NORTHERN IRELAND TROUBLES (LEGACY AND RECONCILIATION) BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights ("the Convention") and other relevant international human rights instruments to which the UK is a party, in relation to the Northern Ireland Troubles (Legacy and Reconciliation) Bill ("the Bill"). It has been prepared by the Northern Ireland Office ("the Department").

2. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). On introduction of the Bill in the House of Commons, the Secretary of State for Northern Ireland made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

3. The Bill contains measures related to and aimed at addressing the legacy of the Northern Ireland Troubles. "The Troubles" are defined in clause 1 of the Bill as events and conduct relating to Northern Ireland Affairs which occurred between 1 January 1966 and 10 April 1998 (the signing of the Belfast/Good Friday Agreement). Things done in connection with preventing, investigating, or otherwise dealing with the consequences of such events or conduct are also included in this definition. "Northern Ireland Affairs" are defined as the constitutional status of Northern Ireland, or political or sectarian hostility between people in Northern Ireland.

4. Part 2 of the Bill establishes a new statutory body, the Independent Commission for Reconciliation and Information Recovery (the ICRIR). This new body will have four main functions:

    a. First, it will be obliged to carry out reviews of deaths and other harmful conduct forming part of the Troubles, principally in response to a request made by victims, family members or certain holders of public office, including the Secretary of State.

    b. Second, it will be under a duty to consider applications for immunity from prosecution for Troubles-related offences relating to a death or serious injury, and to grant immunity to the applicant where certain conditions are met (known as the conditional immunity scheme).

    c. Third, it will have the power to refer its findings to prosecutors following a review, in cases where immunity from prosecution is not granted.

d. Fourth, it will compile a historical record of all remaining deaths resulting from the Troubles.

5. State authorities throughout the UK will be under an obligation to provide full disclosure to the ICRIR, which will produce reports on the findings of its reviews. Designated ICRIR officers will have the powers and privileges of constables and the body will have the power to require the provision of statements and other information from individuals, for the purposes of carrying out reviews. Part 2 also takes powers to preserve certain categories of biometric material from destruction which may be relevant to the investigation of Troubles-related offences.

6. Part 3 of the Bill creates prohibitions and restrictions which apply to police investigations, criminal proceedings, civil proceedings, and inquests (inquires in Scotland) arising out of the Troubles. Under these measures:

    a. criminal investigations by the police into Troubles-related offences must cease, except where they are being carried out in support of a prosecution which began before entry into force (pre-commencement prosecutions). This does not affect the ICRIR in the exercise of its functions.

    b. In future a person may only be prosecuted for a Troubles-related offence connected with a death or serious injury if they have not been granted immunity by the ICRIR immunity requests panel, and the case has been referred by that body to a prosecutor, following a review of the death or conduct causing the injury. A person granted immunity for such an offence by the ICRIR cannot be prosecuted for it.

    c. In future no person may be prosecuted for a Troubles-related offence which is not connected with a death or serious injury (these are Troubles-related offences which are outside the scope of the ICRIR review process and the conditional immunity scheme).

    d. No new inquest, Coronial investigation or inquiry (in Scotland) touching upon a Troubles-related death may be opened or started after entry into force.

    e. No new civil claim arising out of the Troubles may be brought after entry into force.

7. The measures in this Part also affect existing proceedings in some cases:

    a. inquests which have already been opened before entry into force will be permitted to continue until 1 May 2023 or, if earlier, the date on which the ICRIR becomes fully operational. At that point all inquests in which the final, substantive hearing has yet to begin will be required to close.

b. Civil claims brought after the date of the Bill's first reading will also be caught by the prohibition and must be terminated at the point of commencement, if they are still ongoing at that point.

8. Part 3 also amends the early release scheme in the Northern Ireland (Sentences) Act 1998, which was enacted to implement the prisoner release provisions in the Belfast/Good Friday Agreement. The scheme currently applies to persons serving life sentences or determinate sentences of 5 year or more for certain types of offences. It enables prisoners to apply to the Sentences Review Commissioners for early release on licence, with those Commissioners considering whether the prisoner meets certain criteria demonstrating that they do not present a risk of engaging in terrorism. While the scheme currently applies to persons serving a sentence in Northern Ireland for a scheduled offence committed between 1973 and 1998 (as required by the Belfast/Good Friday Agreement), the Bill extends it application back to similar types of offence which arose out of any conduct forming part of the Troubles and which were committed on or after 1 January 1966, in line with the scope of this Bill. The Bill also enables a person to apply for release on licence immediately, whereas they are currently required to serve a minimum proportion of their sentence. It also extends the scheme to those with a determinate sentence of less than 5 years, further widening the application of the scheme.

