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PROVIDING FOR THE FUTURE OF NORTHERN IRELAND'S PAST:

SOME HARD QUESTIONS ABOUT THE UK GOVERNMENT'S NEW APPROACH TO LEGACY CASES

A Policy Exchange Research Note

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"The latest proposal in relation to Northern Ireland legacy cases looks set to strip away hard-won procedural protections from those who served during the Troubles. I agree with Policy Exchange that the Government must think again if we are not to perpetuate a damaging cycle, which is not fair to veterans and may well not promote reconciliation in the province."

Admiral Rt Hon Lord West of Spithead GCB DSC PC, Labour Peer in the House of Lords and a former Head of the Royal Navy

Introduction

On 3 September, the Secretary of State for Northern Ireland, the Rt Hon Hilary Benn MP, provided Parliament and the public with the fullest outline of the Labour government's proposals to address the legacy of the Troubles since the Government took office last year. This research note draws attention to several troubling aspects of the Secretary of State's statements, which seem likely soon to find their way into a government policy paper or draft legislation.

The first troubling matter is that it seems that the UK government's emerging policy on legacy issues, including its likely decision to repeal the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and to revive the prospect of prosecutions for Troubles-related conduct, is driven primarily by a desire to placate the Irish government and to bring a close to the inter-state case brought by the Republic of Ireland against the UK before the European Court of Human Rights in Strasbourg.

The Irish government, for its part, has strongly insisted that it is of cardinal importance that the UK's legacy policy is compliant with Article 2 of the European Convention on Human Rights (ECHR). It is sensible for the UK government to consult with the Irish government on its legacy policy and to strive to act in accordance with its treaty commitments. But it is important to ask whether the UK government's policy is based on what it genuinely considers will bring closure and truth to victims and so promote reconciliation between opposing sides of the conflict, or whether it is driven instead by a dogmatic commitment to the ECHR

and by mistakenly prioritising a contestable application of the ECHR and the resolution of tensions with the Irish government.

A major weakness of the UK government's apparent approach is that it seems to take for granted that the Strasbourg Court would find the Legacy Act's provision for conditional immunities, and for information recovery in lieu of criminal and civil litigation, to be in contravention of Articles 2 and 3 of the ECHR. But the Strasbourg Court has not opined on the Legacy Act and its provisions or on their application to the context of Northern Ireland's difficult legacy issues, and were Ireland's state case to proceed to judgment, it is far from clear what the Court would decide.

The Government seems to be basing its assumption of a legal necessity of returning to prosecutions, including for former veterans and police personnel, on a single High Court decision making declarations of incompatibility in respect of provisions of the Legacy Act. The Government foolishly abandoned its appeal to the Court of Appeal against the High Court's decision and thus forfeited the ability to a further appeal to the Supreme Court, thereby ruling out any chance, following a Supreme Court decision, that the matter might come before the Strasbourg Court. In that way the Government has, on the flimsiest of legal rationales, committed itself to unilaterally surrendering the use of policy tools, such as conditional immunity arrangements, that have previously been argued to be crucial to the peace process.

Furthermore, the Secretary of State's remarks to the Northern Ireland Affairs Committee suggest that the UK government has not pressed the Irish government to answer difficult and serious questions about its own approach to handling legacy issues, which there is reason to suggest is coloured by hypocrisy and double standards and could even be argued to breach the Belfast (Good Friday) Agreement ("the Belfast Agreement").

While the Government may flatter itself that it is handling legacy issues with more care and nuance than did the previous government, there are growing concerns that the approach to renegotiation may include major new flaws. It is far from clear that the Secretary of State has secured *any* concessions from Ireland in the present negotiations. The Government's emerging policy seems to have been developed with a highly limited understanding of the history of legacy issues, including the extensive use made of conditional immunity arrangements in the context of the Belfast Agreement and the 2005 Labour proposals for a categorical

immunity. It is hard to escape the conclusion that the Government is operating in the grip of a maximalist and contestable view of its Article 2 obligations, failing once again to take the UK's side in the relevant dispute.

In view of the Secretary of State's remarks, there must be a real risk that the Government will soon formally return to an approach to legacy issues that involves de facto dependence on inquests, criminal investigations, prosecutions and trials – an approach which is likely to prove divisive, yield few successful prosecutions, lead to unavoidable asymmetry in the investigation of paramilitaries and security personnel, and be of limited use in establishing the truth of what has happened for the majority of Troubles era victims. In other words, the Government's forthcoming policy framework risks solving nothing – while at the same time raising new barriers to reconciliation.

Background to the UK government's apparent new approach to legacy issues

The 1998 Belfast Agreement brought a substantial cessation to the period of violence and social disorder known as the Troubles. Since then, in an environment partly framed by the Belfast Agreement, successive UK governments have sought to support the people and communities of Northern Ireland to address the legacy of the past and to reconcile differences between them.

From 2021-2023, the then UK government attempted to bring about a significant shift in the UK's policy on legacy issues. Broadly speaking, it sought to move away from a focus on criminal prosecutions and civil litigation as mechanisms for promoting reconciliation. Instead, it took steps to replace inquests and criminal and civil litigation with a process focused primarily on information and truth recovery for as many people and families as possible. In its 2021 command paper, *Addressing the Legacy of Northern Ireland's Past*, the Government's rationale was that it wanted:

> *"…to deal with the past in a way that focuses on providing information to as many families as possible. It wishes to help Northern Ireland's wider society to look forward rather than back, and to achieve this by delivering measures intended to facilitate reconciliation. Through reconciliation, the UK Government wants to help create strong relationships across communities, which respect differences and enable the right decisions for the people of Northern Ireland to be taken.*
>
> *"…*
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> *"The need for criminal courts to consider the criminal evidence standard (beyond reasonable doubt) inevitably means that, in many cases where the criminal evidence standard is not met, criminal courts are not able to provide families with the answers they are seeking. More than two thirds of deaths from The Troubles occurred more than 40 years ago. The passage of time means that ultimately, for those cases that get as far as a trial, there is a high likelihood of 'not guilty' verdicts or trials collapsing. For both families of victims and those accused this can be a very distressing outcome following years of uncertainty.*

Furthermore, the criminal justice approach is in stark contrast to the wider aims envisaged in the Belfast/Good Friday Agreement and the Stormont House Agreement of promoting societal reconciliation through acknowledgement, recognition of different narratives and information recovery to the extent that is now possible given the passage of time.

