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The Rt Hon the Lord Lang of Monkton DL
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19th April 2016

I would like to thank the Constitution Committee for considering the Northern Ireland (Stormont Agreement and Implementation Plan) Bill and accompanying memorandum¹ on the European Convention on Human Rights, and for your letter of 14 April.

You note that the Explanatory Notes accompanying the Bill do not offer a justification for the decision not to include a sunset clause for the provisions, so I will take this opportunity to set out the Government's position on this.

As you will be aware, this Bill gives effect to a number of key commitments contained in 'A Fresh Start: the Stormont Agreement and Implementation Plan'² (the Fresh Start Agreement) reached in November 2015.

One of those commitments relates to the establishment of the Independent Reporting Commission (IRC) to promote progress towards ending paramilitary activity, which makes up nearly half of the provisions in the Bill. The IRC will not, however, be formally established through the Bill but rather through an international agreement with the Irish Government. As such, the IRC would need to be brought to an end through the mutual agreement of the UK Government and Irish Government, and for this reason, it would not be appropriate to include a sunset clause in legislation.

However, there are further avenues of scrutiny in relation to the IRC. Parliament will have the opportunity to debate the affirmative regulations to give full effect to the international agreement under clause 4(2) and to scrutinise the agreement itself, under the arrangements set out in the Constitutional Reform and Governance Act

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/500829/NI_Stormont_Agreement_and_Implementation_Plan_Bill_-_ECHR_memo.pdf

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/479116/A_Fresh_Start_-_The_Stormont_Agreement_and_Implementation_Plan_-_Final_Version_20_Nov_2015_for_PDF.pdf

2010. Moreover, when agreement is reached with the Irish Government to bring the Commission's work to an end, clause 5 enables the Secretary of State to make regulations to wind up the IRC, having first consulted the relevant Irish Government Minister, the First Minister and deputy First Minister of the Northern Ireland Executive, and any other person the Secretary of State considers appropriate. These regulations will be subject to the affirmative resolution procedure.

It is also important to note that the Bill provisions arose from ten weeks of multi-party political talks, following a period of significant political instability in Northern Ireland with a real risk of a return to direct rule. The measures in this Bill, taken together with the other commitments in the Stormont House³ and Fresh Start Agreements, are therefore intended to support a stable and workable devolution settlement in Northern Ireland. The inclusion of a sunset clause would undo the commitments made under the Fresh Start Agreement, unless Parliament chose either to renew it or to replace it with further legislation. In this instance, rather than acting as a safeguard, a sunset clause would create uncertainty around the provisions and this would be seen to put at risk the implementation of Fresh Start as a lasting political agreement. It is for this reason that the Government believes that the inclusion of a sunset clause, where certainty and stability are needed most to support the devolved institutions, would be inappropriate.

The Government will of course keep the operation of the measures introduced in this Bill under review, to ensure that they work as intended under the Fresh Start Agreement.

Turning now to the conferral of immunities and privileges on the Commission, its staff and their households (clause 3 of the Bill), the Committee asked for an explanation as to why the Government considers it necessary to make provision for such a broad application of privileges and immunities.

Under paragraph 5.1 of Section A of the Fresh Start Agreement, the IRC is to:

- report annually on progress towards ending continuing paramilitary activity connected with NI (or on such further occasions as required);
- report on the implementation of the relevant measures of the three administrations; and
- consult the UK Government and relevant law enforcement agencies, the Irish Government and relevant law enforcement agencies and, in Northern Ireland, the Executive, PSNI, statutory agencies, local councils, communities and civic society organisations.

The Government recognises the importance of the right of access to a court, and would like to reassure the Committee that very careful consideration has been given as to whether the immunities and privileges conferred, or permitted to be conferred, by the Bill are necessary, justifiable and proportionate in the context of the functions

of the IRC outlined above. The Government has concluded that they are, for the reasons given in the ECHR memorandum and in the memorandum to the Delegated Powers and Regulatory Reform Committee⁴.

The Committee notes that the immunities and privileges appear, on their surface, to go beyond what is needed to protect the independence of the IRC. However, it is considered that the immunities and privileges are necessary to ensure that the IRC is able to fulfil its functions. In particular, they are not only directed at the need to secure the independence of the IRC from the sponsoring Governments but also to ensure that the body cannot be subject to legal challenge by those who may be the subject of its reports.

Disclosure of information is a necessary corollary of legal proceedings or process and the IRC's immunities and privileges are considered crucial to assuring the confidentiality of information. Such confidentiality is itself key to ensuring that the IRC is able to receive the information it needs, from a wide range of stakeholders and to allow it to report in an informed manner in relation to progress towards ending paramilitary activity in line with its functions. If those with relevant information perceive a risk of that information, or the identity of its source, being disclosed, there is a significant risk that they will choose not to provide it. The likely sensitivity of information which the IRC will hold is also reflected within the Bill provisions by the duties at clause 2(3), including the duty not to do anything which might put at risk the life or safety of any person.

