



RESEARCH PAPER 05/78
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Northern Ireland (Offences) Bill

Bill 81 of 2005-06

The Bill was introduced in the House of Commons on 9 November 2005 and is due for debate on second reading on 23 November 2005. It seeks to create a scheme to deal with those suspected of terrorist-related offences committed before 10 April 1998 in connection with the affairs of Northern Ireland.

The scheme proposed in the Bill has provoked considerable controversy. It would cover suspects who have not been prosecuted, tried or convicted because they have been “on the run”, or who, having been convicted, have been unlawfully at large. Individuals will be able to apply for certificates which, if granted, will give them certain exemptions, such as exemptions from arrest, for the offences to which their certificates apply.

Prosecutions for offences to which the certificates apply will be brought by a Special Tribunal, rather than a court. Provided they meet certain conditions those people who are convicted by the Special Tribunal and sentenced to imprisonment will be released on licence, like those released early under the scheme provided for in the *Northern Ireland (Sentences) Act 1998*.

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Summary of main points

The *Northern Ireland (Sentences) Act 1998* allowed prisoners convicted and imprisoned for offences connected with terrorism in relation to the situation in Northern Ireland committed before 10 April 1998 (the date of the Belfast Agreement) to apply to Sentence Review Commissioners for early release on licence. Individuals who were not in custody serving sentences of imprisonment at the time of the Belfast Agreement were not able to benefit from the arrangements created under the 1998 Act.

The Joint Declaration by the British and Irish Governments, which was published in May 2003, was accompanied by a document setting out proposals for dealing with “on-the-runs”, (OTRs), who are those people suspected of having committed terrorist offences in relation to the situation in Northern Ireland before the date of the Belfast Agreement who have been unable to benefit from the arrangements for release on licence under the 1998 Act because they have been “on the run”. The measures in the Joint Declaration did not achieve sufficient support for their implementation but the position of OTRs who might want to return to Northern Ireland or the Republic of Ireland has been an issue in continuing negotiations with the various parties involved in attempts to achieve a lasting settlement in Northern Ireland.

The *Northern Ireland (Offences) Bill 2005-06*, which was introduced in the House of Commons on 9 November 2005, follows the proposals in the document which accompanied the Joint Declaration of 2003. It seeks to create a scheme to deal with those people suspected of having committed terrorist-related offences before 10 April 1998 (the date of the Belfast Agreement) who have not been arrested, charged, tried or convicted because they have been “on the run” or who have been unlawfully at large following their conviction. Individuals who come within these categories and who meet certain conditions will be able to apply to a Certification Commissioner for a certificate, which will give them exemptions from certain powers, such as the power of arrest, in respect of the offences covered by the certificate (“certified offences”). Individuals may still be prosecuted for these offences, but only by a Special Prosecutor before a Special Tribunal. They will not have to appear in person before the Special Tribunal. Individuals who are granted certificates, including those convicted by the Special Tribunal, will be released on licence, as long as they meet certain conditions. They will be in a similar position to those people released under the 1998 Act.

The decisions of the Certification Commissioner will be subject to review by Appeals Commissioners. The decisions of Commissioners will be subject to review by a Special Appeal Tribunal, which will also consider appeals by people convicted by the Special Tribunal. The Secretary of State will have powers to suspend or revive the certification process. He will also have powers to end the operation of the various bodies created by the Bill if he believes that they no longer satisfy a useful purpose.

The provisions in the Bill have provoked considerable controversy and many of the political parties in Northern Ireland have expressed strong objections to them. The Secretary of State for Northern Ireland has sought to emphasise that the Bill involves a judicial process and does not seek to create an amnesty.

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I Political Developments in Northern Ireland

This part of the paper offers a general overview of political developments since the Belfast Agreement was signed in April 1998, and offers a more detailed chronology of events in 2005.

A. The Belfast Agreement and the Northern Ireland Assembly

On 10 April 1998, the *Belfast Agreement* was finalised. It was endorsed through a referendum held on 22 May 1998 and subsequently given legal force through the *Northern Ireland Act 1998*. The Assembly was elected on 25 June 1998 under the terms of the *Northern Ireland (Elections) Act 1998*.

The Northern Ireland Assembly met for the first time on 1 July 1998 and David Trimble (Ulster Unionist Party) was elected as First Minister with Seamus Mallon (Social Democratic and Labour Party) as the Deputy First Minister. The Assembly met on 29 November 1999 when 10 Ministers were nominated, according to the d'Hondt formula set out in the *Northern Ireland Act 1998*. On 30 November 1999 the Secretary of State made the *Northern Ireland Act 1998 (Commencement Order No 5)* resulting in the devolution of powers to the Northern Ireland Assembly from 2 December 1999.

Continued problems regarding decommissioning led to the re-introduction of direct rule through primary legislation in the form of the *Northern Ireland Act 2000* which allowed for the suspension of the operation of the Assembly and Executive, restoration of devolution by order and for Northern Ireland legislation to be undertaken at Westminster by Orders in Council. Devolution was suspended from 11 February 2000 to 30 May 2000. Devolution was restored to Northern Ireland from June 2000 and there were two further one day suspensions of devolution on 11 August 2001 and 21 September 2001.

Throughout 2002, sectarian violence and allegations that the IRA¹ had broken their ceasefire caused further problems for devolution in Northern Ireland. On 14 October 2002 the then Secretary of State for Northern Ireland, John Reid, announced the return of direct rule, following a police raid on Sinn Féin offices at Stormont and the resignation of two Democratic Unionist Party ministers from the executive. The Northern Ireland Office took on the work of the Executive and Assembly Bills were introduced into Parliament as Orders in Council. Talks began again to re-establish devolution.

Elections to the Assembly originally due on 1 May 2003 were postponed twice, first to 29 May 2003 and then until the autumn on the grounds that outstanding issues about the position of the IRA could not be resolved during an election campaign. They were held on 26 November 2003. The *Northern Ireland Assembly (Elections and Periods of Suspension) Act 2003* postponed the election due on 29 May and gave the Secretary of State power to specify the new date in an order.

¹ The term "IRA" is used in this paper to refer to the Provisional IRA, which is sometimes also referred to as PIRA

B. The Joint Declaration of April 2003

Proposals for the various parties to discuss were released to pro-Agreement parties as part of a 28-page document which covered five key areas for discussion in March 2003. This draft Joint Declaration set out a number of “proposals necessary to promote trust, implement the Agreement fully, restore the devolved institutions and attain a fully normal society in Northern Ireland.”² The Governments were not prepared to publish the document more widely at that stage,³ but they had intended to publish it in Hillsborough on 10 April 2003, the fifth anniversary of the Agreement. In fact, publication was delayed as agreement stalled between the parties and clarification was sought about an IRA announcement on decommissioning. General information about the Joint Declaration by the British and Irish Governments is given in Library Research Paper 03/69 *The Northern Ireland (Monitoring Commission etc) Bill*.

The Declaration was finally published on 1 May 2003. It included chapters on the political institutions, paramilitarism, normalisation of security arrangements, policing and justice, and rights, equality, identity and community. There were three annexes, on security normalisation, devolution of policing and justice, and rights and equality. As part of this package, a draft Agreement on Monitoring and Compliance between the British and Irish Governments was published on 1 May 2003. This envisaged the establishment of an Independent Monitoring Commission to monitor the carrying out of various commitments under the Belfast Agreement. The *Northern Ireland (Monitoring Commission etc) Act 2003* was passed to implement this proposal. The Independent Monitoring Commission has since published seven reports which give information on the state of paramilitary violence. It is a separate body from the Independent International Commission on Decommissioning, established under the *Northern Ireland Arms Decommissioning Act 1997*.

On 21 October 2003 negotiations between the Ulster Unionists and Sinn Fein resulted in a new date being announced for elections to the Northern Ireland Assembly. However, the likelihood of devolution being restored immediately after the elections was subsequently cast into doubt when David Trimble announced his dissatisfaction with the level of information disclosed in the latest round of decommissioning. Despite this, elections went ahead as planned on 26 November 2003. The main results were as follows:

- The Democratic Unionist Party won 30 of the 108 seats, 10 more than in 1998. The DUP won the highest share of the first preference votes.
- The Ulster Unionist Party won 27 seats, one fewer than in 1998 despite polling a higher share of the first preference votes.
- Sinn Fein, who secured more first preference votes than the UUP, won 24 seats.

² *Joint Declaration by the British and Irish Governments*, 13 April 2003, Dep 03/1152 and Northern Ireland Office website, at <http://www.nio.gov.uk>. Also available are the accompanying Proposals in relation to On The Run and Agreement between the British and Irish Governments. See http://www.nio.gov.uk/joint_declaration_between_the_british_and_irish_governments.pdf and <http://foreignaffairs.gov.ie/angloirish/proposal.pdf>

³ HC Deb 6 March 2003 c969

- The Social Democratic and Labour Party won the fewest seats, and the lowest share of the vote, of the major parties.
- Turnout was 63.1 percent of the electorate, compared to 68.8 percent at the 1998 Assembly elections and 68.0 percent in Northern Ireland at the 2001 General Election.

Full details of the results are given in Library Standard Note 2801. The Assembly did not meet, since devolution remained suspended.