9. Part 4 of the Bill is about memorialising the Troubles, and places persons designated by the Secretary of State under a duty to secure that a wide-ranging programme of memorialisation work is undertaken. The work includes a study of current memorialisation activities with recommendations for new activities, to be set out in a memorialisation strategy; academic research into the Troubles, including a statistical analysis; a study and analysis of existing Troubles-related oral history records, the creation and preservation of new records, and the encouragement and facilitation of public engagement with oral history records.

10. The Convention rights raised by provisions in this Bill are Article 2 (the right to life), Article 3 (the prohibition of torture), Article 6 (the right to a fair trial), Article 8 (the right to respect for private and family life), Article 14 (prohibition of discrimination) and Article 1 of the First Protocol (protection of property). The Department considers that clauses of or Schedules to the Bill which are not mentioned in this memorandum do not give rise to any significant human rights issues.

European Convention on Human Rights

Article 2 procedural obligation

Clauses 2, 9 – 17 (reviews by the ICRIR into Troubles-related deaths and other harmful conduct); clauses 19 – 21 (conditional immunity scheme); clauses 33 to 37 (prohibitions and restrictions on criminal investigations and prosecutions for Troubles-related offences); clause 39 (inquests, investigations and inquiries); clause 40 (police complaints); and clause 41 (amendment of the Northern Ireland (Sentences) Act 1998).

11. Article 2 enshrines the right to life and includes a positive obligation to put in place a framework of laws, procedures and means of enforcement that will, to the greatest extent reasonably practicable, protect life. It requires the State to establish an independent and effective judicial system capable of establishing the facts of any death, holding accountable those at fault and providing appropriate redress to the victim. Article 2 has also been found to cover life-threatening injury in a variety of circumstances (e.g., *Igor Shevchenko v Ukraine*, App no. 22737/04).

12. In certain circumstances, a death or near death will also give rise to a more onerous procedural (investigative) duty under Article 2. This duty arises where there has been a possible breach of the substantive Article 2 duties. In some cases, the circumstances of a death will automatically give rise to this procedural obligation, including where a person is killed by a State agent and where there is a suspicious death in State custody (*McCann v UK* [1996] 21 EHRR 97, *R (Smith) v Ministry of Defence [2010]* UKSC 29). The essential purpose of the investigation is to secure the effective implementation of the right to life, and in cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (*Amin v SSHD* [2006] 3 All ER 946).

13. Measures in the Bill restrict or prohibit the investigation and prosecution of offences arising out of Troubles-era deaths and life-threatening injuries, and therefore engage the UK's obligations under Article 2 of the Convention. The provisions restricting inquests and their equivalent in Scotland also engage these obligations. Article 2 is also engaged in relation to the ICRIR's function of carrying out reviews, as the Department considers such reviews will provide a means of discharging the procedural obligation, where it arises. Article 3 ECHR (the prohibition of torture) contains a similar procedural obligations which applies in circumstances where the substantive obligation may have been breached; this is discussed further below.

14. The European Court of Human Rights ("ECtHR") has repeatedly stated that what is required to satisfy the procedural obligation will depend on the circumstances of the case; however, through its case-law it has set out certain minimum requirements: the investigation must be independent, effective, reasonably prompt and expeditious, include a sufficient element of

public scrutiny, must adequately involve the next-of-kin, and it must be initiated by the State rather than solely dependent on being raised by the next-of-kin (*Jordan v United Kingdom* [2001] ECHR 327).