"…

"We know, not least from recent cases, that the prospect of successful criminal justice outcomes is vanishingly small. It is not simply the case that positive outcomes are rare; pursuing a criminal justice outcome can also have negative consequences. There are finite resources available to address this complex challenge, particularly in terms of time and people. Using limited resources to pursue a small number of cases to prosecution standards currently means that, while a tiny number of families may see someone prosecuted, and an even smaller number may see an eventual conviction, this is likely to be at the expense of failing to deliver positive outcomes to the vast majority of families, who will miss out on the opportunities to successfully recover information. There is an imperative to take action while those who want – or have – information are still with us. Rather than pursuing a goal (convictions) that will fail almost every family, we want a process of information recovery that will deliver for every family that wants it. The UK Government's aim is to deliver as much information as possible, to as many people as possible, as quickly as possible."[1]

The Government was concerned that without a serious change in policy direction, "the vast majority of families would never get the answers they desire, and legacy issues would continue to burden and traumatise individuals and society in Northern Ireland for decades to come."[2]

This policy led to the enactment of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, which closed down the possibility of further inquests, criminal investigations, and civil litigation in respect of Troubles era conduct. It provided that the work of investigating Troubles offences would be carried out

[1] HM Government, *Addressing the Legacy of Northern Ireland's Past* (CP498, July 2021), https://assets.publishing.service.gov.uk/media/60eed6e18fa8f50c797792c1/CP_498_Addressing_the_Legacy_of_Northern_Ireland_s_Past.pdf, pp. 8-10.
[2] Ibid, p. 22.

by the Independent Commission for Reconciliation and Information Recovery (ICRIR). The ICRIR was set up as an independent investigative body with power to conduct reviews into Troubles-related deaths and serious injuries and to publish reports of its findings, including about what happened to the victim in question and who was responsible for their death or injury. The ICRIR was given the power to compel witnesses, test forensics, and to grant conditional immunity from prosecution for those who come forward with truthful information. This body was also given power to refer Troubles-related conduct to the prosecution authorities where the person alleged to have committed it lacked a conditional immunity certificate. When introducing the bill that would become the Legacy Act 2023 into Parliament, the then Secretary of State for Northern Ireland issued a statement, for the purposes of section 19(1)(a) of the Human Rights Act 1998, that he was satisfied that it was compatible with Convention rights.[3]

The Act was controversial from the outset and was opposed by the main political parties in Northern Ireland, albeit for different reasons. It was also strongly opposed by the Irish government, which in December 2023 began an inter-state case against the UK before the European Court of Human Rights for an alleged breach of Article 2 of the ECHR. Then Taoiseach, Leo Varadkar, said that Ireland was left with "no option" but to legally challenge the UK over the Legacy Act, on the basis of strong legal advice that the Act was in breach of Article 2.[4]

The then Secretary of State for Northern Ireland, the Rt Hon Chris Heaton-Harris MP issued a statement criticising this move and defending the UK's policy and its legal basis. He also pointed out that Ireland:

> *"…have been critical about our proposed approach on the grounds that it moves away from a focus on criminal prosecutions. We believe that the Irish Government's stated position on dealing with legacy issues is inconsistent and hard to reconcile with its own record. At no time since 1998 has there been any concerted or sustained attempt on the part of the Irish state to pursue a criminal investigation and prosecution-based approach to the past.*

[3] European Convention on Human Rights Memorandum issued by the Northern Ireland Office (16 May 2022), https://publications.parliament.uk/pa/bills/cbill/58-03/0010/ECHR_Memo_%20NI_Troubles_17-05-22.pdf.
[4] https://www.thejournal.ie/irish-government-to-take-uk-to-court-over-troubles-legacy-act-6255333-Dec2023/.

"We note, in particular, the former Irish Justice Minister and Attorney General's 2014 reference to an informal decision on behalf of the Irish Government to not investigate Troubles cases – something that he restated publicly in 2021 in response to our proposals.

"Indeed the Irish Government should urgently clarify the number of criminal prosecutions brought in Ireland since 1998 relating to Troubles cases.

"It is also a matter of public record that successive UK and Irish Governments during the peace process worked closely together on a range of initiatives which have provided conditional immunity and early release from prison."[5]

The Irish government did not respond directly to the statement and did not discontinue their case, which remains pending at the Strasbourg Court.[6]

It is difficult to reconcile Ireland's decision to bring the inter-state case with the clear implications of Ireland's commitments to the terms of the Multi-Party Agreement (one of the two agreements that make up the Belfast Agreement).[7] The terms of that agreement clearly imply an acceptance by Ireland (welcome no doubt to the unionist participants in the agreement) that domestic legal remedies enforceable in Northern Ireland and the inter-state machinery for which the Multi-Party Agreement provides should be sufficient to avoid the need for Ireland to interfere externally in the affairs of Northern Ireland in an international forum – or at the very least would delay their doing so until resort to those remedies and that machinery had been exhausted.