A review of the Belfast Agreement with all the political parties began in early 2004. After the European elections in June, review talks resumed in Stormont and then at Leeds Castle where a British/Irish communiqué was issued on 18 September 2004.⁴ An important sticking point was the visual confirmation of decommissioning by the IRA. The DUP insisted that there should be photographic and video evidence of the IRA handing in their weapons.⁵

On 8 December 2004 the DUP leader, Rev Ian Paisley, confirmed negotiations on the plans to restore devolution had broken down. That day, Tony Blair and Bertie Ahern held a news conference where the proposals for the December 2004 agreement were published and made available for public scrutiny.⁶

The BBC summary of events stated:

Sinn Fein President Gerry Adams said that progress was being held up by "the demand for a process of humiliation".

Mr Adams said the issue of photographs of decommissioning was first raised with the party in the week before the Leeds Castle talks in September.

Mr Adams said: "We were told by the two governments that this was a DUP demand and we told the governments, in our view it was not achievable...."

DUP leader Ian Paisley said Sinn Fein had "pulled the plug" on the deal.

Mr Paisley said "significant progress" had been made on all aspects of the comprehensive agreement with the exception of how decommissioning would be handled.

These were entitled the *Proposals by the British and Irish Governments for a Comprehensive Agreement*. The proposals involved a complex series of events designed to lead to full decommissioning by the IRA. The proposals had focused on four areas which the governments saw as key to reaching agreement. These included: the need to bring all forms of paramilitary activity to an end; the need to decommission all paramilitary weapons; the need for a clear commitment on all sides to the stability of the political institutions; and for the achievement of support for policing from all sides of the community.⁷[2] The question of on-the-runs was not directly addressed in these published proposals.

⁴ <http://www.nio.gov.uk/index/media-centre/media-detail.htm?newsID=10254> 18 September 2004

⁵ *Photos the key for DUP to accept IRA arms wipeout, Belfast Telegraph*, 18 November 2004

⁶ *Progress but no deal says Blair, BBC News*, 8 December 2004

The General Election took place on 5 May 2005. Turnout in Northern Ireland was 68.6%, the highest of all UK regions. The DUP won nine seats, half of the Northern Ireland total. They gained four seats from the UUP: East Antrim, Lagan Valley, South Antrim and the seat of the UUP leader David Trimble's in Upper Bann. The UUP lost five of their six seats and their vote share fell by 9.0%.⁸ Sir Reg Empey became the new UUP leader, but he does not have a seat in the Commons. The DUP received more votes than any other party in Northern Ireland for the first time at a General Election. Their share of the vote increased by 11.2% points to 33.7%.

Sinn Fein also increased their share of the vote, and took Newry & Armagh from the SDLP. They came second in Northern Ireland in terms of both seats and votes won, both for the first time at a General Election. The SDLP gained South Belfast from the UUP, leaving them unchanged in total seat numbers. Their share of the vote fell and they came fourth in terms of votes received. Full details are given in Library Research Paper 05/03. Paul Murphy was replaced as Northern Ireland Secretary by Peter Hain in the subsequent Government reshuffle.

C. The IRA statement of 28 July 2005

On 28 July 2005 the Provisional IRA formally ordered an end to its armed campaign and said it would pursue exclusively peaceful means. The decision was made after internal debates. The text was as follows:

The leadership of Oglaiġ na hEireann has formally ordered an end to the armed campaign.

This will take effect from 4pm [1600 BST] this afternoon.

All IRA units have been ordered to dump arms.

All Volunteers have been instructed to assist the development of purely political and democratic programmes through exclusively peaceful means.

Volunteers must not engage in any other activities whatsoever.

The IRA leadership has also authorised our representative to engage with the IICD [Independent International Commission on Decommissioning] to complete the process to verifiably put its arms beyond use in a way which will further enhance public confidence and to conclude this as quickly as possible.

We have invited two independent witnesses, from the Protestant and Catholic churches, to testify to this.

The Army Council took these decisions following an unprecedented internal discussion and consultation process with IRA units and Volunteers.

⁸ Library Research Paper 05/03, *General Election 2005*, p17

We appreciate the honest and forthright way in which the consultation process was carried out and the depth and content of the submissions.

We are proud of the comradely way in which this truly historic discussion was conducted. The outcome of our consultations shows very strong support among IRA Volunteers for the Sinn Fein peace strategy.⁹

The IRA statement was welcomed by the British and Irish Governments that day. Sean Kelly, the former IRA terrorist, was released under temporary licence.¹⁰ The Northern Ireland Secretary, Peter Hain, stated in a letter to MPs that the IMC had been asked to prepare an additional report in January 2006 to check on progress with decommissioning.¹¹ On 1 August the Northern Ireland Secretary, Peter Hain, issued a written statement in which he set out a 2 year plan for de-militarisation, contingent on the security situation:

In April 2003 the government set out proposals to normalise the security profile across Northern Ireland when there was an enabling environment.

Following the IRA statement of 28 July, we are now moving quickly to begin that process.

Today I am publishing planned normalisation programme agreed with the chief constable and the Army GOC [General Officer Commanding Northern Ireland].

My first and over-riding priority and that of the chief constable and the GOC is the safety and security of the people of Northern Ireland.

We will not do anything that will compromise that.

Provided the enabling environment is established and maintained this programme will be achievable within two years though if the conditions are right to move more quickly in implementing elements of the plan, the government will do so.

The programme published today will see the creation of an environment which will allow the return of conventional policing across Northern Ireland.

Update to Annex 1 of the Joint Declaration

This paper provides the updated version of the normalisation programme which was promised in the government's statement of 28 July.

The steps which will be undertaken in a normalisation programme assuming an enabling environment is created and maintained will be as follows:

⁹ BBC News, IRA statement in full, 28 July 2005

¹⁰ Press Notice *Northern Ireland Office* 28 July 2005

¹¹ "Hain responds to IRA statement" *Northern Ireland Office* 28 July 2005 The text of the letter was deposited in the House (Letter to Rt Hon John Prescott 28 July 2005) as Dep 05/1228. The update to Annex 1 was deposited as Dep 05/1229

Within the first eight months, in an enabling environment, we would have achieved:

- The vacation and closure of Forkhill Base; the removal of Tower Romeo 12 in South Armagh; and dismantling of the super sangar in Newtownhamilton. Work has already started and will be completed within a six-month period
- The removal of the observation post at Divis Tower in Belfast and the two observation towers at Masonic in Londonderry. Work is beginning this week and will be completed within a six-month period
- The successive removal of two towers in South Armagh G10 (Creevekeeran); G20 (Drummuckavall). Work will start within a few weeks and be completed within a six-month period; with the sites restored to Greenfield status as soon as possible
- The publication of a structured plan for phased reduction in troops to peacetime levels
- The continuation of the review of the police estate with action taken as agreed with the Policing Board following consultation with district commanders and local communities, including work to defortify some 24 police stations.

Within the next 12 months, in an enabling environment, we would have achieved:

- Further defortification of police stations. Progressive development of and extension of varying patrol patterns: eg single beat officers, bicycle patrols and opening of police shops
- The vacation and demolition of the remaining South Armagh towers. These sites, with the exception of a Blue Light communications site at Crosleive, would be returned to Greenfield status as rapidly as possible thereafter
- Progressive withdrawal of soldiers from sites where co-located with police in Armagh (Crossmaglen, Newtownhamilton, Middletown) and in Fermanagh and Tyrone
- The removal of the military base within Maydown police station
- A reduction in troop numbers in line with the published plan
- The return of private property on vacated sites.

Within the final four months, in an enabling environment, we would have achieved:

- Further implementation of the police estate review, as determined by the Policing Board
- Additional opportunities for the police to patrol without the use of armoured vehicles

- The vacation and demolition of the observation post at Rosemount in Derry
- The vacation, closure and disposal of all military sites to leave no more than 14 core sites
- The further reduction in Army and other service levels, including the disbandment of the operational brigade headquarters, to a permanent military garrison of no more than 5,000. The size of the longer-term garrison is likely to fluctuate in response to global demands on the Army and its overall complement
- Repeal of counter terrorist legislation particular to Northern Ireland¹²

On 4 August 2005 Mr Blair held talks in London. After the meeting, the Democratic Unionists said that they would require a "prolonged period of assessment" to determine whether the IRA had given up its armed campaign.¹³ David Hanson, the new minister for political development, stated on 22 September that he believed that the IRA were beginning to decommission.¹⁴

On 22 September the Independent Monitoring Commission issued a sixth report on the activities of the Ulster Volunteer Force and the Loyalist Volunteer Force. These organisations had been conducting a violent feud which erupted in Belfast in August/September 2005. It believed that there was still an association between the Progressive Unionist Party and the Ulster Volunteer Force, reinforcing its conclusion in its fifth report that the removal of allowances from the PUP in the Assembly should be renewed, and that the Secretary of State should cease to recognise the UVF ceasefire. Mr Hain announced on 13 September 2005 that he had ceased to recognise the ceasefire. This involves specifying the organisation by order in council under s3(8) of the *Northern Ireland (Sentences) Act 1998*.