15. Where the investigation relates to a killing by State agents, in order for it to be effective it must be capable of leading to a determination of whether the force used was justified, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system, and identifying those responsible and if appropriate leading to their punishment (*Öğur v. Turkey*, [GC] App no. 21954/93). In *Finucane [2019]* UKSC 7, the Supreme Court made clear that although the need for an effective investigation goes well beyond facilitating a prosecution, an Article 2 compliant inquiry involves providing the means where, if they can be, suspects are identified, and, if possible, brought to account. However, the ECtHR has previously expressly accepted that, where the procedural obligation arises, "the steps that it will be reasonable to take will vary considerably with the facts of the situation…the authorities are entitled to take into account the prospects of success of any prosecution" (*Brecknell v United Kingdom* (2008) 46 EHRR 42)).

16. The Article 2 procedural obligation does not specifically require that an inquest take place, although the domestic courts have acknowledged that an inquest is the means by which the State ordinarily discharges the obligation save where there is an intervening prosecution or other inquiry (*R (Middleton) v HM Coroner for West Somerset* [2004] UKHL 10). It has been found that alternative processes, including ad hoc inquiries which meet the ECHR's criteria, may be sufficient (*Ali Zaki Mousa v Secretary of State for Defence* [2013] EWHC 1412). The Supreme Court has also found that if for whatever reason an inquest is opened into a historic death (see below), the inquest must satisfy the requirements of the Article 2 procedural obligation (*McCaughey* [2011] 2 WLR 1279).

17. Unlike the Article 2 substantive obligations, the free-standing procedural obligation can, in theory, arise in relation to deaths which occurred before the United Kingdom's ratification of the Convention in 1953 (or, for the purposes of the application of the Human Rights Act 1998 ("HRA"), deaths which pre-date the entry into force of that legislation). The procedural obligation will not arise in all such historic cases. It will only arise where there is a new "plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator", and only where there is either a "genuine connection" between the event which resulted in the death and the "critical date", or, despite the absence of such a connection, the case nevertheless satisfies the "Convention values test".

18. In terms of the "genuine connection" requirement, for domestic (HRA) purposes the critical date is the entry into force of the HRA itself (2 October

2000). As a matter of the UK's international obligations under the Convention, the critical date is the date on which the individual right of petition under the Convention was recognised by the United Kingdom (14 January 1966) (*Chong v United Kingdom* (2019) 68 EHRR SE2)).

19. The requirement for a "genuine connection" comprises two elements: the temporal connection between the event and the critical date, and a condition that "much of the investigation into the death took place or ought to have taken place in the period following [the critical date]" (*Janowiec v Russia* (2014) 58 EHRR 30). The temporal connection is usually only satisfied where the event resulting in the death occurred no more than 10 years before the critical date.

20. Even where a genuine connection between the event and the critical date is absent, for example because the death occurred more than 10 years before that date, the procedural obligation may still arise if, exceptionally, the "Convention values test" is satisfied. This test is met where there is a need to ensure the real and effective protection of the guarantees and the underlying values of the Convention (*Janowiec*), an exceptionally high threshold that has never been met in a case before the ECtHR.

21. It follows from the above that a death which occurred during the Troubles (as defined in the Bill) is in principle capable of engaging the Article 2 procedural obligation, certainly as a matter of international law, and, depending on when the death occurred, for the purposes of the HRA as well. The effect of clauses 33-35 and 39 of this Bill is that there are historic deaths and conduct resulting in serious injury which could in principle trigger the Article 2 procedural obligation, but which may no longer be subject to a full criminal investigation, or result in prosecution or conviction, or be the subject of an inquest. That therefore raises the question of compatibility with Article 2.

22. The Department considers that, in those cases where the Article 2 procedural obligation arises and a police investigation or inquest is no longer available because of provisions of this Bill, the ICRIR will be capable of discharging that obligation, through the process of a review carried out under clauses 9 to 17, in a manner which complies with most of the requirements described above. Further the Department considers that the conditional immunity scheme established by clauses 19 to 21, under which immunity may be granted on a case-by-case basis in return for genuine cooperation by the applicant, can be justified as an exception to the requirement to punish those identified as being responsible for a death or life-threatening injury, as a proportionate means of achieving and facilitating truth recovery and reconciliation in Northern Ireland, taking into account current ECtHR case-law in relation to amnesties. These issues are discussed further below.

ICRIR reviews as means of discharging the Article 2 procedural obligation

23. The ICRIR will be an independent statutory body headed by a panel of Commissioners appointed by the Secretary of State. Two Commissioners, the Chief Commissioner (who must be a current or former member of the judiciary) and the Commissioner for Investigations, are identified in the Bill. There are to be a further 1-3 additional Commissioners.