The Independent Monitoring Commission (IMC), an international body which operated between 2003 and 2011 and monitored activity by paramilitary groups and oversaw implementation of security normalisation measures, also enjoyed immunity from suit and legal process. The IMC commented on the importance of these immunities in its final report⁵, as follows:

"These immunities were fundamental to our ability to operate. They meant that we could receive material from official and private sources secure in the knowledge that no third party could force us to reveal either its origin or its contents. They also meant that we could freely express our views in our reports, subject to the requirement imposed on us not to act prejudicially. We were able to say what we thought needed saying.

In our statement of March 2004 we said that we would observe the confidentiality of both what we learnt and who told it to us. The immunities enabled us to do this. We were clear from the start that this was essential if people were to be forthcoming with us; if they were not, we would not have access to the range of information we would need. We frequently repeated this to our interlocutors, adding that they were free to say what they liked about their exchanges with us but that we would neither confirm nor deny even that we had met them. We also repeated it in a number of reports. As a result we were able to take what we learnt fully into account and to reflect it in our reports, but in a way which did not reveal the source.

⁴ [http://www.parliament.uk/documents/lords-committees/delegated-powers/NorthernIreland\(StormontAgreementandImplementationPlan\)BillDPM.pdf](http://www.parliament.uk/documents/lords-committees/delegated-powers/NorthernIreland(StormontAgreementandImplementationPlan)BillDPM.pdf)

⁵ <http://cain.ulst.ac.uk/issues/politics/docs/imc/imc040711.pdf>

We are convinced that this was essential to our work. Our concern was not over those in official positions with whom the necessary trust could be built up, as indeed it was. We needed and secured a much wider range of sources than that. Paramilitaries themselves, victims, community groups and other members of the public often spoke to us extremely frankly. We do not think this would have happened without the promise of complete confidentiality which this made possible."

This point was recognised in the judgment in *Re: Owens* ([2015] NIQB 29)⁶ of the High Court in Northern Ireland (in the context of a challenge to a decision of the Secretary of State not to release information from the IMC's archive to the Coroner). Although the functions and focus of the IRC are different to those of the IMC, the Government considers that the nature of the information it requires is similarly sensitive. It has therefore concluded that, in the context of the IRC's work, the immunities and privileges are necessary to ensure that it can fulfil its functions.

In addition, as the Court in that case noted, disclosure in court (in that context to the Coroner) in the first instance may ultimately result in disclosure on a wider scale, with resulting prejudice to the contributors' Article 2 ECHR rights (paragraph 66 of the judgment). The Government considers that that risk remains relevant in relation to the work of the IRC, and is a further reason why immunities and privileges are necessary.

The Committee noted the ability of the IRC to waive its immunities and privileges, but commented, correctly, that a decision to refuse to waive is subject to those immunities and privileges. The Government considers that such decisions are rightly to be taken by the IRC itself, which will be an international body independent in performance of its functions, and is confident that the IRC will exercise its discretion to waive in an appropriate manner, consistent with the duties imposed under clause 2(3) of the Bill.

As regards the Committee's question about the power at clause 3(3)(b) to confer by secondary legislation certain immunities and privileges on members and staff of the IRC and members of their households, the outcome of discussions with the Irish Government will determine precisely which immunities and privileges will be conferred.

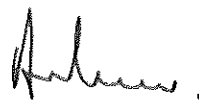
I would like to reassure the Committee that the Government will give very careful consideration before deciding to what extent to confer immunities and privileges under this power, as to whether they are justifiable in view of the IRC's functions. As the Committee will be aware, the power to make secondary legislation is subject to section 6 of the Human Rights Act and must be exercised in a manner compatible with Convention rights, including Article 6 ECHR. Moreover, while the power is, on its face, relatively broad, its limits are defined by the International Organisations Act 1968. Conferring via regulations will allow the Government to respond to discussions with the new Irish Government, once formed, and give flexibility to respond to changing circumstances during the period of operation of the IRC.

⁶ This case is being appealed, with the appeal to be heard at the end of May 2016.

Similar provision was made in relation to the IMC. The Northern Ireland (Monitoring Commission etc.) Act 2003 (Immunities and Privileges) Order 2003⁷, article 7 provided that, except in so far as in any particular case any privilege or immunity was waived by the IMC, members of the IMC would enjoy immunity from suit and legal process in respect of things done or omitted to be done by them in the course of the performance of their official duties. Articles 8 and 9 conferred the same immunity on members of staff and agents of, or persons carrying out work for or giving advice to the IMC, in both cases subject to the ability of the IMC to waive the immunity in any particular case. To illustrate the intended impact, conferring such protections on the individuals, as well as on the Commission ensured that neither Commissioners could be sued, for example, for defamation, nor the IMC itself be subject to legal challenge in respect of a report published.

Whether, as in that 2003 Order, any exemption from tax or social security or the like would be conferred is likely to depend on decisions to be taken about who the members of the IRC will be.

I hope that this response is useful. I am copying it to those members who spoke during the Bill's Second Reading and will place a copy in the libraries of both Houses.



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⁷ <http://www.legislation.gov.uk/uksi/2003/3126/contents/made>