D. Independent Commission on Decommissioning report September 2005

On 26 September, General John de Chastelain, chairman of the Independent Commission on Decommissioning announced that the IRA had completed its decommissioning. A report was sent to the British and Irish Governments and was deposited in both Houses.¹⁵ The decommissioning had been witnessed by two clergymen, Catholic priest Father Alec Reid and ex-Methodist president Rev Harold Good. General de Chastelain was quoted as stating that: "We are satisfied that the arms decommissioning represents the totality of the IRA's arsenal."¹⁶ There was no photographic evidence available. The announcement was welcomed by the British and Irish Governments. However, the Rev Ian Paisley said the church witnesses had been

¹² "Northern Ireland Secretary's statement" *BBC News* 1 August 2005

¹³ "Blair defends NI military moves" *BBC News* 4 August 2005

¹⁴ "IRA moving towards decommission" *BBC News* 22 September 2005

¹⁵ Dep 05/1227 HINF2005/1593 *Report of the Independent Commission on Decommissioning addressed to Peter Hain and Michael McDowell* 26 September 2005

¹⁶ "IRA has destroyed all its arms" *BBC News* 26 September 2005

agreed by the IRA and as such could not be considered "independent". He continued: "without a photographic proof, an inventory and details on how the weapons were destroyed questions remains."¹⁷

As Peter Hain noted in his statement to the Commons on 13 October 2005 a report was awaited from the Independent Monitoring Commission, which focuses on paramilitary activity. The Government asked this Monitoring Commission to produce an extra report in January 2006 to reinforce the verification process, following the IRA statement of 28 July.¹⁸ Mr Hain noted in his statement:

There remains outstanding the question whether a financial penalty should be imposed on the Progressive Unionist party following the recommendation made to me earlier in the year by the IMC. I intend to watch developments carefully over the next few months, in particular the role that the PUP plays in attempting to secure peace and stability in the loyalist community, before reaching a decision on this in the context of the January report from the IMC, to which I referred earlier.¹⁹

Mr Hain also announced that the Police Board for Northern Ireland would be reconstituted from 1 April 2006 with political appointees selected in proportion to the 2003 election results, using the d'Hondt formula.

Mr Hain referred to plans to reinvigorate discussions with the parties about devolving criminal justice and policing to Northern Ireland and promised enabling legislation in the meantime, when parties had reached agreement. He also promised an announcement on the appointment of a victims commissioner.

On 19 October 2005 the Independent Monitoring Commission published its seventh report.²⁰ Previous reports are summarised in Library Standard Note no 3757 *Political Developments in Northern Ireland since January 2005*. The report found that in the six months up to the end of August loyalists were responsible for much more violence than republicans. It made some encouraging comments in relation to the IRA after the 28 July announcement, but stated:

Clearly we are looking for cumulative indications of changes in behaviour over a more sustained period of time.²¹

Mr Hain made a written ministerial statement to the Commons in which he set out proposals to restore allowances to Sinn Fein Members in the Assembly. These had been suspended in April 2004, following reports of the Independent Monitoring Commission which recommended sanctions against Sinn Fein. In March allowances were also

¹⁷ *ibid*

¹⁸ HC Deb 13 October 2005 c449-452

¹⁹ HC Deb 13 October 2005 c450

²⁰ Available at

<http://www.independentmonitoringcommission.org/documents/uploads/7th%20%20IMC%20%20Report.pdf>

²¹ *Seventh Report* para 3.18

removed from Sinn Fein MPs for one year from April 2005, following a Commons motion.²² Mr Hain said:

The report concludes that the PIRA statement, despite coming at a point when five sixths of the period under review had elapsed, is 'very significant'. The statement and the act of decommissioning reported by the IICD on 26 September have created a platform for future progress and 'initial signs following the PIRA statement are encouraging'. However, it is essential that the IMC, as they state, are able to observe 'cumulative changes in behaviour over a more sustained period of time ..'. I await the next report of the Commission, due in January 2006.

In the meantime I have decided to restore Sinn Fein's Assembly allowances, with effect from 1 November, and will, in due course, recommend to the House that it lifts the suspension of allowances to Sinn Fein Members of Parliament, which took effect on 1 April this year.

The report also concludes that paramilitaries, especially Loyalists and dissident Republicans, continue to exert a malign influence over communities which has obstructed the development of a 'culture of lawfulness'. As I said in my Statement to Parliament on 13 October, it has taken a long time for the Republican movement to acknowledge that violence does not pay but it has now publicly done so. Loyalist paramilitaries must now also realise that exclusively peaceful and democratic means represent the sole way forward.²³

The BBC reported concern at this decision from the Independent Monitoring Commission:

But commission chairman Lord Alderdice said the decision to return Sinn Fein's allowances was against the wishes of the IMC.

"While we do feel that something very significant happened potentially in the IRA statement and indeed in the decommissioning which was reported on, we felt it was too early to make a definitive judgement on the question of returning public funds to Sinn Fein at this time," he said.²⁴

The decision also sparked hostile reaction from Rev Ian Paisley at Prime Minister's Question Time on 19 October.²⁵ David Lidington, for the Conservatives, considered that it was too early to make decisions in respect of allowances. That day a meeting was held of the British-Irish Intergovernmental Conference in Dublin.²⁶

On 24 October Mr Hain announced that he had laid in Parliament the Direction made under the *Northern Ireland Act 1998* to restore Sinn Fein allowances in the Assembly.²⁷

²² Standard Note no 1667 *Sinn Fein and Access to Commons Facilities* gives full background

²³ HC Deb 19 October 2005 c58WS

²⁴ "IRA progress signs encouraging" *BBC News* 19 October 2005

²⁵ HC Deb 19 October c843

²⁶ "Joint Communique: British-Irish Intergovernmental Conference NIO Press Release 19 October 2005

²⁷ HC Deb 24 October 2005 c6WS *Direction given by the Secretary of State under section 51B of the Northern Ireland Act 1998*, laid 20 October 2005

The Direction indicated that the annual amount of assistance was £120,000. That day at Business Questions, Nigel Dodds expressed his party's concern:

Mr. Nigel Dodds (Belfast, North) (DUP): May we have a statement on the Floor of the House so that Ministers can be questioned about the decision to reinstate immediately to Sinn Fein its Assembly allowances worth hundreds of thousands of pounds and the intention to reinstate allowances and privileges in the House? Is not it wholly unacceptable that that should be announced in a written ministerial statement? Should not it come before the House? Will not people in Northern Ireland note the fact that the Government are proceeding contrary to the recommendation of the Independent Monitoring Commission, which states that the IRA is still involved in criminality? Will not any future attempt to tell the people of Northern Ireland that they should abide by IMC recommendations be rejected on the basis of the way that the Government are acting?

Mr. Hoon: It is important that I set out for the benefit of the House the precise legal position on allowances. Allowances for parties represented at Westminster have been available for some time. Obviously, the position of Sinn Fein was considered very carefully and that led the Government to propose a motion suspending Westminster allowances for a 12-month period, but that was contingent on the way in which Sinn Fein was operating and behaving. In the light of the IRA statement of 28 July, including the indication that the armed struggle was over, the situation is clearly different and one to which we are bound to apply the relevant legislation, which requires those payments to be made. Therefore, my right hon. Friend the Secretary of State for Northern Ireland has concluded that he should lift the suspension of the allowances with effect from 1 November. That is a perfectly straightforward situation and it is wholly consistent with the relevant legislation as it affects the House.²⁸

As yet, no motion has been tabled to reinstate allowances for Sinn Fein Members of the Commons.

Mr Hain did announce to the Northern Ireland Affairs Select Committee that legislation on on-the-runs would be brought forward shortly, possibly in November 2005. According to media reports, Unionists expressed concern at the proposed Bill.²⁹

Recent paramilitary activity is summarised in the following extract from the seventh report of the Independent Monitoring Commission:

The level of paramilitary violence remains high on the loyalist side. The downward trend in the total number of shooting casualties has continued. The total number of casualties of assaults has now been broadly the same for 18 months, though it is a good deal less than it was over the period from March 2003–February 2004:

- Averaged out, there were 1.5 victims of shooting a week and about 2 victims of assault a week;
- The number of casualties of loyalist shootings was nearly the same as in the preceding 6 months and that of loyalist assaults was one third higher.

²⁸ HC Deb 20 October 2005 c990

²⁹ "Unionist fury as Ulster amnesty law scuppers murder inquiries", *Times*, 27 October 2005

In contrast on the republican side there were about half the number of shooting casualties, and there were about a third fewer assault casualties;

- The change may be summarised as follows:

Republican Groups

- Shooting casualties *down* by 43% compared with the preceding 6 months, and *down* by 64% compared with the corresponding period in 2004;
- Assault casualties are *down* by 40% compared with the preceding 6 months and *down* by 17% compared with the corresponding period in 2004;
- Since the PIRA statement of 28 July, there have been no reported republican assaults or shootings though we are aware that there was one assault in early August by PIRA to which we refer in paragraph 3.15.