24. The ICRIR will be required to carry out reviews of deaths and other harmful conduct forming part of the Troubles, when requested to do so (clause 2(4)(a) and (b)). In relation to deaths, those who can make a request are any family member, the Secretary of State, the Attorney and Advocate General for Northern Ireland or a Coroner with conduct of an ongoing inquest (clause 9). Equivalent provision is made for relevant office holders in Scotland and in England & Wales. In relation to other harmful conduct, victims of specified serious injuries may request a review, or the Secretary of State may request a review in any case (clause 10). The person requesting a review will be able to pose particular questions that they want to be answered when making their request (clause 11(1)). In addition, the ICRIR may open a review in response to a request for immunity (see further below) where the conduct in respect of which immunity is sought is within its remit, if there is no review ongoing in relation to the same matter (clause 12). Requests may be made until the end of the fifth year of the ICRIR's period of operation.

25. The purpose of granting the Secretary of State the power to request a review in any circumstances is to ensure that in any case where the procedural obligation arises under Article 2 ECHR, a review can be triggered in order to discharge that obligation. It is also intended that, in general, this power will only be exercised when the procedural obligation arises and a review has not otherwise been requested. The Secretary of State will consider whether that obligation arises in appropriate cases.

26. In order to ensure its reviews are effective, the ICRIR's Commissioner for Investigations will be given the powers and privileges of a constable anywhere in the UK. The Commissioner will be able to confer, through designation, all or some of these powers on individual officers of the ICRIR (clause 6). Such powers may be exercised in relation to any of the functions of the ICRIR, except the function of producing the historical record.

27. State authorities throughout the UK, including Government departments, devolved bodies, the police and the intelligence agencies will be under a legal duty to provide full disclosure to the ICRIR, as may be reasonably required in connection with its functions (clause 5).

28. The Commissioner for Investigations will also have the power to issue a notice requiring the recipient to provide documents and written or oral statements, in connection with the exercise of the review function. These powers are in similar terms to those conferred on coroners in inquest

proceedings, with the sanction for non-compliance being a financial penalty (clause 14 and Schedule 4).

29. The ICRIR will be required to write a report following any review, which, where the review is carried out following a request, will be published unless and to the extent that publication would be contrary to the ICRIR's overarching duties under clause 4. Where the ICRIR exercises its discretion to conduct a review in response to a request for immunity from prosecution, it will have a discretion to publish is report and, when deciding whether to do so, must consider the views of family members and victims. Prior to finalisation of the report and publication, drafts will be sent to the person who requested the review, close family members or victims, and any individual who is criticised in the report. Any representations that they make on the content of the draft report will be taken into account by the Chief Commissioner, including when deciding whether to remove material from the final report where to do so would be in the public interest (clause 15(8)).

30. The Department therefore considers that the ICRIR will be able to carry out investigations which are compliant with key aspects of the Article 2 procedural obligation. It will be independent and effective, with the ability to utilise full police powers to investigate suspects, and to refer them for consideration for prosecution in cases where immunity is not granted under the conditional immunity scheme. Its reports will be made public, with the possibility of accountability for perpetrators including State actors. The ICRIR's investigations will fully involve the next of kin, and the ability of the Secretary of State and other holders of public office to request a review means that the initiation of an investigation does not wholly depend on the next of kin making a request. (While the investigation can no longer be said to be "prompt" in relation to the original event, that would be the case for any contemporary investigation of a Troubles-related incident.) It is intended that the ICRIR will be resourced to carry out reviews swiftly, with the Secretary of State carrying out a review of the ICRIR's performance of its functions after three years of operation.