Shortly after the Irish government initiated their inter-state case, the Legacy Act's compatibility with Convention rights was indeed challenged in the Northern Ireland High Court. In February 2024, the High Court in *Dillon v Secretary of State for Northern Ireland* [2024] NIKB 11 declared several provisions of the Legacy Act to be incompatible with Articles 2, 3 and 6 of the ECHR.[8] The declarations applied to provisions that included those relating to conditional immunity from prosecution, the prohibition of criminal enforcement action for offences that are

[5] Northern Ireland Office, 'Statement in response to legacy inter-state case by the Irish Government' (20 December 2023),https://www.gov.uk/government/news/statement-on-the-northern-ireland-troubles-legacy-and-reconciliation-act.
[6] https://www.echr.coe.int/web/echr/inter-state-applications.
[7] See further Conor Casey, Richard Ekins and Sir Stephen Laws, *The ECHR and the Belfast (Good Friday) Agreement* (Policy Exchange, 2025)
[8] *Dillon v Secretary of State for Northern Ireland* [2024] NIKB 11.

neither serious Troubles-related offences nor connected to a serious Troubles related offence, the discontinuance of Troubles-related civil actions, and the exclusion of evidence gathered by the ICRIR from use in civil proceedings.

It needs to be made clear that, despite repeated assertions to the contrary by the Secretary of State for Northern Ireland and other ministers, the effect of the declarations was not to declare or otherwise render provisions of the Legacy Act "unlawful", or to "strike down" provisions of that Act. Referring to the declarations in these terms is to misrepresent the true legal position. Sections 4(6) and 6(2) of the Human Rights Act 1998 are unequivocal that a declaration of incompatibility under that Act has no such legal effect. In accordance with the scheme of the Human Rights Act as enacted in 1998, which incorporates Convention rights into UK law, the function of a declaration of incompatibility is to give Parliament an opportunity to reconsider the provisions in question and to decide whether and how to exercise Parliamentary sovereignty in response. In addition, any declaration made by a first instance court is of course always subject to appeal, if necessary, up to the Supreme Court; and on a matter of such fundamental importance, those appeals needed to be pursued.

The then government did appeal the declarations of incompatibility to the Court of Appeal. Before the appeal could be heard, however, a new Labour government came to power following the general election in July 2024. On 29 July 2024, the new Secretary of State for Northern Ireland advised Parliament that (a) he had written to the Northern Ireland Court of Appeal to abandon all its grounds of appeal against the declarations of incompatibility made in *Dillon* under section 4 of the Human Rights Act 1998 and (b) the Government would introduce a remedial order to repeal the provisions declared incompatible by the High Court in Northern Ireland. It was the abandonment of the appeal on which the Government relied in taking itself to have legal authority to make the proposed remedial order, and thus to use a statutory instrument, rather than primary legislation, to undo provisions of the Legacy Act.[9]

The Secretary of State said that the "action taken today to abandon the grounds of appeal against the section 4 Human Rights Act declarations of incompatibility

[9] Secretary of State for Northern Ireland Hilary Benn MP Written Statement to Parliament on Northern Ireland Troubles (Legacy & Reconciliation) Act 2023 (29 July 2024), https://www.gov.uk/government/speeches/northern-ireland-troubles-legacy-reconciliation-act-2023.

demonstrates that this government will take a different approach. It underlines the Government's absolute commitment to the Human Rights Act, and to establishing legacy mechanisms that are capable of commanding the confidence of communities and of victims and survivors."[10]

The Court of Appeal welcomed the concession and added that:

> *"We are confident that the ECtHR has set its face against amnesties and immunity in a fashion which would result in the 2023 Act being held to be incompatible with the Convention, notwithstanding the point … that immunity was conditional and could be revoked. In addition, we were struck by the clear message from the Committee of Ministers that the introduction of an amnesty provided for by the 2023 Act was likely to be incompatible with the Convention."*[11]

While the Secretary of State noted the Government's manifesto commitment to repeal and replace the Legacy Act 2023, he added that it "would be irresponsible to repeal the Act in its entirety without anything to replace it."[12] The Government would instead keep the ICRIR and the majority of its investigative powers but seek to reform it. He did not explain why repealing provisions of the Legacy Act in advance of enacting and bringing into force their replacement was necessary or "responsible", although that is precisely what he proposed the remedial order should do.

As to what the Government's eventual position on resolving legacy issues would be, the Secretary of State said that the Government would undertake a period of:

> *"consultation with interested parties, including victims and survivors, to seek their views. This will, of course, include engagement with the Northern Ireland political parties and with the Irish government, with whom the UK government is committed to working in partnership in seeking a practical way forward that*

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[10] Ibid.
[11] *In re Dillon v Secretary of State for Northern Ireland* [2024] NICA 59. We will simply note here that the Court of Appeal was wrong to consider any such message from the Committee of Ministers. Section 2(1)(d) of the HRA does require a UK court to "take into account" a decision of the Committee of Ministers under Article 46 of the ECHR. This was not such a decision and had no authority in international or domestic law.
[12] Secretary of State for Northern Ireland Hilary Benn MP Written Statement to Parliament on Northern Ireland Troubles (Legacy & Reconciliation) Act 2023 (29 July 2024), https://www.gov.uk/government/speeches/northern-ireland-troubles-legacy-reconciliation-act-2023.

can command support across communities in Northern Ireland and beyond. This will include veterans, recognising the dedicated service of the vast majority of police officers, members of the armed forces, and the security services who did so much to keep people in Northern Ireland safe during the Troubles."[13]

The Secretary of State added that the Government "recognises that this process will involve difficult conversations, and that many stakeholders will hold different views regarding the best way forward. It is also clear that a resolution addressing the legacy of Northern Ireland's past will not be reached without a willingness, by all, to listen, to understand the perspectives of others, and to compromise. The Government welcomes the opportunity to have these conversations in the months ahead."[14]

[13] Ibid.
[14] Ibid.

