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**Baroness Drake
Chair of the Constitution Committee**

House of Lords
London
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constitution@parliament.uk

21 February 2023

Dear Baroness Drake,

**Government Response : Report of the Constitution Committee Northern
Ireland Troubles (Legacy and Reconciliation) Bill**

Thank you for your report following the Committee's scrutiny of the Constitutional issues and implications of the Northern Ireland Troubles (Legacy and Reconciliation) Bill. The Government has considered the Committee's recommendations and our response is set out below.

Para. 6: Opposition

The Committee flagged the strength of opposition to the Bill, particularly by victims, could undermine its aim of addressing the past and promoting reconciliation.

While we recognise the Government's desire to legislate to address the legacy of the Troubles in Northern Ireland, we note the strength of opposition to the Bill—particularly by victims—which risks undermining its aim of addressing the past and promoting reconciliation.

Government Response

While recognising that this legislation is very challenging for many in Northern Ireland, we note that finding consensus or an agreed way forward on legacy has proved elusive for successive governments. This Government believes that this legislation has the potential to deliver better outcomes for those most affected by the Troubles. It will be able to provide answers and greater accountability for many families, through the information it recovers and reports it will publish, while delivering on our commitments to those who served in Northern Ireland.

The Government recognises that, even with the changes we've brought forward, this Bill will remain difficult for many, including, as I have made clear at the dispatch box, myself. That is why I remain absolutely committed to constructive engagement with all interested parties on their concerns, and how they might be addressed, as the Bill continues its passage through Parliament.

We must also recognise, however, that a perfect solution to legacy issues is not attainable. We must work constructively towards the best practical solution that works for those most affected by the Troubles and helps society to look forward.

Para. 12: ECHR Compliance

The Committee noted the concerns raised about the Bill's compliance with the ECHR, and more generally the importance of the rule of law.

In the light of the concerns raised about the Bill's compliance with the ECHR, and more generally the importance of the rule of law, the House will wish to consider the implications of this Bill for the United Kingdom's international obligations, for victims and for confidence in the justice system—and whether it correctly balances those considerations.

Government Response

The Government remains confident that the legislation is legally robust, and complies with our international obligations. The ICRIR, as a public authority for the purposes of section 6 of the Human Rights Act 1998, must be under a duty to exercise its functions compatibly with Convention Rights, including the procedural obligations under Articles 2 and 3. This extends to the review function, and the requirement to ensure each review looks into *all the circumstances* of the death or other harmful conduct, including criminal activity. In carrying out this function to fulfil this requirement, in particular when determining the scope of a review and the investigative steps which may be required as part of it, the Commissioner for Investigations will need to comply with the section 6 duty. Any failure to do so may be enforced by the courts.

In an attempt to allay concerns on this issue and to resolve apparent confusion surrounding the term “review”, I brought forward an amendment at Committee Stage to make clear beyond any doubt that the Commissioner for Investigations is to decide whether a criminal investigation should form part of a review in any case that is considered by the Commission. This makes clear that, under the legislation, the Government’s international obligations in cases where a criminal investigation might be required in order to fulfil the Article 2 or 3 procedural duty can and will be met.

All relevant authorities will be under a duty of full disclosure to the ICIR (as per Clause 5 of the Legacy Bill), and therefore must provide all material that the body may reasonably require for the purposes of its investigations.

This commitment in statute goes further than that contained in existing legislation, and will ensure the Commission will have access to the full range of state records in relation to incidents it is investigating. The further release of that information will still be subject to important protections regarding any potential risk of prejudicing national security, and/or risk to life, or a prejudicial effect on any criminal proceedings.

The Commission will also have access to any relevant biometric or forensic evidence, as well as the full police powers, and a separate power- akin to the power of coroners - to compel witness testimony. Through the use of these powers the Government considers that the ICIR will be capable of determining, where relevant, whether any use of force by state agents was or was not justified in the circumstances, and will be capable of identifying the perpetrators of unlawful conduct.

Para 16: Legislative Consent from Northern Ireland

The Committee noted the lack of consent from the main Northern Ireland political parties and wider Northern Irish society for the proposals in this Bill.

