will have the powers and privileges of a Constable, this suggests that the ICRIR will be able to conduct what would be recognised as full criminal investigations. It is not clear, therefore, why the word 'review' is used so frequently in the Bill. For many 'review' would mean a review of material that is readily available without any active investigation. For example, active criminal investigations will pursue lines of inquiry to identify further witnesses, suspects or evidence whilst reviews would not. The contrast between the review work of the Historical Enquires Team (HET) that was closed down following a critical inspectorate report and the detailed investigative work of Operation Kenova perhaps helpfully reflects the difference between a review and an investigation.

For added clarity the National Police Chiefs Council Murder Investigation Manual (2021) states the objective of a murder review is to 'evaluate the conduct of the enquiry to ensure it helps the Senior Investigating Officer to detect the crime. It manual states a review should:

- Conform to national recognised standards
- Be thorough
- Be conducted with integrity and objectivity
- Not overlook any investigative opportunities'

This can be contrasted with the definition of a criminal investigation contained in the Codes of Practice to the Criminal Procedures and Investigation Act 1996 which state: 'A criminal investigation is an investigation conducted by police officers with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it.'

The difference between review and investigation might sound to some like semantics. However Operation Denton, the review into the activities of the so called Glenanne Gang being conducted by the Kenova team, has encountered disclosure issues not experienced by the separate Kenova criminal investigations. The Glenanne commissioning from the Chief Constable of the PSNI was for a review rather than an investigation and this has led to a number of legal obstacles in getting information from the An Garda Siochana and more recently this has also been raised as a potential issue by the Police Ombudsman of Northern Ireland. If the ICRIR's core function is described as reviewing cases similar legal problems are possible.

The term review will also potentially inhibit other overseas jurisdictions from providing cooperation as International Letters of Request (ILOR) are predicated on providing material for criminal investigations, not reviews. The legal leverage available to those conducting criminal investigations must be equally made available to the work conducted by the ICRIR.

Although the SoS has stated that the Bill is compliant with the Human Rights Act 1998 it is important to note that Article 2 European Convention of Human Rights specifically requires for an effective, independent and prompt 'investigation' that updates the next of kin. It does not talk of a 'review'.

In evidence to NIAC the Chief Commissioner of the Human Rights Commission was adamant that the Bill was not ECHR, Human Rights Act or Good Friday Agreement compliant.

The Bill appears to provide less powers for the ICRIR than an Operation Kenova style criminal investigation process through the regular use of the term review rather than criminal investigation. Victims groups and interested parties predominantly assess the Bill to be deliberately written to focus on reviews as a conscious means of suppressing the truth. To demonstrate to victims and families that the government have no intention to limit the rigour of the work of the ICRIR clarity must be provided in the Bill with amended wording such as;

The primary objective of any ICRIR review is to ensure it conducts every reasonable action on behalf of the Chief Commissioner to detect the Troubles related crime under examination. The review must:

- *have access to all material relating to that case held by government agencies*
- *establish whether any forensic opportunities exist to identify those responsible for the crime*
- *identify potential witnesses, members of the security forces or suspects who might be able to assist in understanding who was responsible for the crime*
- *conform to nationally recognised standards*
- *be thorough*
- *be conducted with integrity and objectivity*
- *not overlook any investigative opportunities*
- *Identify and share investigative and organisational good practice.*

Each ICRIR review should be undertaken in a timely manner providing victims and families with organisational reassurance that no reasonable opportunity has been missed. It should identify recommendations and forward any fast track lines of inquiry to the Chief Commissioner for Investigations for immediate assessment. The review may also identify learning which should be shared with appropriate partners to maximise the benefit in the relevant area of business. A comprehensive ICRIR review should be conducted for all of those cases to be considered by the Commission.

The above description captures the assessment process applied by Kenova.

2.2 State bodies will be under a duty to give the ICIR full disclosure of all relevant material that is reasonably required for it to fulfil its functions.