The UK government's proposals for legacy issues

On 3 September this year, the Secretary of State for Northern Ireland provided Parliament and the public with the fullest description of the Government's thinking on legacy issues that it has offered since assuming office.

Appearing before the House of Commons Northern Ireland Affairs Committee, the Secretary of State confirmed that an agreement was close to being reached between the UK and Irish governments over how to approach legacy issues.[15] The Secretary of State said that the framework that was close to agreement would include provision for:

- significantly reformed, independent and human rights-compliant commission that gives families the best chance of getting answers;
- investigations that are capable of referring cases for potential prosecution where there is evidence of criminality;
- significant reform of ICRIR's governance and powers, including—
    - independent oversight;
    - an ability to hold public hearings in some cases, take sworn evidence and allow families to have effective representation; and
    - much clearer "conflict of interest" arrangements, a victims' advisory group, and maximum disclosure consistent with national security, based on the arrangements for disclosure at public inquiries.

The Secretary of State added that there was "potential" for the following to be included in an agreed framework:

- a separate information recovery body;

[15] https://committees.parliament.uk/oralevidence/16397/pdf/

- resumption of a number of inquiries that have been prematurely halted; and

- protections for veterans so that, when they are asked to participate in legacy processes, they are treated with dignity and respect.

The last of these was described as crucial and, as an example of what it might involve, the Secretary of State said that "with modern technology, there is no reason why veterans should have to travel to Northern Ireland to answer questions."[16]

In answer to a question about the timing of the remedial order, which was laid before Parliament in draft in December 2024 but needs to be approved by a resolution of each House before it comes into force, the Secretary of State said that "It is my intention to lay it alongside the draft legislation." This was an extraordinary answer. No Minister can possibly consider "that there are *compelling reasons* for proceeding under this section", that is section 10 of the Human Rights Act 1998, when the remedial order is made at the same time as primary legislation that would provide a vehicle for legal change. If the Secretary of State proceeds on this basis, the remedial order will be ultra vires.

In later remarks, on 5 September, to the British-Irish Association conference, the Secretary of State reiterated that the agreement would include provision for:

- A reformed, independent and human rights compliant Legacy Commission that gives families the best possible chance of finding answers.

- Investigations capable of referring cases for potential prosecution where evidence exists of criminality.

- A new oversight body for the Commission, a Victims Panel as in Kenova, able to hold public hearings and provide representation for families.[17]

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[16] Ibid.

[17] Operation Kenova is an "independent investigation into a range of activities surrounding an alleged individual codenamed Stakeknife. Many are concerned at the involvement of this alleged State agent in kidnap, torture and murder by the Provisional IRA during 'the troubles' and believe they were preventable. The focus of this investigation is to ascertain whether there is evidence of the commission of criminal offences by the alleged agent including, but not limited to, murders, attempted murders or unlawful imprisonments attributed to the Provisional IRA. It will also look at whether there is evidence of criminal offences having been committed by members

- The maximum possible disclosure of information, in line with the disclosure process for public inquiries.
- The potential for a separate information recovery body.
- The resumption of a number of inquests that were prematurely halted by the Legacy Act.
- Protections to ensure that anyone who served the State in Northern Ireland to keep people safe and who is asked to participate in a legacy process as a witness is treated with dignity and respect.[18]

In response to a question about the return of criminal investigations and possible prosecutions, the Secretary of State said that conditional immunity was "never going to be capable of being delivered" and "was then found to be incompatible with our human rights obligations and was struck down by the courts in Northern Ireland."[19] (We note again that this is a clear misrepresentation of the constitutional and legal position.) He added that the Government was also "not in favour of giving immunity to terrorists"[20] and that many veterans did not want provision for immunity.

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of the British Army, the Security Services or other government personnel." See https://www.opkenova.co.uk/operation-kenova-terms-of-reference/.

[18] Secretary of State's Speech to the British-Irish Association Conference (University of Oxford, 5 September 2025), https://www.gov.uk/government/speeches/secretary-of-states-speech-to-the-british-irish-association-conference-in-oxford

[19] https://committees.parliament.uk/oralevidence/16397/pdf/

[20] Ibid.

Reasons for concern over the Government's emerging policy

A full evaluation of the Government's proposed legacy framework will, of course, depend on close assessment of the eventual command paper and any draft legislation or Parliamentary Bill giving effect to it. However, if the Secretary of State's recent remarks are an accurate preview of what these are likely to contain, then there are several points of concern that should be subject to intense scrutiny within Parliament and civil society.

The role played by the Irish government in the UK government's thinking about legacy policy

The first is that it looks like the UK government's emerging policy on legacy issues, including bringing back the prospect of prosecutions for Troubles-era conduct, is driven by a desire to satisfy the Irish government and bring a close to the inter-state case brought against the UK before the Strasbourg Court. The Secretary of State's evidence to the Northern Ireland Affairs committee certainly gives the impression that agreement with Ireland has been prioritised over the consultation with other interested parties the Secretary of State had proposed originally. He did not suggest any respects in which he had invited the Irish government to engage with the outcome of those consultations but, instead, put very significant emphasis on the importance of securing the Irish government's support for any UK approach to legacy issues. He asserted that:

> *"To be able to get Ireland's support for the new arrangements that I am planning to put in place would be a very significant step forward… it would enable the revised arrangements to command greater confidence in Northern Ireland if the Irish Government are shown to move from their current position to one of saying, "We have talked to the British Government and we are able to agree*

> *jointly on a way forward". That would be a very significant and beneficial step."*[21]