There is a clear lack of consent from the main Northern Ireland political parties and wider Northern Irish society for the proposals in this Bill. In the absence of an Assembly, and in the light of the stated positions of the political parties in Northern Ireland, it seems that legislative consent will not be obtained. It is constitutionally inappropriate for such a significant measure to pass without consent.

Government Response

The Government has introduced legislation that will deliver a significantly different and potentially improved approach to addressing the legacy of the Troubles in Northern Ireland. While the Northern Ireland parties have made their public positions clear, it is also the case that there is no consensus by the parties as to a viable and effective alternative to the legislation that the Government has put forward.

Short of a viable and effective alternative, the Government's legislation will provide the best opportunity for information recovery, so that families can know what happened to their loved ones, and for wider reconciliation, so that society can move forward.

The Government will continue to engage with the Northern Ireland Parties as the Bill makes progress in Parliament, and hopes to see the Executive restored. The Government is clear, however, that the people of Northern Ireland have waited too long to see the implementation of effective legacy mechanisms.

Para 18: Legislative consent from Scotland

The Committee has stated it is not clear that sufficient attention has been paid in the Bill to the constitutional position of the Lord Advocate, the independent head of the system of criminal prosecution in Scotland.

It is not clear that sufficient attention has been paid in the Bill to the constitutional position of the Lord Advocate, the independent head of the system of criminal prosecution in Scotland. The Bill seeks to restrict the role of the Lord Advocate in the performance of these duties, which includes the granting of immunity from prosecution. The Government should clarify what steps have been taken, out of respect for that role, to seek and obtain the Lord Advocate's consent to what is being proposed. The legislative consent of the Scottish Parliament is essential: it has been sought but not yet granted.

Government Response

The UK Government has been, and will continue to engage with the Lord Advocate and the Crown Office and Procurator Fiscal Service. I can give you my full assurance that the UK Government is open to continuing discussions. We believe that it will be possible to work together towards resolving issues that relate to the interface between the Bill and the duties of the Lord Advocate satisfactorily.

Para 21. Delegated Powers (Clause 19)

The Committee does not see a compelling justification for this regulation-making power and agrees with the Delegated Powers and Regulatory Reform Committee that it should be removed from the Bill.

We do not see a compelling justification for the regulation-making power in clause 19 and agree with the Delegated Powers and Regulatory Reform Committee that it should be removed from the Bill. If "sexual offence" needs

further definition it should be done by amendment to the Bill. At the least the regulations under this provision should be made subject to the affirmative procedure.

Government Response

The temporal and territorial scope of the legislation is complex. It covers 3 jurisdictions and a 32 year time period (1966 to 1998). That is why the Government was unable to accept the Opposition's amendment tabled at Committee Stage that sought to replicate similar provisions made under the Overseas Operations Act and instead tabled an amendment allowing for a delegated power in this space.

The Government takes its approach to dealing with sexual offences seriously. We do not believe it appropriate to try and capture an absolute list of sexual offences under primary legislation.

It is intended that the power under clause 19(9) would be used to clarify which specific offences are caught by the general definitions in paragraphs (b) and (c) of subsection (7). It would not be used to bring within the scope of the clause offences which are of an entirely different character, and which could not therefore reasonably be regarded as sexual offences.

A delegated power provides a vehicle to amend the definition provided as required and ensure that we can take the required time to capture the full range of possible offences that need to be covered, bearing in mind that the statute book will have changed significantly in each of the three UK jurisdictions over the 30+ year period in question. We do not want to be in a position where too much haste in primary legislation omits an offence that we want to ensure is covered by the provisions. Given the nature of the debate on this most serious and delicate of issues, we think that a comprehensive list in Secondary Legislation is the most appropriate way forward, and the negative procedure will ensure sufficient scrutiny can occur.

Para 24. Delegated Powers (Clause 21)

The Committee does not think it is acceptable to give this power to the Secretary of State without parliamentary oversight. They do not consider this to be constitutionally acceptable and there is a risk that the requirement to take account of the Secretary of State's guidance could have a chilling effect on the ICRIR and undermine its independence.