Loyalist Groups

- Shooting casualties are *down by only* 3% compared with the preceding 6 months, and *down by only* 8% compared with the same period in 2004;
- Assault casualties are *up* by 38% compared with the preceding 6 months, and *down by only* 5% compared with the same period in 2004.³⁰

During the second reading of the *Terrorism (Northern Ireland) Bill* on 31 October 2005, Peter Hain announced that the Loyalist Volunteer Force (LVF) had issued a statement to the effect that they were standing down their 'military units'.³¹ The Bill extends the provisions of Part 7 of the *Terrorism Act 2000* until July 2007, with provision for further extension. Lady Hermon, for the UUP, noted:

He really needs to clarify the inconsistency of his approach in recent weeks. We are being asked to approve terrorism legislation that will extend part VII for at least two years, and perhaps another year on top of that, on the basis that the security situation, as determined at the present time, makes the provisions "necessary". How can he reconcile a Bill that we are being asked to pass on that assessment with the facts that he has already indicated that Sinn Fein's allowances will be returned in the Assembly, that he will recommend in a few weeks that Sinn Fein Members' allowances in this House should be returned, and that Royal Irish Regiment home battalions should be disbanded? Before we go any further, will he reconcile the two irreconcilable points of view that are coming out of the Northern Ireland Office?³²

Sir Patrick Cormack, the new chairman of the Northern Ireland select committee, asked during the second reading debate for the House to be given the opportunity of pre-legislative scrutiny for the proposed on-the-runs legislation. In response, Peter Hain referred to his evidence given to the Northern Ireland Affairs Committee on 26 October 2005 where the difficulties of timing had been discussed.³³

³⁰ Seventh Report Independent Monitoring Commission available at <http://www.independentmonitoringcommission.org/documents/uploads/7th%20%20IMC%20%20Report.pdf>

³¹ HC Deb 31 October 2005 c627

³² HC Deb 31 October 2005 c630

³³ uncorrected transcript available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmselect/cmniaf/uc621/uc62102.htm>

On 31 October Mr Hain was questioned closely about the normalisation programme published on 1 August 2005 and the continuing problem of paramilitary violence. For the Opposition, David Lidington complained about lack of consultation on the proposed on-the-runs legislation:

Frankly, I find it frustrating that members of Sinn Fein have seen, so they tell me, the Government's proposals and are happy with them, but that my party and, I think, the Liberal Democrats, have not had access to the details of what the Government have in mind.³⁴

Mark Durkan, SDLP leader, took issue with Mr Hain's declaration that pro-Agreement parties had generally endorsed the Joint Declaration of May 2003:

I recognise that, as the Secretary of State said, in many ways the Bill connects back to aspects of the joint declaration of May 2003. However, I quibble with his saying that the joint declaration was generally endorsed by all the pro-agreement parties. Although there was general endorsement of some aspects of it, some of us had specific criticisms of other aspects. Some of us never went along with the pretence about having three annexes and two other documents that happened to coincide with them—one about on-the-runs and the other about sanctions that would be attached to the Independent Monitoring Commission. We never went along with the pretence that those documents were not annexes. In the all the talks before, during and since the Hillsborough talks on the joint declaration, including the talks in Leeds castle to which the hon. Member for North Antrim (Rev. Ian Paisley) has referred, we consistently pointed out to both Governments that they were turning a blind eye to the reality of continuing criminality.³⁵

Nigel Dodds for the DUP. raised concerns about the perceived unfairness of treatment of ex-terrorists:

Let us consider the Government's actions in relation to Sean Kelly, a child murderer and a mass murderer who belongs to the Provisional IRA-Sinn Fein movement. When he was first arrested, we were told by the Secretary of State that it was vital that he should be arrested, because of his involvement in terrorism and the danger that he posed to the community at large. Sean Kelly was released on the eve of the IRA statement at the end of July, purely because the Government were told by the IRA-Sinn Fein leadership that it was vital to the IRA making its statement. Such an approach to the people of Northern Ireland by the Government has bred deep cynicism and a total lack of confidence in their willingness to stand by their pledges, to do the proper thing, and to judge the IRA by its actions, not its words.

The way in which the Government have behaved has contributed significantly to the lack of confidence in the unionist community and the feeling of one-sidedness to which the hon. Member for South Staffordshire (Sir Patrick Cormack) referred.

³⁴ HC Deb 31 October 2005 c642

³⁵ HC Deb 31 October 2005

It is intolerable that the Government should rush headlong to make concessions.³⁶

II The *Northern Ireland (Offences) Bill 2005-06*

A. Background

The *Northern Ireland Sentences Act 1998* allowed prisoners convicted and imprisoned for offences connected with terrorism in relation to the situation in Northern Ireland to apply to Sentence Review Commissioners for release on licence. Under the terms of the Act 447 prisoners have been released early and 127 applications for release have been unsuccessful.³⁷ Among the 127 applications there were 14 prisoners who were released, having served their sentence, before the Sentence Review Commissioners reached a decision on their application³⁸. 13 of the prisoners released under the 1998 have been returned to prison in accordance with section 9 of the Act because the Secretary of State believed that they had broken, or were likely to break, the conditions of the licence under which they were released.³⁹

The phrase 'on-the-runs'(OTRs) refers to suspects who were not in custody at the time of the *Belfast Agreement*, and were therefore unable to benefit from the terms of the *Northern Ireland Sentences Act 1998*.

The Joint Declaration of May 2003 contained an accompanying document on OTRs entitled *Proposals in relation to on the runs*.⁴⁰ The measures in the Joint Declaration did not achieve sufficient support for their implementation but OTRs have been a significant aspect in continuing negotiations with the parties. An article in the *Observer* on 29 June 2003 suggested that 61 OTRs were waiting to be allowed back into Northern Ireland, including individuals wanted for the murder of civilians and police officers.⁴¹

The document that accompanied the 2003 Joint Declaration outlined the British proposals for dealing with OTRs. The *Northern Ireland (Offences) Bill 2005-06*, which was introduced in the House of Commons on 9 November 2005, is generally designed to implement these proposals. The first paragraph of the 2003 document set out the context:

Within a context of acts of completion, the British Government would bring before Parliament the legislation necessary to resolve outstanding cases on a basis involving due judicial process, and showing sensitivity to the position of victims.

³⁶ HC Deb 31 October 2005 c669-70

³⁷ HC Deb 14 November 2005 c1019W

³⁸ *ibid.*

³⁹ HC Deb 30 June 2005 c1740W

⁴⁰ http://www.nio.gov.uk/proposals_in_relation_to_on_the_runs_otrs_-_april_2003.pdf

⁴¹ "On-the-runs must wait for IRA to disarm" – *Observer* 29.6.2003

The Irish Government would address similar cases in its jurisdiction. A related issue would be the complete ending of exiling and allowing those exiled to return.⁴²

In the course of a statement to the House of Commons on 13 October the Secretary of State for Northern Ireland, Peter Hain said:

The House will know that we have undertaken to legislate to deal with the position of individuals connected with paramilitary crimes committed before the Belfast agreement, dealing with those suspects categorised as on-the-runs. As the House will recall, the proposals were published alongside the joint declaration more than two years ago, in May 2003. This is not an amnesty: nevertheless, the implementation of those proposals will be painful for many people. I fully understand that, but the Government believe that it is a necessary part of the process of closing the door on violence forever.⁴³

B. The Northern Ireland (Offences) Bill 2005-06

The Bill is intended to apply only to offences defined in Clause 1, which are

- a) offences under the law of any part of the UK committed before 10 April 1998 in connection with terrorism and the affairs of Northern Ireland (whether committed for terrorist purposes or not); or
- b) offences involving escape from prison or lawful custody committed before that date in respect of any of the offences listed in paragraph a)

The inclusion of the phrase "whether committed for terrorist purposes or not" is intended to enable offences committed in the course of efforts to combat terrorism in Northern Ireland to be covered by the Bill.⁴⁴ This might include offences committed by the security forces and others.

C. Certificates of Eligibility

Clause 2 and Schedule 1 of the Bill provide for the appointment by the Secretary of State of a "certification commissioner" who will issue certificates of eligibility to people who apply for them. To be eligible an applicant will have to fall within one of the categories set out in Clause 3(2) and appear to meet conditions set out in clause 3(3).

The categories set out in Clause 3(2) are:

- There is a written statement from a senior member of the Police Service of Northern Ireland confirming that since before 1 November 2005 police officers

⁴² *ibid.*

⁴³ HC Deb 13 October 2005 c451

⁴⁴ *Explanatory Notes* paras. 4 & 14

have had, and continue to have, reasonable grounds for suspecting the applicant to be guilty of an offence to which the Bill applies, and that the applicant would have been arrested for the offence before that date but for the fact that he was believed to be outside the United Kingdom; or

- The applicant has been charged with an offence to which the Bill applies, but not convicted or acquitted of it. (The *Explanatory Notes* comment that this is intended to cover individuals who have been charged with such offences in the past and have absconded before trial, and individuals who are charged with such offences in the future); or
- The applicant has been convicted of such an offence and—
 - 1) has not been sentenced for it,
 - 2) is serving (whether in custody or on licence) a sentence of imprisonment imposed in respect of it, or
 - 3) is unlawfully at large during the currency of such a sentence.

An applicant who falls within one of the categories set out in Clause 3(2) will have to be granted a certificate by the commissioner if it appears to the commissioner, on the information available to him, that the applicant meets all of the following conditions:

- the applicant does not support a “specified organisation” (see below);
- he is not concerned or likely to be concerned in the commission, preparation or instigation of acts of terrorism;
- he has not been convicted of an offence committed on or after 10th April 1998 which would, if committed before that date, be an offence to which the Bill applies;
- he or she has not been sentenced to five or more years’ imprisonment following:
 - a) conviction for an offence committed on or after 10 April 1998 under the law of any part of the UK or
 - b) conviction for an offence under the law of any other country committed on or after 10 April 1990 which would be punishable with imprisonment for five years or more if it had been committed in Northern Ireland (a “serious foreign offence”).