Comment: More clarity on what ‘reasonably required’ means is necessary. In the case of a review this disclosure requirement does not appear as legally binding as for a criminal investigation. A criminal investigation attracts legal requirements for agencies to cooperate or face legal consequences – the Bill needs to be definitive as regards the legal duty for agencies to provide unfettered access to the Commission of material that they hold.

2.3 The ICIR will produce a historical record of all remaining deaths (i.e. those not investigated by the ICIR) that occurred during the Troubles.

Comment: It is not clear how this historical record will be created where there is no investigation/review of some cases by the ICIR.

2.4 A programme of memorialisation work including an oral history initiative will be carried out.

Comment: Many groups are concerned that the SoS will designate persons to Memorialisation and Oral History and that he will have the responsibility for considering and formally responding to any recommendations for memorialisation activity in Northern Ireland. The levels of trust towards the SoS in regard to legacy of NI victims and those groups representing them is uniquely low and as such his independence towards any functions the Bill requires of him will require rationale and benefit from additional measures in the Bill or from the SoS.

2.5 Introduction of a conditional immunity scheme which allows those who cooperate with the ICIR to receive immunity from prosecution for offences resulting in or connected with Troubles related deaths or serious injuries. If immunity is not granted the ICIR can continue its investigation and if sufficient evidence is recovered submit a file to the Public Prosecution Service.

To achieve immunity a person merely has to provide the ICIR with their account, that account must describe their conduct which includes involvement in the Troubles related event and that account is true to the best of the person’s knowledge and belief.

Comment: This element appears to have been written in consideration of the case of Soldiers A & C. The case resulted in a prosecution following a HET examination of the case that was never intended to be a process for a criminal prosecution and itself relied on the original 1972 accounts the two soldiers provided at a time when they were not given any legal protections. In effective the prosecution came about as a result of a defective process in 1972 applied in taking the soldiers accounts that was added to with a further defective process in 2010 by the HET (who never expected or intended for the soldiers to be prosecuted) as to how the soldiers were then dealt with. The court rightfully dismissed the case in 2021.

The immunity element is entirely perpetrator focused and does not have sufficient protections to ensure the information of the person seeking immunity is accurate through proper testing of the account. If people come forward seeking immunity and give their account, a mere review of what they have said will give little confidence to stakeholders and families. Such a process requires an investigative approach with a thorough testing of their statement in advance of any prospective immunity being granted. Indeed the Bill specifically states that there is no requirement to corroborate what a person seeking immunity says with any other person.

Kenova has experienced a number of false accounts being given to families of what happened to their loved ones by various parties claiming to know the truth of what occurred. The harm caused by inaccurate information upon families cannot be overstated. A number of these can be associated with mental well-being issues of those providing the account.

The recent case of the fantasist Carl Beech who was ultimately convicted of 12 counts of perverting the course of justice having fabricated lies about abuse as a child which the Metropolitan Police too readily accepted with worrying little challenge caused considerable reputational and emotional harm to those named in his false claims.

This element of the Bill requires considerable reinforcement in order that additional protections are in place to verify and test the accuracy of information from those claiming immunity.

2.6 Investigations into Troubles related incidents are prevented from being started or continuing by any organisation other than the ICRIR once the legislation comes into force. Prosecutions for Troubles related offences not involving death or serious injury or not connected to such offences will be barred, unless a decision has already been made to prosecute.

Comment: The Bill therefore allows for cases where a decision has been taken to prosecute for the continuance of that prosecution.

The Bill allows for any cases where a prosecution is underway for that prosecution to continue through the criminal justice route. Legacy prosecutions in NI normally take some 5 or more years. The Bill also allows for legacy inquests and civil cases to continue whereby those legal proceedings are underway. Again these matters will likely take some years to complete.

The Bill will not allow the Operation Denton work to finish notwithstanding that the work and final report are expected to be completed by the end of March 2024. The Bill is expected to become law in May 2023 or shortly thereafter. It seems out of kilter with the continuance of prosecutions, civil cases and inquests that are underway and will take many years to complete, that the Denton review is to be concluded less than a year after the Bill is introduced yet is not allowed to be finished. There are some 127 Denton families who have high levels of trust in the Denton/Kenova team and our approach. It is expected that legal challenge and lobbying for amendments to the Bill to allow the Denton review to conclude will occur from the Pat Finucane Centre, Justice for the Forgotten and individual families. The Irish government is also expected to wish for the Denton work to be allowed to finish as a number of the crimes committed by the Glenanne Gang occurred within their jurisdiction.