31. In many of the cases that will be referred to the ICRIR, there will already have been some historic investigation of the event. This may be capable of constituting a component of an effective investigation in any given case. The ICRIR will also be under a duty not to duplicate any aspect of a previous historic investigation unless it considers it to be necessary. It is recognised that many historic investigations were not effective for the purposes of Article 2, as the courts have found on a number of occasions. There is no intention to prohibit such investigations from being re-examined. However, there are more recent investigations into Troubles-related events conducted by external police forces (such as Operation Kenova), which have been conducted according to modern policing practices and rigorous standards of independence and impartiality. It is not considered to be an effective use of State resources for the ICRIR to re-investigate matters covered by these

investigations, among others. The ICRIR will therefore be able to take a view on the circumstances in which duplication of a previous investigation is necessary. There is no appeal mechanism provided for this decision but it would in principle (like all the ICRIR's decisions) be subject to judicial review, and as a public authority under the HRA the ICRIR would of course be required to exercise this discretion compatibly with the Convention rights.

The conditional immunity scheme

32. The ICRIR will also have a separate function of considering applications for immunity from prosecution under a conditional immunity scheme (clauses 18 – 21). This is conceptually separate from its investigative function of carrying out reviews, although it will run in parallel and in practice the two will overlap. The ICRIR will have the discretion to carry out a review in relation to (the subject matter of) an application for immunity (clause 12). The Commissioner for Investigations must have regard to any application for immunity that has been made in connection with a death or serious injury when deciding what steps are necessary in carrying out a review into the same matter (clause 13(5)). This might for example include conducting further investigations into the matters covered by account given by the applicant.

33. Applications for immunity from prosecution will be considered by a panel ("the immunity requests panel") chaired by the Chief Commissioner (who will be a serving or former member of the judiciary) and two members with at least 10 years' legal experience (clause 21).

34. The immunity requests panel is required to grant immunity from prosecution where it is satisfied that each of three conditions are met (clause 18(1)).

35. The first condition is that a valid request for immunity from prosecution has been made, bringing in certain procedural requirements (clause 18(2)). Clause 19 deals with procedural matters and contains a power for the Secretary of State to make rules about the procedure for making applications for immunity and for dealing with requests. A review for immunity is not valid if not made in accordance with any such rules, or in accordance with any other procedural requirements determined by the ICRIR itself. Applications made after the end of that period are only permitted in cases where ICRIR is already conducting a review into the relevant incident. This is intended to ensure that those who want to come forward do so promptly, but in practice the Department envisages that the majority of applications for immunity will be made in the context of pre-existing reviews in any event.

36. Individuals who are subject to ongoing prosecution, or hold a conviction, are specifically prohibited from applying for immunity in respect of the conduct for which they are being prosecuted or in relation to which they were convicted. An ongoing prosecution is one where a decision to prosecute has already been taken. These restrictions are intended to avoid interference with

ongoing criminal cases or the enforcement of sentences already imposed on convicted persons.

37. Under the second condition (clause 18(3)), the immunity requests panel must be satisfied that the applicant has provided an account of his or her involvement in conduct forming part of the Troubles which is true to the best of his or her knowledge and belief. An account for these purposes can consist of or include information provided previously by that person, for example in an earlier investigation by a different body. The Secretary of State has a power to give guidance about the application of each of the conditions under the test (clause 20(7). The immunity panel must take account of that guidance when determining applications.

38. Under the third condition (clause 18(5), the immunity requests panel must be satisfied that the applicant's account discloses conduct which would tend to expose him or her to (criminal) investigation or prosecution for at least one "serious or connected" Troubles-related offence. This condition is intended to ensure that immunity is only granted to individuals who are genuinely at risk of criminal liability on the basis of the information they provide, a restriction which is important to the justification of the grant of immunity as a tool for recovering information which might not otherwise have been volunteered, for the purposes of aiding truth recovery and reconciliation.

39. In terms of the scope of offences for which immunity can be granted, "Serious" offences are defined in clause 1 as offences which cause death or serious physical or mental harm (as also defined). "Connected" is defined in the same provision as relating to or otherwise connected with such offences, and in particular, offences are connected when they form part of the same event. Offences which are Troubles-related but not "serious" or "connected" are outside the scope of the scheme and instead are subject to a total prohibition on investigation and prosecution by clauses 33 and 36. The reason for this approach is to prioritise the investigation and information recovery of "serious" events, i.e. those which have resulted in death or serious injury, also being those in which the procedural obligation under Article 2 may potentially arise.)