“Specified organisation” has the same meaning as in section 3 of the *Northern Ireland (Sentences) Act 1998*. Section 3(8) of the 1998 Act requires the Secretary of State to make an order specifying an organisation which he believes:

- (a) is concerned in terrorism connected with the affairs of Northern Ireland, or in promoting or encouraging it, and
- (b) has not established or is not maintaining a complete and unequivocal ceasefire

The following organisations are currently specified under the 1998 Act:

- The Continuity Irish Republican Army
- The Loyalist Volunteer Force
- The Irish National liberation Army

- The “Real” Irish Republican Army
- The Ulster Volunteer Force
- The Red Hand Commando

A certificate of eligibility issued under Clause 3 of the Bill will have to specify the conduct constituting an offence for which a person would have been arrested or, if they have been charged or convicted, the offence concerned. An offence specified in a certificate in this way will be a “certified offence” for the purposes of the Bill.

Clause 4 of the Bill sets out procedure for making and dealing with applications for certificates. Applications will have to be made in the manner required by the commissioner and will have to provide any information or document required by the commissioner, including physical evidence of identity of a kind prescribed in rules made by the Secretary of State. It is intended that it should be possible for applications to be made through an intermediary such as a solicitor.⁴⁵

The commissioner will have to inform the Secretary of State and the Director of Public Prosecutions for Northern Ireland of any application made to him.⁴⁶ The Secretary of State will be able to make representations to the commissioner about the application.⁴⁷ The *Explanatory Notes* comment that if the Secretary of State has information that the conditions are not met, he may not only provide information to the commissioner, but also make representations about matters such as the weight that it may be appropriate to place on the information.⁴⁸

When the commissioner grants or refuses an application for a certificate of eligibility he will have to inform the applicant and the Secretary of State of his decision and the reasons for it.⁴⁹

Rules governing the procedure to be followed by the commissioner will be made by the Secretary of State. They may provide for the disclosure of information or evidence in connection with an application, may prevent information about an applicant from being disclosed to anyone other than the commissioner in certain circumstances and may prevent reasons for the grant or refusal of an application from making reference to certain specified matters. The rules will be subject to annulment under the negative procedure.⁵⁰

The Secretary of State will have powers to direct members of the Police Service of Northern Ireland to provide assistance to the certification commissioner in connection with the exercise of his functions.⁵¹ If the Secretary of State is satisfied that providing any particular information to the commissioner would be prejudicial to national security or would pose a significant risk to a person’s safety, he will be able to give directions to the police that the information must not be provided to the commissioner.⁵² He may also

⁴⁵ *Explanatory Notes* para.23

⁴⁶ Clause 4(4)

⁴⁷ Clause 4(5)

⁴⁸ *Explanatory Notes* para.20

⁴⁹ Clause 4(6)

⁵⁰ Clause 25(4)

⁵¹ Clause 4(9)

⁵² Clause 4(11)

refuse to provide such information in response to a request made to him by the commissioner.⁵³

While an application for a certificate is pending, it will not be possible for proceedings for offences to which the Bill applies or related offences committed before 10 April 1998 to be brought and any such proceedings already brought will be suspended.⁵⁴ This bar on proceedings will not, however, apply where second or subsequent applications are concerned unless the certification commissioner certifies that there has been a material change since the previous application.⁵⁵ This is intended as a safeguard to prevent the use of the application procedure as a means of preventing criminal proceedings going ahead.

A person whose application for a certificate of eligibility is refused will be able to appeal to appeals commissioners appointed by the Secretary of State under provisions in Clause 13 and Schedule 3 of the Bill. The appeals commissioners will also hear any appeal from the Secretary of State against the grant of a certificate of eligibility in any particular case. The appeals commissioners are to be the only legal forum for questioning the exercise by the certification commissioner and the Secretary of State of their functions under the Bill.⁵⁶ The appeals commissioners will hear proceedings that would otherwise be brought in the High Court and will have all the powers that the High Court would have.⁵⁷ It will not be possible for the exercise of their functions to be questioned in criminal proceedings.⁵⁸

The Secretary of State will have the power to cancel a person's certificate of eligibility if he believes that:

- the conditions that the applicant was required to meet under Clause 3(3) were not met at the time the certificate was granted or are no longer met by him; or
- the person has at any time supported an organisation that is currently a specified organisation, or has become one since the certificate was granted.⁵⁹

When the Secretary of State cancels a person's certificate of eligibility he will have to inform the Director of Public Prosecutions for Northern Ireland and give the person concerned notice of the cancellation and of the reasons for it.⁶⁰ He may make rules, which will be subject to annulment under the negative procedure, preventing such reasons from making reference to particular matters.⁶¹ This is intended to prevent the disclosure of sensitive information.

Once a certificate of eligibility has been issued, the person holding it will be exempt from the following powers in connection with a certified offence if he has not been convicted of it:

⁵³ *ibid.*

⁵⁴ Clause 5(1)

⁵⁵ Clause 5(3)

⁵⁶ Clause 15(1)

⁵⁷ Clause 15(3)

⁵⁸ Clause 15(5)

⁵⁹ Clause 6(1)

⁶⁰ Clause 6(2)

⁶¹ Clause 6(3).

- Powers of arrest or detention
- Powers of entry or search
- Powers to remand in custody or on bail
- Powers to take fingerprints or samples
- Powers to obtain information exercisable in relation to criminal proceedings⁶²

It will be possible for these powers to be exercised against a person who has been convicted of a certified offence if, for instance, he breaks the terms of his licence.⁶³

D. Prosecutions for certified offences

It will still be possible for a person to be prosecuted for offences in relation to which they have been given a certificate, but under Clause 8 of the Bill, the trial for any such “certified offence” will take place not before a court, but before a body known as the Special Tribunal, which is to be set up under Schedule 2 of the Bill.

The Special Tribunal will consist of a retired judge who has held office as a county court judge in Northern Ireland, a circuit judge in England and Wales or a retired judge of a higher tier.⁶⁴ The retired judge will sit without a jury. The Tribunal will sit in Northern Ireland and will try people for offences under the law of Northern Ireland. Where a certified offence is an offence under the law of England and Wales or Scotland, it is intended that the Tribunal should try the person for an equivalent offence under the law of Northern Ireland.⁶⁵ The Bill seeks to ensure that the procedure followed in proceedings before the Tribunal corresponds with that followed in proceedings on indictment at the Crown Court, with the qualification that this is subject to the direction of the court.⁶⁶ The Secretary of State will be able to make rules concerning the procedure for bringing cases before the Special Tribunal.

Prosecutions before the Special Tribunal will be instituted and conducted by a Special Prosecutor, who will be appointed by the Secretary of State after consultation with the Advocate General for Northern Ireland.⁶⁷ The Special Prosecutor will exercise his functions under the superintendence of the Advocate General for Northern Ireland.⁶⁸ He will be under a duty to ensure that appropriate arrangements are made for giving information to victims about the case of each person against whom proceedings are taken before the Special Tribunal, although information should not be given if doing so would endanger the safety of any person.⁶⁹

A defendant will not have to appear before the Special Tribunal.⁷⁰ If he chooses not to appear but is represented in the proceedings, pleas may be entered on his behalf by his representative.⁷¹ A defendant who declines to appear will be taken to have pleaded not guilty to all the charges against him, except for those in respect of which his

⁶² Clause 7

⁶³ *Explanatory Notes* paragraph 33

⁶⁴ Schedule 2 paragraph 2

⁶⁵ *ibid.* paragraph 4

⁶⁶ *ibid.* paragraph 6

⁶⁷ Clause 18

⁶⁸ Clause 18(2)

⁶⁹ Schedule 6(6)

⁷⁰ Clause 8(3)

⁷¹ Clause 8(4)

representative has entered a plea on his behalf.⁷² The Special Tribunal will generally have the same powers, authorities and jurisdiction as the Crown Court.⁷³ The Tribunal will not, however, have the power to remand a person in custody. Publicly-funded legal assistance will be available, as it would be in proceedings in the Crown Court.⁷⁴

E. Release on licence

Where a person who holds a certificate of eligibility is sentenced to imprisonment by the Special Tribunal it is intended that he should be released on licence as soon as possible.⁷⁵ Release on licence will be dependent on the person providing fingerprints and non-intimate samples at a specified place in line with requirements imposed by the Secretary of State. People who apply for certificates following their conviction, who will not have been tried by the Special Tribunal, will also have to be released on licence as soon as possible after being given a certificate, as long as they comply with requirements to provide fingerprints and non-intimate samples. The certification commissioners will therefore be exercising powers equivalent to those given to the Sentence Review Commission under the *Northern Ireland (Sentences) Act 1998*, with two significant differences:

- the two year minimum period in custody under the 1998 Act will be reduced to zero
- the requirement under the 1998 Act that, to qualify, the sentence needs to be of at least five years, will be removed

A person who is sentenced to life imprisonment in respect of a certified offence, whether by the Special Tribunal or following conviction by a court, will not be eligible for release on licence if it appears to the Secretary of State that, on release, he would be a danger to the public.⁷⁶ As life imprisonment is the mandatory sentence for murder this provision would have to apply in any case where the certified offence with which a person has been convicted, whether by the Special Tribunal or by a court, is murder.