The Bill as currently drafted will stop all other legacy investigations and so will allow for the potential of PSNI Legacy Investigation Branch staff, Police Ombudsman legacy staff and the Kenova team all currently involved in legacy investigations to be recruited to the proposed ICRIR.

2.7 Any person in prison, having been convicted of a scheduled or equivalent Troubles related offence, may apply for immediate release.

Comment: This appears to mean that even if prosecuted and convicted of murder under the Bill the offender will serve no term of imprisonment at all. This appears to not be fully understood by some victims and groups as this is written at para 303 of the NIO explanatory notes for the Bill.

2.8 Inquests that have not reached the stage of substantive hearing by 1st May 2023 or when the ICRIR becomes operational (whichever comes first) will be stopped.

Comment: This will mean that families who have been waiting many years for an inquest into the death of their loved one and whose cases are in the queue for the Lord Chief Justice's 'Five Year Plan' for legacy inquests will not now have one. Recent legacy inquests have identified much new information for families. To now be denied an inquest will doubtless cause frustration and anger to them. At the Second Reading the Minister of State for Northern Ireland did seem to indicate that he would be willing to be flexible to those who are close to having their inquest opened.

As referenced at 2.6 of this document legacy inquests that are past this stage will be allowed to continue however such proceedings might still take some time to conclude.

2.9 Complaints against police officers relating to Troubles related conduct will no longer be dealt with once the Bill comes into force.

Comment: This will have staffing implications for the Police Ombudsman of Northern Ireland (PONI), although staff could be seconded to the ICRIR

3.0 Additional Operational Implications

3.1 Governance

The ICRIR will be an arms led body led by a panel of up to five Commissioners, including a Chief Commissioner and a Commissioner for Investigations. Although the Stormont House Agreement and the 2018 draft Bill set out roles for the Department of Justice (DoJ) (NI) and the Northern Ireland Policing Board, this Bill grants governance powers in the main to the SoS for NI. For example the SoS will be responsible for the appointment of the Chief Commissioner, he will be responsible for rules concerning requests for immunity, he can trigger ICRIR reviews into 'harmful conduct', will decide on information disclosure provisions, and will designate persons to Memorialisation and Oral History. The SoS will have the responsibility for considering and formally responding to any recommendations for memorialisation activity in Northern Ireland. This controlling set of functions of the SoS have caused various legal commentators to question the independence of the ICRIR. Funding of £35m-£50m per year will come from the UK Government. There does not appear to be a direct role for the DoJ (NI) in implementing this Bill. There are no wider independent governance mechanisms.

The Governance of the ICRIR and any dispute resolution and guidance sits with the SoS for NI. This will cause concerns with many victims groups who have such low levels of trust regarding the primary intention of the Bill and the UK government being the protection of military veterans.

It is clear that the SoS is not viewed by a number of stakeholders and victims as an independent arbiter as in their view he represents one of the sides that was involved in the Troubles. The background to how the Bill was consulted upon and the various strategic statements about legacy that pre date the Bill have left an enduring mistrust towards the SoS and NIO. This mistrust can be overcome and both the SoS and NIO should work hard to do this. Their response to suggested amendments of the Bill will provide such an opportunity.

It was raised during the Second Reading that some sort of independent oversight panel, such as set up by Operation Kenova, should be considered as best practice.

3.2 Implications for PSNI, PONI & Kenova

As mentioned above all investigations into criminal offences by any organisation other than the ICRIR and police complaints investigations into Troubles related incidents and conduct will cease when the Bill comes into force. This will mean that the investigation work of the Legacy Investigation

Branch of the PSNI and the Historical Investigations Directorate of PONI will end. Clearly this will release staff for other duties including potentially within the ICRIR.