40. The Department considers that, given the passage of time, it is only these events in which there is now real value in gathering information and finding answers for the surviving victims and family members. As the conditional immunity scheme is designed as a tool to generate information recovery, the availability of immunity should logically be linked to the investigation of those events. The inclusion of "connected offences" (for example, possession of a firearm) is designed to assist information recovery as in some cases, it is more likely that persons committing less serious offences as part of an event causing death or serious harm will come forward to provide information. This information may be critical in providing answers for victims and families or leads for further investigations.

41. The panel must grant a person immunity from prosecution for all those serious or connected troubles-related offences which they consider the facts disclosed in the person's account would expose that person to a risk of investigation or prosecution for. The grant must either specify all the offences, specify a description of offences framed by reference to the person's disclosed conduct, or be a combination of both. This discretion is intended to ensure the panel can articulate the grant of immunity clearly. Immunity cannot be revoked once granted. Decisions on immunity will be amenable to judicial review. The effect of a grant of immunity is that no criminal enforcement action may be taken in relation to the serious or connected Troubles-related offences for which immunity was granted (clause 34).

42. In order for the conditional immunity scheme to be workable and to encourage participants to be open and frank, clause 7(3) creates restrictions when it comes to the use of material provided by an applicant in future criminal proceedings, regardless of the outcome of the immunity application. Under these restrictions, statements made by the applicant as part of the application cannot be used against them in criminal proceedings, nor may the prosecution rely on any other evidence obtained directly or indirectly as a result of those statements.

Strasbourg case-law on amnesties

43. The ECtHR has articulated a general opposition to reconciliation-linked amnesties, broadly based on the principle that immunity hinders investigation and leads to impunity. It has repeatedly found amnesties granted in favour of the security forces to be in breach of Articles 2 and 3 ECHR (*Margus v Croatia* (2016) 62 EHRR 17). In the context of an amnesty law in Mauritania which applied only to members of the armed forces and security services, the Court found in *Ould Dah v France* (2013) 56 EHRR SE17 that "an amnesty is generally incompatible with the duty incumbent on the states to investigate such acts". It recognised that a conflict can arise between the need to prosecute criminals and a country's determination to promote reconciliation in society; but in that case, there had been no reconciliation process put in place. The amnesty therefore undermined Article 2. The Court's case-law applies not only to blanket amnesties, but to those granted on the facts of individual cases (*Margus*). It is therefore applicable in principle to the model of conditional immunity that is being proposed in this Bill.

44. There does however appear to be scope for exception to the general principle, although its scope and limits are not fully worked out in the case law.

45. In *Tarbuk v Croatia* (Application no. 31360/10, Judgment 11 December 2012), the Strasbourg Court stated:

> "*even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public".*

46. This statement was made in the context of a case where the applicant claimed that, because he had been arrested, placed in pre-trial detention and subsequently been the subject of an amnesty, he was entitled to compensation for his detention. It is therefore perhaps unsurprising that in the context of that case, the Court appeared to endorse a broad test. In that case the ECtHR also endorsed a previous admissibility decision in a case (*Dujardin v France* (Application No.: 16734/90, Decision 2 September 1991) where the French authorities had adopted a general amnesty on granting independence to New Caledonia. The amnesty prevented criminal proceedings being instituted against the killers of police officers there, and was found to be of an "entirely exceptional character… adopted in the context of a process designed to resolve conflicts between the various communities of the islands".

47. The ECtHR has countenanced the possibility of an amnesty being compatible with Article 2 in some particular circumstances, including where a reconciliation process is in existence (*Margus*). It is therefore an open question as to whether the Court would find an amnesty to be compatible with the Article 2 procedural obligation where there are alternative procedures that allow for investigation, information recovery and reconciliation.

The South Africa Truth and Reconciliation Commission

48. Perhaps the most well-known conditional immunity scheme is the one operated by the Amnesty Committee of the South Africa Truth and Reconciliation Commission ('TRC), established under the Promotion of National Unity and Reconciliation Act 1995 passed during the transition from the Apartheid system to democracy in that country. Under that legislation, the Amnesty Committee was empowered to grant amnesty in respect of "any act associated with a political objective committed in the course of the conflicts of the past" occurring within a prescribed time period", provided procedural requirements were met and that the applicant had made a "full disclosure of all relevant facts".