Individuals who have been given licences will not have to serve their sentences in custody unless their licences are suspended or revoked under Clause 11. As with licence arrangements for prisoners released from sentences of imprisonment imposed in the ordinary criminal courts, individuals who receive licences under Clause 9 will still be considered to be serving their sentences. Where a person receives a licence under Clause 9 in relation to a sentence for a fixed term, their sentence will expire, and their licence will lapse, when they reach the two-thirds point of what would have been the full term of their sentence.⁷⁷ This reflects current arrangements governing the remission of sentences in Northern Ireland.

A person's licence under Clause 9 will be subject to the conditions in Clause 3(3) which had to be met before his certificate of eligibility could be granted and the condition that no organisation that he has at any time supported becomes a specified organisation after the licence is given. Where a person has been given a licence in relation to a life

⁷² Clause 8(5)

⁷³ Clause 8(7)

⁷⁴ Schedule 2 paragraph 5

⁷⁵ Clause 9(1)

⁷⁶ Clause 9(3)

⁷⁷ Clause 9(5)-(7)

sentence, the licence will also be subject to the condition that he does not become a danger to the public.⁷⁸

Clause 11 of the Bill is intended to enable the Secretary of State to suspend a person's licence if he believes that any of the conditions to which their licence is subject, or which had to be met in order for their certificate of eligibility to be granted, has been broken or is likely to be broken. The Secretary of State will have to give notice of the suspension and of the reasons for it to the person and to the appeals commissioners, who will then consider the case. If the commissioners consider that none of the conditions imposed by the licence has been broken they will be able to confirm the licence; otherwise they will have to revoke it. The commissioners will have to notify the person and the Secretary of State of their decision and the reasons for it. A person whose licence has been revoked will become subject to whatever release provisions would have applied to him had the licence not been given.

F. Appeals

Appeals commissioners appointed by the Secretary of State under provisions in Clause 13 and Schedule 3 of the Bill will consider

- appeals from people whose applications for certificates of eligibility have been refused
- appeals from the Secretary of State against the grant of certificates of eligibility to particular individuals
- appeals from people whose certificates of eligibility have been cancelled by the Secretary of State
- the cases of people whose licences have been suspended by the Secretary of State

The appeal commissioners will have powers under Clause 15 to review the exercise by the certification commissioner and the Secretary of State of their functions under the provisions of the Bill and it is intended that the appeals commissioners should be the only legal forum for questioning the exercise of these functions.⁷⁹ The appeals commissioners will have the jurisdiction and powers of the High Court in relation to reviews of these functions.⁸⁰

The Secretary of State will be able to make rules, subject to annulment under the negative procedure, prescribing the procedure to be followed by the appeals commissioners. These rules may provide for proceedings to be held in private, except where the commissioners direct otherwise, or for proceedings to be held in the absence of any person, including the applicant and anyone representing him. Where an applicant or his representative are excluded under these rules, the Attorney General for Northern Ireland, or Advocate General for Northern Ireland, will be able to appoint a person to represent the applicant's interests in the proceedings.⁸¹

The appeals commissioners will be appointed by the Secretary of State, who will be required to:

⁷⁸ Clause 10

⁷⁹ Clause 15(1)

⁸⁰ Clause 15(3)

⁸¹ Schedule 3 paragraph 6

have regard to the desirability of the commissioners, as a group, commanding widespread acceptance throughout the community in Northern Ireland.⁸²

The Secretary of State will have to appoint a chairman of the appeals commissioners, who will have to be a retired judge who has held office as a county court judge in Northern Ireland, a circuit judge in England and Wales or a retired judge of a higher tier.⁸³

It will not be possible for the exercise by the appeals commissioners of their functions under the Bill to be questioned in criminal proceedings.⁸⁴ Clause 17 and Schedule 5 of the Bill are designed to enable a separate body, the Special Appeal Tribunal, to have powers equivalent to those of the High Court to review the exercise of functions by the appeals commissioners. Under Clause 16 of the Bill the Special Appeal Tribunal will also have powers equivalent to those of the Court of Appeal to hear appeals from people convicted of offences by the Special Tribunal against:

- their convictions, on any ground
- the sentences imposed, unless the sentence is fixed by law, such as the mandatory life sentence for murder.⁸⁵

No leave will be required for such an appeal and there will be no appeal from the decision of the Special Appeal Tribunal in such a case.⁸⁶

The Special Appeal Tribunal will consist of a person who has held high judicial office.⁸⁷ Rules providing for the appointment, remuneration and tenure of the judge who sits in the Special Appeal Tribunal will be made by the Secretary of State after consultation with the Lord Chancellor.⁸⁸

G. Inadmissibility of evidence provided to the certification commissioner

It is intended that evidence and information provided to the certification commissioner concerning a person's entitlement to a certificate of eligibility should only be used for purposes associated with the granting of the certificate. Under Clause 20 such evidence and information will not be admissible in proceedings before the Special Tribunal or the Special Appeal Tribunal or in proceedings for offences under anti-terrorist legislation and related proceedings, except where the applicant wishes to use it on his own behalf or, in certain circumstances, for the purposes of establishing his identity.

H. Suspension and repeal provisions

The Secretary of State will have powers under Clause 22 of the Bill, to make orders suspending, or later reviving, the operation of Clause 3, which enables the certification commissioner to grant certificates of eligibility. Where an application for a certificate has

⁸² Clause 13(2)

⁸³ Schedule 3 paragraph 1

⁸⁴ Clause 15(5)

⁸⁵ Clause 16(2)

⁸⁶ Clause 16(4)-(5)

⁸⁷ Schedule 5 paragraph 1

⁸⁸ Schedule 5 paragraph 1 and Clause 25(3)

already been made the effect of a suspension order will be to prevent the grant of a certificate and suspend the prohibition on criminal proceedings in relation to that application. Where a certificate of eligibility has already been granted the effect of a suspension order will be to suspend the exemption from arrest, detention and the other powers listed in Clause 7 and the bar on the certified offences being tried by courts other than the Special Tribunal. In such cases the order will also prevent the granting of a licence under Clause 9. The suspension of Clause 3 will not, however, affect the status of any person who has already been granted a licence.⁸⁹

Orders suspending or reviving Clause 3 will have to be laid before Parliament in draft and approved by both Houses under the affirmative procedure.⁹⁰ In urgent cases the Secretary of State will be able to make an order and lay it before Parliament after it has been made, but such an order will cease to have effect after 40 days unless it is approved by both Houses within that time.⁹¹

The Secretary of State will have powers under Clause 23 to repeal by order any provision of the Bill at any time, once two years have passed since the legislation's commencement. This is intended to enable the Secretary of State to terminate the operation of the various bodies created by the Bill, if he believes that they no longer serve a useful purpose.

Under Clause 23(2) of the current Bill, if the Secretary of State uses his power under Clause 23 to repeal Clause 3, he will be able to make an order amending the *Northern Ireland (Sentences) Act 1998* to give a person who is eligible for release under that Act a right to be released immediately, or as soon as is reasonably practicable. Orders made under Clause 23 will have to be laid in draft before both Houses of Parliament and approved under the affirmative procedure.⁹²

III Reaction to the proposals for dealing with On-The-Runs (OTRs)

The Government's proposals for dealing with OTRs have provoked considerable controversy. In replying to the Secretary of State's statement to the House of Commons on 13 October in which he announced that there would be legislation to deal with OTRs the Conservative spokesman, David Lidington, made the following comments about the proposals:

The Secretary of State will know the position that my party has consistently taken on the question of terrorists on the run. Can he say now whether the terms of the proposed legislation will actually require an alleged terrorist to appear in court and, at least, shoulder the responsibility for his deeds, or will the whole process take place in absentia? Will such a terrorist be subject to licence, so that he could be recalled if he were ever to revert to terrorism? If not, despite the Secretary of State's words, we are talking about an amnesty in all but name.⁹³

⁸⁹ Clause 22(3)

⁹⁰ Clause 25(5)

⁹¹ Clause 25(6)

⁹² Clause 25(8)

⁹³ HC Deb 13 October 2005 c452

In response, Mr Hain said that the proposed legislation would not be an amnesty and it would involve judicial process.⁹⁴

During the evidence session with the Northern Ireland Affairs Select Committee on 26 October 2005 Mr Hain gave some further indications of the scope of the proposed legislation in response to a series of questions as follows:

Mr Campbell: How many people will the OTR legislation be applicable to in your estimation?

Mr Hain: We will obviously take advice from the police on this. They have a number of suspects for crimes, I readily concede crimes which in some cases were horrific crimes and the individuals responsible are not allowed back into the United Kingdom for fear of immediate arrest by the police, and they will notify us of the people concerned. It goes into dozens at any rate. There is then a separate category of people who committed offences before 1998, like these people did, who might be unearthed, could be Loyalists, could be Republicans, by the police's inquiries into historic crimes, and we have funded the Chief Constable to carry out this specific inquiry. It may be that people are uncovered as a result of that. They will have to go through proper process of being charged and then the judicial process of being let out on licence. May I make one final point about this? I know that it is difficult, very difficult indeed; not least it is going to be very difficult in parliamentary terms for myself and my ministerial team. I understand that. However, this is a situation where if people breach their licence they will be pulled back in, as happened to Sean Kelly.