Kenova expects to have finished all investigative activity on Operations Kenova, Turma and Mizzenmast for when the Bill commences. By the commencement of the Bill the families for the aforementioned matters will have received their individual family reports and public facing thematic reports will also have been delivered to the chief constable of the PSNI for publication.

As discussed the Glenanne Gang review under Operation Denton is expected to be completed by March 2024. The commencement of this Bill either in May 2023 or thereafter effectively means that Denton will be less than 1 year from completion. In the same way that the Bill will allow cases that are being prosecuted when it is introduced in law to continue through the justice process and for inquests and civil cases to be completed if they are at an advanced stage, I strongly advocate that the Denton review be permitted to be completed. The trust and confidence between 127+ Denton Families and the Kenova team is unprecedented and any decision to collapse Denton when the new legislation is introduced will certainly be met with legal challenge.

The ICRIR must ensure that officers include those who have experience of conducting criminal investigations in and outside of Northern Ireland. This will likely mean existing staff from the PSNI and PONI could be seconded into the ICRIR.

As described at **2.2** The Bill 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. Most of this information is held by the PSNI, MI5 and the MOD. In 2016 PSNI undertook an exercise to identify the legacy information it held. It found it had 104,000 legacy paper files comprising of 43,000,000 individual pages and 56,575 microfiche files comprising of 5,200,000 pages. The Chief Constable PSNI commented during his appearance at the Northern Ireland Affairs Committee in 2020 on the 'eye watering volume of data' held, including over 95 tonnes of hard copy criminal justice material.

Resources will need to be deployed to convert and maintain legacy material in a useable state and to manage requests from the ICRIR for information, locate the information and provide it in a format that can be easily used. PSNI, MI5 and the MOD will need to allocate sufficient resources to feed the ICRIR.

The Bill makes no reference to where the ICRIR will be located or of satellite offices. The SoS in his statement during the Second Reading spoke of how the NIO had moved to Belfast city centre. Although Operation Kenova has been based in London it also uses secure and appropriately accredited premises in Northern Ireland. There will be a clear requirement for the ICRIR to have premises in Northern Ireland. The ICRIR will hold sensitive information and so any premises will require the requisite security accreditation, which will require the assistance of the PSNI and the support of MI5.

There may be a requirement for additional operational support from the PSNI and other UK police forces should the ICRIR make arrests or conduct operations, as is the case currently for Operation Kenova.

3.3 European Convention on Human Rights (ECHR)

As mentioned above the lack of a requirement for effective, independent 'investigations' in the Bill and the provisions for immunity for prosecution are considered by some to be in breach of ECHR and therefore the Human Rights Act 1998. This certainly is the view of the Chief Commissioner of the Northern Ireland Human Rights Commission and the legal opinion of the respected Model Bill Team. It does seem likely there will be ECHR challenges to the Bill which may delay its implementation. At

the Second Reading the SoS was asked to place the Treasury Counsel advice provided to him that the Bill is indeed ECHR compliant in the Commons library.

The SoS has declared that the Bill is ECHR and Human Rights Act compliant.

3.4 Neither Confirm Nor Deny (NCND)

Particular challenges for the ICIR are likely when deciding what of the person granted immunity's statement can be addressed in a report. The dilemma of Neither Confirm nor Deny (NCND) issues will be very difficult to overcome and indeed remain a challenge for Operation Kenova. There are occasions where the routine application of NCND in regards to Troubles related cases has prevented criminal acts involving state actors from being uncovered that would have led to criminal proceedings and of the truth being provided to families. Therefore as regards NCND being applied for crimes committed during the Troubles there should be a set of principles that enable the Commission to stand NCND to one side when it is legally proportionate and necessary to do so as long as by doing so no person is put at risk or any tactic deployed regarding the use of informants is exposed to the future detriment of the tactic.