49. The Commission came into operation on 15 December 1995 and the first application for amnesty was submitted on 1 January 1996. The Committee, which was based in Cape Town, met for the first time in February 1996. In excess of 7000 applications were received before the deadline of 30 September 1997, and the Commission completed its work at the end of May 2001. Of the 7,116 applications for amnesty, 1,167 were granted.

50. The 1995 Act provided no guidance on the interpretation of the "full disclosure of all relevant facts" requirement. In practice, although there was no legal burden of proof, the onus rested on the applicant to satisfy the Committee that a full and complete disclosure of all relevant facts had been made . Although the Commission was not a judicial body and applied no formal system of precedent, it is tolerably clear from the available materials that, in general, the Committee treated the requirement of full disclosure as a requirement for truthful disclosure, and that the civil rather than the criminal standard was of proof was applied. Despite the requirement for "full" disclosure, in cases where the applicant had a lack of or incorrect recollection of events, the application might be granted where the applicant admitted to general involvement in the event and accepted the evidence of others as to his or her particular involvement in an incident. In other cases amnesty might be granted where unsatisfactory elements of the applicant's evidence were attributable to a genuine inability to recall past events (for example due to the passage of time) rather than deliberate lies.

51. Unlike the conditional immunity scheme provided for in the Bill, the South African scheme did not include a general legal moratorium on criminal investigations and prosecutions in cases where amnesty might have been available but where an application had not been determined. In individual cases, where an application had been made, the Commission would request the postponement of criminal proceedings pending determination of the application. However, in practice it appears that for cases where amnesty was potentially available, criminal investigations and prosecutions were not progressed during the period from the end of Apartheid until 2003.

Northern Ireland precedents

52. There are precedents for post-conflict amnesties in Northern Ireland.

53. The Northern Ireland Arms Decommissioning Act 1997 expressly provided for an "amnesty" in section 4. This provides 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." The beneficiaries of this amnesty were those who held arms and munitions unlawfully, so no State actor could benefit from it in respect of acts committed in the course of their duty. Section 5 of this Act provides that weapons or munitions recovered as a result of decommissioning could not be forensically tested nor was such material or information derived from it admissible in criminal proceedings.

54. The early release of prisoners pursuant to Northern Ireland (Sentences) Act 1998 was an "amnesty-like" measure directed to reconciliation, underpinned by commitments in the Belfast/Good Friday Agreement. (Parallel legislation was enacted in Ireland in the Criminal Justice (Release of Prisoners) Act 1998.)

55. The Northern Ireland (Location of Victims' Remains) Act 1999 made provision for immunity from prosecution for those who provided evidence to the Independent Commission on the Location of Victims Remains (ICLVR). Section 3 of this Act provided an immunity in relation to evidence arising from an engagement with the Commission. Section 4 provided that forensic testing could only be carried out for the purposes of identification. This form of immunity from prosecution was applicable, in practice, only to those involved in paramilitary kidnapping and murder; State actors did not benefit from it. The ICVLR has successfully delivered answers and closure for the families involved in its cases, although as its caseload has been very small it is difficult to make an assessment of its impact on wider reconciliation.

Article 2 compatibility

56. The Department considers that the package of measures in the Bill relating to immunity from prosecution and restrictions and prohibitions on criminal investigations, prosecutions, inquests and the investigation of police complaints, when taken together with the new body's functions and powers in relation to the investigation of deaths and other harmful conduct, is compatible with Article 2. The package, which is directed at seeking information recovery to address outstanding concerns about past events, supported by reconciliation measures, is very different to the types of amnesties which have been found by the ECtHR to fall foul of Article 2. As explained above, there is some support for the concept of amnesties in ECtHR jurisprudence, which recognises that the use of an amnesty can further the objective of reconciliation. Reconciliation can provide a means of furthering the objective of Article 2 in the context of bringing a permanent end to sectarian conflict, particularly where there are parallel mechanisms for investigation and information recovery.

57. These proposals are not a one-sided measure which benefit only State agents. The definition of the Troubles in clause 1 of the Bill ensures that immunity-related measures apply equally to State actions and paramilitary activity (on all sides). Of the 3600 people killed during the conflict in Northern Ireland, 360 have been attributed to the security forces, around 2000 to Republican paramilitaries and around 1000 to loyalist paramilitaries. The potential beneficiaries of these measures come from all sides of the conflict.