Dr McDonnell: Will there be a definitive list or will it be a list which is ---

Mr Hain: I am not sure about a definitive list, but in the case of the suspects the police would like to arrest and charge, the Police Service of Northern Ireland know who they are, so there is a set of people in that category. As to the historic inquiry, by its definition we do not know the people it might uncover: Loyalist - I stress Loyalist - and Republican. It is very likely to uncover both. I just want to stress one other thing to the honourable Member and the honourable Member for East Londonderry who spoke earlier: this is not an amnesty. An amnesty is when you let people out. This is a process people will have to go through, a judicial process, they will have to account for what they have done and in the case of historic crimes they will have to be charged and go through that process and then let out on licence. An amnesty is where you just let people go. This is very different from an amnesty.

Gordon Banks: On the issue of 'on the runs' do you agree that the way in which paramilitary 'on the runs' will be addressed in future may well have to be mirrored in dealings with the security services who are alleged, or, maybe through historic inquiries, may be alleged in the future to have taken part in some degree of unlawful violence?

Mr Hain: It is important that we do not have one law for one group and another law for another group. The answer is that we need ... My honourable friend will

⁹⁴ HC Deb 13 October 2005 c454

have to wait for the legislation, but this is one of the issues we have been discussing.

Lady Hermon: You have referred to 'on the runs' as a category of people and you have from time to time referred to the fact that you will be taking advice from the PSNI. Can you give a categorical assurance that those who appear within the list of 'on the runs' will not be a list submitted by Sinn Fein or Loyalist paramilitary organisations, but will genuinely come from the PSNI?

Mr Hain: These are people whom the police suspect of committing crimes, in some cases very serious atrocities. That is the basis upon which they will be defined and selected. It does just raise the interesting point, however, as to whether in some cases people might be encouraged by this process to confess to things which the police may not have a suspect for. It could be that at least in the case of the victims and the families there is some kind of closure of what have often been historic cases

Sammy Wilson: What you have said seems to be at variance with what the police are indicating. As far as the police are concerned, they have actually suggested that the names which were first given and the names which first appeared on this whole 'on the runs' issue were given by the IRA. Indeed the police were surprised at some of the names; they did not know the people who were named were actually people they should be looking at and searching after. So could you just confirm for us whether there was at any stage in this process a list of names given by the IRA which then provoked the promise to introduce this legislation?

Mr Hain: I have not seen such a list, if that is the question you are asking. Have there been discussions, including with the police and including with Sinn Fein? Yes, of course there have. I respect the fact that a number of honourable Members on this Committee, including the honourable Member and Lady Hermon, strongly object to this legislation; I understand that. However, I think it is necessary to cement in for good the peace process and I have to make a political judgment on it. There are no surprises in it; this was something agreed between the two Governments of the United Kingdom and the Republic a number of years ago.

For the DUP, Sammy Wilson asked about the consequences for the cold cases review by the PSNI:

Sammy Wilson: I will just make an observation. Since you assured us in the House today that all the guns had gone, I wonder why you need to lock people in. Currently the Police Service of Northern Ireland are spending £50 million and have engaged 50 additional officers in looking at cold cases, the cold case review, many of those prompted by requests from families whose relatives have been killed and no-one ever brought to justice. Are you telling us today that this legislation will ensure that if anyone is identified during those investigations, they will not go to jail? If that is the case, even if they are identified as having been involved in murder, what is the point of the £50 million being spent, the 50 officers spending their time and the victims asking the police to try to get to the bottom of these crimes?

Mr Hain: What I can assure the honourable Member is this. If any individual is identified and charged by the police, as we hope they will be, from whatever

quarter, in the course of this historic inquiry which we have funded, they will be charged.

Sammy Wilson: Will they go to court?

Mr Hain: They will be charged.

Sammy Wilson: Will they go to court?

Mr Hain: They will go through judicial process. I understand that there is a judgment to be made here and the honourable Member has made a different judgment to me. We have to bring closure on this whole awful dark period of terrorism and violence and murder and mayhem in Northern Ireland. Our judgment as a Government is that this is one of the ways in which that is finally done.

During Prime Minister's Question Time on 9 November 2005 the SDLP MP Mark Durkan said:

Does the Prime Minister appreciate the concerns about collusion in the past between state forces and various paramilitaries in Northern Ireland? With the publication of the Northern Ireland (Offences) Bill today, we now have collusion on the past between the state and Sinn Fein. Will he accept that victims, including victims of state collusion, will be not only deprived of justice, but denied even truth?⁹⁵

In reply the Prime Minister said:

As the hon. Gentleman knows, the proposals are part of the continuing process to bring an end to terrorism in Northern Ireland. The Good Friday agreement, of which he and I were part, contains provisions on prisoners that deal with the question of the so-called on-the-runs. The situation is different, because the measures that we are introducing are designed to end terrorism, not to further it.⁹⁶

The leader of the Alliance Party of Northern Ireland, David Ford, accused Government ministers of "running scared" on the issue of paramilitary fugitives.⁹⁷ News reports suggested that the Conservative, Liberal Democrat and Ulster Unionist and Democratic Unionist parties were also opposed to the proposals in the Bill.⁹⁸

An article on the *BBC News* website reported the Sinn Fein MP Martin McGuinness as saying that many people had been on the run since internment more than 30 years ago and that while many people had suffered pain, the legislation was a sensible measure. He was quoted as saying:

We have to see all of this as part of a bigger picture... the peace process has transformed the lives of people in the north.

⁹⁵ HC Deb 9 November 2005 c302-303

⁹⁶ *ibid.*

⁹⁷ "Government running scared on OTRs: Ford at <http://www.allianceparty.org/news/1689.html>

⁹⁸ "Plan to let NI fugitives return" – *BBC News* 9.11.2005 at http://news.bbc.co.uk/1/hi/northern_ireland/4418738.stm ; "Parties unite to block return of IRA fugitives" – *Observer* 6.11.2005

What is the sense of people being pursued whenever everybody knows that as a result of the releases under the Good Friday Agreement they are not going to spend one day in prison.⁹⁹

In discussions about moves to promote reconciliation in Northern Ireland some commentators have referred to the Truth and Reconciliation Commission established in South Africa after the end of the apartheid regime. The text of the Republic of South Africa's *Promotion of National Unity and Reconciliation Act 1995*, which established the Commission, is available on the internet,¹⁰⁰ as is the Commission's report, published in 2003.¹⁰¹ In some cases amnesties granted by the Commission provoked considerable controversy.¹⁰² The Secretary of State for Northern Ireland, has sought to emphasise that the arrangements proposed in the *Northern Ireland (Offences) Bill* involve judicial process and are not an amnesty.¹⁰³

A. European Convention on Human Rights, Article 2

The Bill's *Explanatory Notes* set out the Government's view of the compatibility of the Bill's provisions with the European Convention on Human Rights in some detail. They make the following specific comments about the effect of the exemptions conferred by a certificate of eligibility, the scheme for trial before a Special Tribunal and the arrangements for release on licence in the context of Article 2 of the Convention:

The effect of the exemptions conferred by a certificate of eligibility under clause 7, and the scheme for trial before a Special Tribunal have been considered in the context of Article 2 of the Convention. This Article imposes a substantive obligation on the State to establish a legal regime for the protection of the right to life, not intentionally to take life, and to take reasonable positive steps within the scope of its power to protect life in cases where its servants are or ought reasonably to be aware that an individual in its care is at risk of death or serious injury. The case of *McCann v United Kingdom*¹⁰⁴ established that the obligation imposed on a state to protect the right to life includes a procedural aspect; in particular the court agreed that Article 2 carries an obligation of investigation in cases where individuals have been killed as a result of the use of force by agents of the state. The effect of the provisions in relation to exemption, trial before the Special Tribunal, and release on licence has been considered in the context of Article 2. The primary method by which the investigatory obligation under Article 2 may be discharged is the holding of a criminal trial for the finding of fact and attribution of criminal responsibility. Under the scheme set up by the Bill the full

⁹⁹ "Plan to let NI fugitives return" – *BBC News* 9.11.2005 at http://news.bbc.co.uk/1/hi/northern_ireland/4418738.stm

¹⁰⁰ <http://www.doi.gov.za/trc/legal/act9534.htm>

¹⁰¹ <http://www.info.gov.za/otherdocs/2003/trc/>

¹⁰² "Outrage over amnesty for apartheid killer" – *Guardian* 13.6.2000 For more information on applicant views of the amnesty process see Therese Abrahamsen & Hugo van der Meuve, "Reconciliation through Amnesty? Amnesty Applicants' Views of the Truth and Reconciliation Commission (2005) at <http://www.csvr.org.za/papers/paptahv.htm> ; For a general discussion of the Truth Commissions created in South Africa and Guatemala see Joanna R. Quinn & Mark Freeman, "Lessons learned: practical lessons gleaned from inside the Truth Commissions of Guatemala and South Africa" *Human Rights Quarterly* 25.4 (2003)

¹⁰³ HC Deb 13 October 2005 c454

¹⁰⁴ 1995 21 ECHR 97

gravity of any crime committed is capable of being reflected in charges brought before the Tribunal and the imposition of serious penalties, because the Special Tribunal will enjoy the same powers as the Crown Court. The impact of the exemptions on any investigation into an offence is limited by the fact that they apply only to the offences specified in the certificate. Further, in practice they apply only to certificate-holders who fall under the first class of persons set out in clause 3(2). Such limitation on the ability to investigate as there may be is considered not to breach Article 2, on the basis that it serves the legitimate aim of reconciliation within Northern Ireland.