3.5 Set up of ICIR

As mentioned above there is no indication of where the ICIR will be based. We only know it will be staffed by people with experience of investigations both within and outside of Northern Ireland. Challenges, other than finding suitable secure accommodation, include finding back office staff to manage eg HR, finance, procurement and communications, as well as obtaining a secure IT system capable of managing data classified up to Top Secret. Operation Kenova is very reliant on the Metropolitan Police Service, Bedfordshire Police and Counter Terrorism Policing for these facilities. This enabled them to set up quickly and keep costs to a minimum. As an arm's length independent body this support is unlikely to be available which will add to the costs and time to set up. It would, therefore, be advisable to consider sitting the ICIR within the business functions construct of either Counter Terrorism Policing, The Metropolitan Police or Bedfordshire Police.

3.6 Victims and Families

The Bill does not sufficiently prioritise victims and families. Previously efforts, including by The Consultative Group on the Past chaired by Lord Eames and Denis Bradley in 2009, have been made to establish a day of reflection for those affected by the Troubles. Various groups in Northern Ireland have set aside the 21st June, the longest day of the year, to reflect on their collective loss and provide support for those injured and for families who have been bereaved. An opportunity exists through the Bill to acknowledge and recognise victims of the Northern Ireland Troubles and for a national holiday to be introduced in NI. Some momentum already exists for such a proposition. Every day of the calendar year someone was murdered during the Troubles. The solstice date (21st June) has traction and allows many to acknowledge the deep hurt and pain caused by the conflict. It would allow people to focus on the shared determination that such loss should never be allowed to happen again and would emphasise a commitment to a peaceful and safe future, that those lost are not forgotten.

4.0 General Feedback on the Bill from Victims and Stakeholders

The principle victim advice groups in Northern Ireland namely SEFF, Wave Trauma Centre, Pat Finucane Centre & Relatives for Justice and indeed the recently appointed Commissioner for Victims and Survivors in Northern Ireland have each strongly criticised the Bill.

The political parties in NI and the opposition parties in GB have spoken against the Bill. The Irish and American governments have also spoken out against the Bill. Every piece of feedback from Kenova

families has been very critical of the Bill with a unified assessment that the Bill's aim is to prevent the truth of what happened during the Troubles from being uncovered. The approach of most of these stakeholders is for the Bill to be entirely scrapped and re-written rather than being corrected or balance through amendments being introduced.

The Veterans Commissioner in NI, the UK government and a majority of Conservative MPs support the Bill together with a number of small groups who do not represent victims.

5.0 Conclusion

The Bill comes some 24 years after the GFA. A Bill with balance and independence that offers those who lost family members during the Troubles and seriously injured an opportunity for being told the truth of what happened can succeed. Taking into account the cycle of democracy and national elections no such opportunity for legacy legislation will come along for years if this opportunity is missed.

All interested parties and political groups should work to find a broad consensus that demonstrates that the ICIR has the independence and effectiveness to reassure those with trust issues towards the government's intentions, yet allows the government to introduce a mechanism that provides access to information for victims and in certain limited cases will result in the prosecution of offenders. Each year that passes makes it harder to find the truth as witnesses and those involved pass away and of course as time passes victims and relatives have died without having the peace of mind of being listened to, acknowledged and given the truth of what happened.

The Bill presents a 'last chance saloon' opportunity to provide victims and families with a legacy framework that gives all such victims and bereaved families access to an investigative process to recover all the information available to understand what happened to them or their loved one.

In its current form the Bill is far short of the investigative mechanisms and independence offered by Kenova and appears to have taken little learning from a model that has been praised by victims, families, stakeholders and veterans groups alike and that has also received accolades for its ECHR compliance, investigative rigor and victim care from independent subject matter experts.

The various victims groups and political parties would do best for victims and families to collaborate together and put forward a set of reasoned amendments to improve and balance the Bill. The Bill is in need of surgery not merely minor adjustments.

From a Kenova perspective a specific amendment to the Bill is required to permit for the Glenanne Review being conducted under Operation Denton to be completed and to be allowed to report upon before 31st March 2024. Such an amendment would be in the spirit of the Bill permitting prosecutions that are underway to continue, inquests and civil cases that have passed a certain point to be completed and would be finalised and reported upon within a year of the ICIR being introduced.