The Irish government, in turn, strongly insisted that it is of cardinal importance that the UK's legacy policy is compliant with the European Convention on Human Rights. At the British-Irish Association Conference of 5 September, Tánaiste and Minister for Foreign Affairs Simon Harris said that amongst the points of particular importance during negotiations was that:

> *"any and all reformed Legacy mechanisms must be compliant with the European Convention on Human Rights. The ECHR is a fundamental safeguard in the Good Friday Agreement. It is a core part of the delicate balances in that agreement… The ECHR's guarantees cannot be negotiated away, despite what some politicians might claim. Sometimes it is necessary to state the obvious: protecting fundamental rights protects everyone. The ECHR does not take sides."*[22]

It is entirely sensible for the UK government to consult with the Irish government on its legacy policy, as Ireland is co-guarantor of the Belfast Agreement and because of the mechanisms for cooperation on matters of mutual interest that are set out in that agreement. It makes sense to involve Ireland in the search for a solution to legacy issues that commands cross-party support in Northern Ireland, as it makes sense to seek to devise solutions that are compatible with the UK's commitments under the ECHR. The Secretary of State is right to think that agreement with Ireland would be a significant factor in facilitating the acceptance of any proposals, particularly in the nationalist communities.

But the UK government's policy on as sensitive an issue as promoting reconciliation in Northern Ireland should not be *dictated* by what either the Strasbourg Court might do or what the Irish government demands. Any suggestion that the Irish government is "calling the shots" would be unlikely to facilitate the acceptance of the Government's proposals in unionist

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[21] Ibid.
[22] Tánaiste's Remarks at the British-Irish Association Conference (University of Oxford, 5 September 2025), https://www.gov.ie/en/department-of-foreign-affairs/speeches/t%C3%A1naistes-remarks-at-the-british-irish-association-conference-oxford-5-september-2025/

communities.[23] And there is a strong case for arguing too that the ECHR should not be a reason for adopting what, in terms of practicalities, is a sub-optimal route to peace and reconciliation in Northern Ireland if a better one can be found.

Instead, the policy should be driven by what the Government genuinely considers will best bring closure and truth to victims and promote reconciliation between opposing sides of the conflict. It would be unacceptable, as well as unwise, if the UK government were to give the Irish Government a veto over legislation about legacy matters, especially one apparently forced upon the UK by the ECHR inter-state case and a flawed, maximalist reading of Article 2.

It will be important for the Government to be able to demonstrate to parliamentarians and the public that it sincerely and firmly believes in the effectiveness and value of its proposals. The proposals should be subject to the most probing scrutiny on that issue, both in Parliament and in the forum of public opinion in Northern Ireland.

So, the question that now arises is whether the Government really believes (and if so why) that a return to criminal investigations and prosecutions is a critical tool for resolving legacy issues and will help bring the different communities of Northern Ireland closer together? Will it provide information and truth to as many families as possible, and avoid any divisive feelings of unfairness due to the relative treatment of veterans, police service personnel, and paramilitaries? Or, is the Government adopting this policy first and foremost because of an unquestioning dogmatic commitment to the ECHR in conjunction with a desire to appease tensions with the Irish government?

Several members of the current UK government were members of or advisers to the Blair government when the Northern Ireland Offences Bill 2005 was prepared and presented to Parliament. The Secretary of State for Northern Ireland, Hilary Benn, was a member of the Cabinet at that time (serving as Secretary of State for International Development). That Bill would have granted immunity in respect of offences committed before 10th April 1998 in connection with terrorism and the affairs of Northern Ireland irrespective of whether they were committed for terrorist purposes or in the course of efforts to combat terrorism. In other words,

[23] https://www.newsletter.co.uk/news/politics/dublin-is-leading-him-around-by-the-nose-unionists-heap-fresh-criticism-on-simon-harris-and-hilary-benn-over-troubles-legacy-negotiations-5305635.

it would have amounted to a more or less a categorical block on prosecutions of both paramilitaries and security personnel. Prime Minister Tony Blair defended the proposal, stating to a Commons committee that:

> *"I'm not pretending this is an easy issue at all. This is an issue that's uncomfortable to deal with for very obvious reasons…If you don't deal with this, you can't move forward, and I think the most important thing is to move it forward."*[24]

In the end, the Bill failed to secure sufficient support in Parliament and was withdrawn. It is worth asking current Ministers, including those in office at the time, whether they now think that what was proposed then by a Labour government – something much more categorical than anything in the Legacy Act – was in breach of Article 2 and morally and legally outrageous? Have they changed their minds? If so, why? If not, then it is worth asking what made the policy proposed in 2005 a permissible approach to securing reconciliation then, while a more modest and conditional approach to immunity – that requires information recovery – must be regarded as unacceptable now?

In the final analysis, parliamentarians are justified in asking whether any decision to return to a policy of investigations and prosecutions has been made, not because it is judged to be the best means to promote reconciliation in Northern Ireland, but rather because of a perceived imperative to persuade the Irish government to withdraw its litigation before the Strasbourg Court.

If that is the case, then this invites further questions about whether the current approach of the Irish government really has its origins in the defence of fundamental principles or should, rather, be seen as an act of political and diplomatic expediency that the UK government would be wrong to seek to appease. The inter-state case certainly looks like an attempt to use the threat of litigation to force the UK government to accept concessions which arguably it should, instead, be robustly resisting, both on their merits and because of the circumstances in which they are being sought. The Irish government, after all was complacent about both the proposals in 2005 and their subsequent non-statutory

[24] https://www.irishexaminer.com/news/arid-10046937.html.

alternative implementation in the form of "comfort letters" – a system from which the then government resiled in 2014, with uncertain effect.[25]

The UK government might argue that its attempts to secure the approval of the Irish government, including by establishing to Ireland's satisfaction that its policy is Article 2 compatible, is necessary to ensure the buy-in of the main Northern Ireland political parties. It would indeed be reasonable to seek that kind of buy-in, if it is attainable; but equally it would be wrong to take cross-party opposition (with or without support from Ireland) to all or any provisions of the Legacy Act as making it impossible to require a move away from investigations and prosecutions to bring about peace and reconciliation.