The power in clause 21 gives the Secretary of State wide discretion to give guidance about the potential criminal liability of a person, without parliamentary oversight. We do not consider this to be constitutionally

acceptable. There is a risk that the requirement to take account of the Secretary of State's guidance could have a chilling effect on the ICRIR and undermine its independence.

We recommend that the House considers whether determining the important matters contained in clause 21(7) should be the subject of guidance from the Secretary of State. The House may wish to consider whether the guidance envisaged in clause 21(7) should be incorporated into the Bill.

Government Response

It is vital the Commission operates independently of the Government. The Commission will have full operational independence in all aspects of its work, including all decisions relating to the conduct of reviews and all decisions relating to immunity applications.

The purpose of this guidance to be published by the Secretary of State in relation to the determination of immunity applications is to suggest a framework through which the body should go about deciding whether the conditions for immunity are met when considering an application for immunity. It will provide further technical detail that follows on from the content of the legislation as agreed by Parliamentarians.

The Government does not consider it necessary to subject said guidance to parliamentary procedure on the basis that it does not reflect new policy. The guidance will endeavour to provide technical detail surrounding the determination of immunity applications that parliamentarians will have already been given the opportunity to scrutinise via the passage of this legislation.

Para. 26 Delegated Powers (Clause 29)

The prohibition in clause 4(1)(a) is vague and broadly defined, and the use of guidance in relation to it gives the executive potentially wide discretion to guide the ICRIR towards inaction, with no independent review of the national security claims being made. We recommend that the House considers the breadth of this power.

Government Response

It is right that the release of information is carefully considered and does not pose a risk to national security or safety to life. This guidance is required to ensure that the ICRIR and Government has full confidence in the processes in place to protect national security, balanced against the need to provide transparency. It is not

possible or appropriate to set out in the Bill the level of detail that may be required due to its likely sensitivity and specialist nature. Guidance will need to be kept under review as circumstances evolve.

Parliamentary scrutiny of these provisions is sufficient to provide oversight of the guidance flowing from them given national security considerations.

Given the content of the guidance issued under clause 29 will relate to the identification of sensitive information, it may itself contain information of a sensitive nature and therefore it may be considered appropriate to issue it at a level of government classification not suitable for publication.

Para. 29 Delegated Powers (Clause 30)

The Committee have previously concluded, and remain of the view that the creation of criminal offences through delegated legislation is constitutionally unacceptable.

We have previously concluded that the creation of criminal offences through delegated legislation is constitutionally unacceptable. We remain of this view. We recommend that the House amends the Bill to remove the relevant provisions in clause 30. Criminal offences should be set out in the Bill itself, allowing for full parliamentary scrutiny.

Government Response

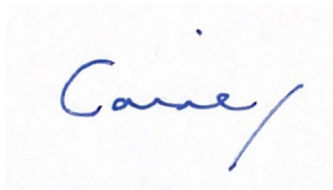
The power to make provision in respect of the holding of information by the ICRIIR deals with matters of detail, which are more appropriate to secondary legislation. In relation to existing bodies, such provision would normally be made using Memoranda of Understanding or service level agreements. In this case, however, it is considered appropriate for the purpose of transparency - and given the sensitivity of the issues involved - to include such provisions in secondary legislation to inform the subsequent development of memoranda or agreements. As Government standards on the protection of information develop, this secondary legislation can be amended with the appropriate levels of scrutiny and speed required to reflect those standards. It is important to note that the offences which could be created (i) may only apply to a person who is or has been a Commissioner, officer or contractor of ICRIIR, and (ii) may not impose a penalty greater than a penalty that may be imposed for an offence under Sch 6 to the Bill.

As these regulations will relate to procedural matters concerning the holding of information etc, and likely to follow established practice set out in existing regulations, Memoranda of Understanding and service level agreements for other bodies, it is considered that negative resolution procedure will provide appropriate scrutiny.

Conclusion

Should you have further questions, please do not hesitate to contact my office.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Caine', with a long, sweeping flourish extending from the end of the name.

**LORD CAINE
PARLIAMENTARY UNDER-SECRETARY OF STATE
FOR NORTHERN IRELAND**