Further, the eligibility conditions make clear that the scheme is aimed at those individuals who have renounced violence and not been convicted of a further terrorist offence since 1998, or sentenced to a term of imprisonment of 5 years or more within the last 5 years. Persons released on licence under the scheme are liable to recall if they do become involved in terrorist activity, while a person serving a life sentence is not eligible for release on licence if he poses a danger to the public. It is also relevant that the aim of the legislation is to further the process of reconciliation in Northern Ireland, consistent with Article 2 which seeks to safeguard life.¹⁰⁵

An article in the *Times* of 16 November 2005 reported that a Democratic Unionist MEP, Jim Allister, had written to the justice commissioner at the European Commission, Franco Frattini, asking him to consider whether the *Northern Ireland (Offences) Bill* was in line with Europe's level of expectation in regard to the protection of the human rights of victims.¹⁰⁶

The Northern Ireland Human Rights Commission has said that, while it understands that the Bill is intended to contribute to "closure" on major issues outstanding from the conflict in Northern Ireland, it is concerned that aspects of its provisions raise significant human rights issues. After a meeting on 15 November 2005 with the Northern Ireland security minister David Hanson the Chief Commissioner, Professor Monica McWilliams said:

We had a frank and in-depth discussion with David Hanson on his proposals for 'on-the-runs' and others, including agents of the state, who have not been dealt with by the courts for pre-Agreement crimes. Commissioners still have concerns with this draft legislation. We have agreed to scrutinise the Bill to ensure that the proposals comply with human rights principles. The legitimate concerns of victims and survivors must not be overlooked in this legislation and we will be listening to their views and the concerns of other interested parties before we submit this advice.¹⁰⁷

IV OTRs in the Republic of Ireland

The Republic of Ireland's plans for dealing with OTRs within its jurisdiction were outlined in a note of 9 November 2005 on the website of the Republic's Department of Justice. The note quoted the Republic's minister for Justice, Equality and Law Reform, Mr Michael McDowell, T.D as saying that the arrangements in the Republic would not apply

¹⁰⁵ *Explanatory Notes* paragraphs 86-87

¹⁰⁶ "'On the run' Bill referred to EU" – *Times* 16.11.2005

¹⁰⁷ "Commission voices concern on OTRs" – Northern Ireland Human Rights Commission press notice 15.11.2005 at <http://www.nihrc.org/index.htm>

to people convicted in connection with the killing on 7 June 1996 of Garda Jerry McCabe and the wounding of Garda Ben O'Sullivan:

Minister McDowell said "It is the clearly stated position of the Government that those already convicted of offences relating to the cowardly killing of Garda Jerry McCabe and wounding of Garda Ben O'Sullivan will not benefit from early release. Equally, arrangements being proposed in this jurisdiction for dealing with what have become known as "On the Runs" will not apply to persons in respect of these offences."¹⁰⁸

The note went on to say:

It is the intention, in the light of the Constitutional framework in this jurisdiction, to deal with these cases under Article 13.6 of Bunreacht na hEireann.¹⁰⁹ A scheme for dealing with "On the Runs" in this jurisdiction will be operated in accordance with that provision. An Eligibility Body will be established to deal with these cases.

"Qualifying Persons" will generally cover persons who, before 10 April, 1998, committed offences in connection with the situation in Northern Ireland once these persons are not affiliated to, nor support, organisations which are not maintaining a complete and unequivocal ceasefire. The Eligibility Body will determine whether a person is a "qualifying person" and shall notify the Minister who in turn would submit cases to Government with a view to recommending that the President use her powers under Article 13.6. The scheme, as already indicated, would not apply to persons in relation to offences connected with the killing of Garda Jerry McCabe and the wounding of Garda Ben O'Sullivan.

While the approach taken in the two jurisdictions reflect their differing Constitutional and legal frameworks, the net effect is similar viz. persons benefiting from the arrangements would not be imprisoned.

Minister McDowell said that the fact that only a handful of cases are likely to arise in this jurisdiction, and that what was proposed could be seen as a logical follow through of the early release provisions of the Good Friday Agreement, did not mitigate in any way the distress which the operation of this scheme was likely to cause people, particularly those who had been the victims of outrages perpetrated by paramilitary organisations. Nevertheless in the context of bringing about an end to the conflict both Governments have indicated for some years their belief that this issue had to be addressed.

It is intended that the scheme in this jurisdiction will operate in tandem with the operation of the provisions in the UK, which must await enactment of the legislation there, so it is not possible to indicate at this stage when the scheme here will begin to operate.

Article 13.6 of Bunreacht na hEireann states:

"The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities."

¹⁰⁸ "McDowell confirms that OTR arrangements will not apply to persons wanted for killing of Garda Jerry McCabe" - Irish Department of Justice website 9 November 2005 at <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6HYMGP-en>

¹⁰⁹ the Constitution of Ireland

This power is exercisable by the President on the advice of the Government.¹¹⁰

¹¹⁰ *ibid.*

Appendix: Statistics relating to the security situation in Northern Ireland

Chart 1 - Shooting and Bombing Incidents 1997/98 - 2005/06 (up to 31/08/05)

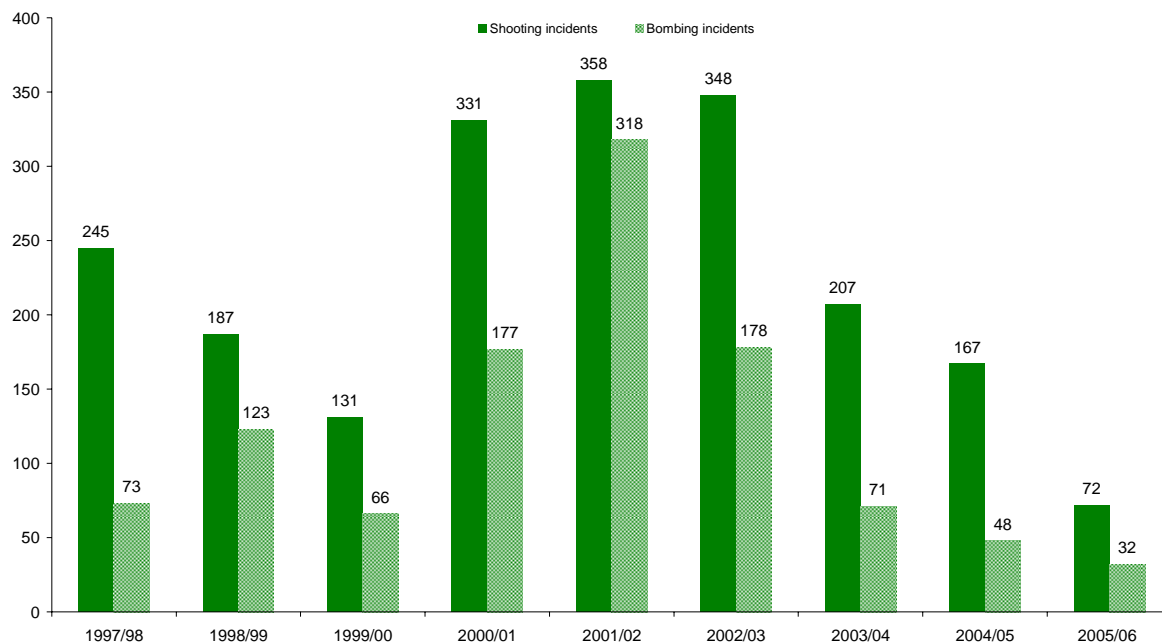


Table 1 - Security-Related Incidents 1997/98 - 2005/06

	Shooting Incidents ¹	Bombings ²		Incendiarities ³	
		Incidents	Devices	Incidents	Devices
1997/98	245	73	91	6	6
1998/99	187	123	229	20	20
1999/00	131	66	86	5	5
2000/01	331	177	206	9	22
2001/02	358	318	407	5	6
2002/03	348	178	226	8	8
2003/04	207	71	80	3	3
2004/05	167	48	51	29	36
As at 31st August					
2004/05	85	31	33	7	12
2005/06	72	32	41	1	1

1 The following types of shooting incidents are included:

- Shots fired by terrorists
- Shots fired by the security forces
- Paramilitary-style attacks involving shootings
- Shots heard (and later confirmed)
- Other violent incidents where shots are fired (eg armed robbery)

2 An individual bombing incident may involve one or more explosive devices. Incidents recorded include explosions and defusings (devices used). Incidents involving hoax devices, petrol bombings or incendiaries are excluded.

3 Incidents recorded include explosions and defusings (devices used).

Source: PSNI statistics