The principle of subsidiarity and indeed the spirit of the Belfast Agreement warrants, in the first instance, letting the communities of Northern Ireland figure out a solution on their own, if they can. If it cannot, then the higher constitutional authority – the UK Parliament – has an obligation to intervene and the sovereignty to do so – a sovereignty that Strand 3 of the Belfast Agreement expressly recognises. It would not be ideal for parties in Northern Ireland to think that the UK Parliament has acted wrongly in forcing legislation upon them – including even a categorical amnesty – but that might nonetheless be a more effective way to break the impasse and promote peace and reconciliation over time. The UK government should not accept that cross-party support (with or without endorsement from Ireland) is a necessary pre-condition for action. Reconciliation, as the Secretary of State effectively conceded in his written statement of 29 July 2024,[26] involves people surrendering entrenched positions to which they are deeply and sincerely committed. That process will never be successful if you start with the premise that a deep and sincere commitment to an entrenched position qualifies you to have a veto over how the process is managed, or over its outcome.

The UK government's questionable assumptions about Article 2 of the ECHR

A major weakness of the UK government's proposed approach – apart from its determination generally to subordinate the achievement of the most satisfactory outcome to avoiding the risk of legal or procedural challenge – is that it mistakenly

[25] Richard Ekins, "Amnesty and Abuse of Process" (2015) 131 *Law Quarterly Review* 196.
[26] See footnote 12 above.

takes for granted that the Strasbourg Court would find that the Legacy Act's provisions for conditional immunities, and for information recovery in lieu of criminal and civil litigation, are incompatible with Articles 2 and 3 of the ECHR. It is important to recall that the Strasbourg Court has never opined on the Legacy Act and its provisions or on their application to the context of Northern Ireland's difficult legacy issues. In making predictions about what that Court might make of it all, it is highly relevant that the Strasbourg Court is both notoriously unpredictable and was never asked to answer the relevant questions in relation to the aborted 2005 proposals, nor in relation to the "comfort letters" system – either before or after the 2014 statement that the letters could no longer be relied on.

The Government would seem, therefore, to be basing the legal necessity of returning to prosecutions, including for former veterans, on the basis of a single High Court decision. The Government recklessly abandoned its appeal to the Court of Appeal and forfeited the ability to appeal to the Supreme Court, which might have enabled the matter eventually to reach the Strasbourg Court. The Government seems to be willing to commit itself, on the flimsiest of legal rationales, to unilaterally surrendering the use of policy tools, like conditional amnesties, that have proven crucial to the peace process before.

Paradoxically, the only practicable way in which the relevance of the ECHR to legacy issues could now be authoritatively decided, if the UK government remains determined to make this the controlling factor in its policy making, would be for the UK government to ensure that the inter-state case is expedited and the Strasbourg Court invited to indicate quickly and clearly what solutions would be acceptable to it.

The risk of that, of course,[27] is that the Strasbourg Court, like the domestic courts, might adopt a maximalist reading of Article 2 that fails to address the historical context of Northern Ireland and the importance of finding a political solution that will enable reconciliation.[28] That would not support the peace process in

[27] The risk is heightened by the Government's unwise concessions in the domestic courts and apparently in its negotiations with Ireland.

[28] For criticism of the Strasbourg Court's jurisprudence in relation to Article 2 and its implications for legacy cases, see the paper by then Attorney General for Northern Ireland, John Larkin QC, *The ECHR and the future of Northern Ireland's past* (Policy Exchange, 2020), with a foreword by the late Lord Brown of Eaton-under-Heywood. See also Richard Ekins, Julie Marionneau and Patrick Hennessey, *Protecting Those Who Serve* (Policy Exchange, 2019).

Northern Ireland. It would likely be taken, rightly or wrongly, as imposing a constraint on what could not be done but still provide no clarity about what could be done and be effective.

In the absence of an authoritative finding as to the applicable reading of the ECHR, (which should not in any event be the controlling factor for policy-making in this area), the search for a satisfactory solution to legacy issues certainly should not be allowed to proceed on a basis that what is possible should be treated as falling within supposed legal parameters that policy-makers might be wrongly assuming are narrower than in fact they are. If certainty cannot be achieved, the case for giving pragmatism priority over legal risk aversion becomes compelling.

In this context, however, what is abundantly clear is that, in terms of the ECHR and the Strasbourg Court's jurisprudence, the conclusions of the High Court judgment in *Dillon* are eminently contestable in a significant number of respects. The High Court read the Strasbourg jurisprudence as falling just short of a categorical ban on amnesties, such that amnesty-like provisions are permissible only in very limited circumstances. The Court accepted, that the Strasbourg Court "contemplates the possibility of exceptions" to its general position on amnesties, including where they would contribute to a "reconciliation process" and said that "the scope and limits of any... exceptions have not been defined in the case law".[29]

The High Court reasoned that the provisions of the 2023 Act were incompatible with Articles 2 and 3 of the ECHR because they were not necessary to bring a violent dictatorship to an end, or to bring a long-running conflict to a swifter end. The Troubles ended, the Court said, in 1998, which seemed, to the Court at least, to count against legislating in 2023, or later. The Court held that there was "no evidence that the granting of immunity under the 2023 Act will in any way contribute to reconciliation in Northern Ireland",[30] and indeed that the evidence was to the contrary – a conclusion that spoke of a degree of confusion about the nature of evidence, about the difference between evidence of opinion and evidence of fact and about the extent to which it is possible to rely on either when making judgments about the validity of the stochastic reasoning involved in decision-making about the likely outcome of possible policy choices.

[29] *Dillon*, para 183.
[30] *Dillon*, para 187.

With respect to the learned judge, his confidence in dismissing the possible contribution of conditional amnesties to reconciliation was unwarranted. There is no unequivocal Strasbourg ruling that the 2023 or past comparable conditional amnesties, in the context of Northern Ireland's history, are (or were) incompatible with Convention rights. Despite the inferences drawn by the High Court, the Strasbourg Court remains, as another commentator argues, "evidently unsure of how to deal with amnesties".[31] While the ECtHR's judgments are becoming increasingly stringent, they still "indicate a degree of hesitancy about an unequivocal position of impermissibility."[32]

The justification for the 2023 provisions was that it was desirable to draw a line under the past. They would prevent cases that are very unlikely (partly because of the, to the judge, disqualifying factor of the passage of time) to result in prosecutions and convictions from proceeding. They would facilitate and encourage the people of Northern Ireland to address the legacy of the Troubles in a different, and better way that would lead to more answers and truth for more of the families affected. The passing of a quarter century between the Belfast Agreement and legislation about this matter should not be accepted as weakening the case for legislating. There is a persuasive case to be made that it actually strengthens it.

Whether Parliament's assessment in 2023 of what was needed, and why, is to be preferred to the High Court's assessment in 2024 is a political question, not a question for ordinary legal reasoning or a question of fact to be determined on evidence. It involves an evaluative prediction of a complex social, political and moral nature, which Parliament is far better placed to make in the course of the established processes for primary legislation. The High Court judge failed to take this into account, which seriously undermines the cogency of the judgment. The government is wrong to accept, in the absence of a clear ruling from the Supreme Court or the Strasbourg Court, that such provisions are necessarily incompatible with the ECHR.

Conditional amnesties have already been used at a number of critical junctures in Northern Ireland, justified by reference to the peace process. Examples of their past use include:

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[31] Miles Jackson, "Amnesties in Strasbourg" (2018) 38 *Oxford Journal of Legal Studies* 451, 463.
[32] Ibid.

- The early release of hundreds of prisoners on licence under the Northern Ireland (Sentences) Act 1998.
- The immunity from prosecution under the Northern Ireland (Location of Victims' Remains) Act 1999 for those providing evidence to the Independent Commission on the Location of Victims Remains – an immunity that, in practice, was likely to be used only by paramilitaries and their accomplices.
- The provision in the Northern Ireland Arms Decommissioning Act 1997 that: "No proceedings shall be brought for an offence listed in the Schedule to this Act in respect of anything done in accordance with a decommissioning scheme." That also necessarily benefited only those who had stored arms unlawfully.
- Section 5 of that Act, which had the practical effect of conferring immunities from prosecution: providing that arms recovered could not be forensically tested and that information and other evidence deriving from the decommissioning process was inadmissible in criminal proceedings.

Conditional immunities are and will remain politically controversial. But whatever one thinks about them, there remain reasonable grounds for thinking that no "truth recovery process concerning the past in Northern Ireland will be possible without guarantees that those who cooperate in good faith with its mechanisms will not be prosecuted as a result."[33]

To forego any provision for conditional immunity in exchange for information means foregoing an important tool for recovering information which might not otherwise have been volunteered. Dropping the potential conditional immunity removes an important incentive for people with information to come forward. Without this kind of information being volunteered, it might become next to impossible to provide answers for victims and families, or investigative leads for use in a large number of cases involving Troubles offences. It would be wrong for the Government to adopt a policy that runs the risk of damagingly narrowing the future policy options for attempting to promote peace and reconciliation in Northern Ireland, particularly on such a weak legal basis.

[33] Louise Mallinder, Kieran McEvoy, Luke Moffett and Gordon Anthony, The Historical Use of Amnesties, Immunities, and Sentence Reductions in Northern Ireland (March 2015) Transitional Justice Institute Research Paper No. 16-12, p. 15.

The questions that the UK government should be putting to the Irish government

The Secretary of State's remarks also suggest that the UK government has not pressed the Irish government to answer the difficult, serious and relevant questions about its own approach to handling legacy issues. As set out above, in December 2023, Hilary Benn's predecessor as Secretary of State for Northern Ireland, Chris Heaton-Harris, responded to Ireland's initiation of an inter-state case by issuing a statement highlighting that, while the Irish government was "critical about our proposed approach on the grounds that it moves away from a focus on criminal prosecutions", there are reasons to believe the Irish government could be charged with operating with double standards.[34] The Irish government did not reply in any formal or substantive ways to these important questions.

Some of the issues the then Secretary of State raised could and should have been asked by the current Secretary of State. In the absence of any withdrawal of the inter-state case against the UK, and more generally so long as the Irish government continues to claim the right to any influence over the decisions made in the UK on legacy issues, they remain relevant. The issues include whether the Irish government's stated position on dealing with legacy issues in the UK is inconsistent and hard to reconcile with its own record. Parliamentarians and the public, in considering to what extent they should accept the influence of the Irish government over policy making on legacy issues, would be justified in asking:

- Why since 1998 has there not been any concerted or sustained attempt on the part of the Irish state to pursue a criminal investigation and prosecution-based approach to the past, including with respect to crimes that killings that took place in the Republic like that of Jean McConville, or where crimes were planned, as in the Omagh bombing?
- Why the Irish government has not clarified the number of criminal prosecutions brought in Ireland since 1998 relating to Troubles-related cases?

[34] Northern Ireland Office, 'Statement in response to legacy inter-state case by the Irish Government' (20 December 2023), https://www.gov.uk/government/news/statement-on-the-northern-ireland-troubles-legacy-and-reconciliation-act.

- What are we to make of the fact that former Irish Tánaiste, Justice Minister and Attorney General, Michael McDowell[35] has made several public references – in 2014 and 2021 – to an informal decision on behalf of the Irish Government not to investigate Troubles-related cases?[36]
- Why very little is being done by the Irish government to facilitate even information and truth recovery in the Republic of Ireland?
- How is the Irish government's approach to legacy compatible with its commitment under the Multi-Party Agreement to bring forward measures that "would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland"?

Has the UK government asked, for instance, when or whether the Irish Government will adopt in the South the approach that it is prescribing for the North? Has the British Government made any such change in practice in the South a condition of any agreement to policy made in relation to legacy issues for the North?

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[35] McDowell said that the "Irish government of which I was a member took the decision that further investigation and prosecution by An Garda Síochána of such historic offences was no longer warranted or justified by reason of the greater interest in ending the Provisional campaign and all other political violence in Northern Ireland. And so, as far as this State was concerned, a line was drawn across the page of historic Provisional IRA criminality in Northern Ireland." https://www.irishtimes.com/opinion/sinn-fein-needs-reality-check-on-historic-prosecutions-from-troubles-1.4704986.

[36] Notable exceptions include the Smithick Tribunal and the Barron Tribunal. The former was established in 2005 to investigate suggestions that members of An Garda Síochána or other employees of the State colluded in the fatal shootings of RUC Chief Superintendent Harry Breen and RUC Superintendent Robert Buchanan on 20 March 1989. The sole member of the tribunal was His Honour Judge Peter Smithwick. The Smithwick Tribunal presented its final report to Acting Dáil Éireann on 29 November 2013 and it was published on 3 December 2013. The report concluded that there was collusion between the Gardaí and the Provisional IRA in respect of the murders and that several members of the Garda under investigation previously enjoyed friendly relations with members of the Provisional IRA. However, the tribunal concluded that there was not sufficient evidence to name the individual responsible for colluding in the murders of the RUC officers. See https://www.rte.ie/documents/news/smithwick-tribunal-final.pdf. Since the report, there have been no developments in the case.
The Barron Tribunal was an investigation into the Dublin-Monaghan terrorist bombings which killed 34 individuals. It was led by Mr Justice Henry Barron and issued its final report in 2003. It concluded that the bombing was carried out by loyalist paramilitaries and that it was likely that Ulster Defence Regiment soldiers and RUC officers helped prepare, or were aware of the preparations for, the attack. See https://www.irishtimes.com/news/barron-report-conclusions-1.398978.

The Secretary of State for Northern Ireland made much before the Northern Ireland Affairs committee of the Irish government's willingness to sign a memorandum of understanding guaranteeing full co-operation and assistance to the the Omagh Bomb Inquiry, including maximal disclosure of relevant documents and evidence. This is a welcome and important commitment. But it remains the case that there are many other historic allegations of Troubles era offences committed within its jurisdiction that the Irish authorities are simply not investigating or establishing the truth of, let alone prosecuting.

None of this is to argue that it would necessarily be illegitimate or incompatible with the ECHR for the Irish government to decide or to have decided to avoid an approach to legacy issues that does not, in practice, lead to criminal investigation and prosecutions. For the reasons set out above, there are exceptional circumstances and grounds – like promoting reconciliation in the aftermath of a traumatic and divisive conflict like the Troubles – that can reasonably justify such an approach.

It is to argue, however that the prima facie evidence that the Irish government might be applying "double standards" should be taken seriously by the UK government, which should press the Irish government to address it.

If engagement with legacy issues in the North is important for peace and reconciliation, then the failure to engage with them in the South – or to acknowledge and publicly defend how they are in fact being handled – is important in its own right, and important also because of its impact on the process and its popular acceptance in the North. Even if one rejects Article 2 maximalism, and think that there is still room in Article 2 jurisprudence for conditional immunities in the pursuit of reconciliation, as we do, it is entirely arguable that Ireland is in breach of Strasbourg case law in relation to historic allegations due to its failure to even engage in robust forms of information and truth recovery and its failure to ensure that its general approach is "provided by law" – an objection, it is fair to note, that might also have been made about the "comfort letters" system.

If concerns about double standards are made out, it would further illustrate why it is inappropriate for the UK government to design its policy on legacy issues with a view to satisfying the Irish government, as opposed to straightforwardly pursuing what it genuinely considers to be the best approach to securing reconciliation and truth in Northern Ireland.

Conclusion

The Secretary of State's remarks suggest that the Government's forthcoming policy will return Northern Ireland to an approach to legacy issues that relies heavily on inquests, criminal investigations and trials – an approach that has thus far proven divisive, yielded few successful prosecutions, will lead to unavoidable asymmetry in the investigation of paramilitaries and security personnel, and be of limited use in establishing the truth of what has happened to the majority of Troubles era victims.

In other words, the Government's forthcoming policy framework risks solving nothing at the cost of risking new barriers to reconciliation. There are also unanswered questions about why the proposed policy has taken this shape, including whether it is unduly influenced by a maximalist approach to ECHR obligations or to please the Irish government. Finally, there are reasons to think that the UK government has not pressed the Irish government robustly enough on whether its severe criticism of the UK's approach to legacy issues is hypocritical or on the damaging implications of Ireland's own approach to legacy issues for any attempt to bring peace and reconciliation to the North by returning there, but not also in the South, to a policy of investigations and prosecutions.