58. The Department's view is that for the ICRIR to conduct successful information recovery investigations, which will in turn significantly aid reconciliation in the long term, it is essential for the possibility of a prosecution outcome to be restricted to those who fail to participate effectively in the truth recovery process. Individuals will be more likely to come forward, and to provide genuine cooperation, where it would lead to the removal of the threat of prosecution for conduct forming part of the Troubles. The cooperation of key actors is essential to finding answers for victims and families so that they can achieve some form of closure, which is essential to reconciliation.

59. Almost twenty-five years on since the Belfast/Good Friday Agreement, the issues relating to the investigation of the past continue to be divisive. The security threat from dissident republican groups remains “substantial”, which means that an attack is likely; this necessarily includes the risk of fatal attacks. The Department believes that ongoing adversarial legal proceedings of all types relating to the Troubles feed a persistent public narrative focussed on past tensions and divisive positions. This in turn serves the interests of those who seek to continue violent conflict and hinders real reconciliation. There is a strong public interest in moving away from adversarial legal proceedings as the unsystematic mechanism for investigating the past, to a more purpose-built and accessible model which is focussed on victims’ and families’ needs and supports them through the process. The measures restricting or prohibiting certain types of legal proceedings, combined with a new conditional immunity scheme which provides a genuine opportunity for individuals to come forward and tell their story in exchange for immunity, is considered to be the best way to address these issues in a proportionate manner while taking into account the views of multiple diverse interests.

60. Further, a coherent statutory scheme involving prohibitions and restrictions on legal proceedings, a conditional immunity scheme and a new framework for investigations will create a structure based on the rule of law for investigating and resolving these historic issues. The current arrangements for doing so amount to ad hoc prosecution decisions and civil and inquest proceedings, which are beset with lack of resources, endemic delay, collapse of prosecutions and persistent legal challenges, the combination of which results in a lack of cases being successfully carried through to a conclusion, without the collateral benefits of information recovery associated with this statutory model.

61. Previous and current methods of investigating events arising from the Troubles have been dogged with controversy and allegations of State bias. The Historical Enquiries Team (HET) within the Police Service of Northern Ireland (PSNI), which ran from 2005 to 2013, completed reviews into 1625 cases relating to 2051 deaths before it was disbanded. A report in 2013 by HM Inspectorate of Constabulary found that the HET was not conforming to current policing standards and that its policy of treating State cases differently to non-State cases, based on a misinterpretation of the law, meant that some State cases were reviewed with less rigour. It concluded that the HET’s approach to cases involving State involvement was inconsistent with Article 2 ECHR. Subsequently, the Legacy Investigation Branch (LIB) of PSNI was established, but a legal challenge has claimed that its work is not independent for the purposes of Article 2 ECHR. Although in that case the Supreme Court ultimately determined that it had not been established that the LIB was not capable of conducting an investigation with practical independence, the lengthy projected timescales for the LIB’s work requires a change in approach.

62. As explained further above, the ICRIR will have the independence, structure and powers necessary to enable it to thoroughly investigate allegations of all kinds, including the most controversial cases in which allegations of State collusion have been made. These include policing powers, the power to compel written and oral testimony and documents, and the right to receive full disclosure from a range of UK-wide State bodies, including classified information.

63. The option to prosecute any individual for a serious or connected Troubles-related offence who does not provide a truthful account of their conduct clearly remains open. If the ICRIR is not satisfied that an individual has given an account that is true to the best of their knowledge and belief, it must refuse immunity. It can continue to investigate the individual using the full range of police powers and, where it considers there is evidence that an offence has been committed, refer the matter to prosecutors.

Clause 40 (Police complaints)

64. This clause amends the Police (Northern Ireland) Act 1998 with the effect that the investigation of police complaints relating to conduct forming part of the Troubles is prohibited. The limited case-law of the ECtHR and domestic courts on the topic indicates that, depending on the circumstances, a police misconduct investigation or disciplinary proceedings may serve in part to discharge the State's procedural obligation under Article 2.

65. The main domestic authority, *Birks (No.2)* [2018] ICR 1400 (§49), involved circumstances where both an inquest and an effective criminal investigation had been carried out, and the question before the court was whether display proceedings were necessary in addition, in order to meet the requirements of Article 2. In that case the High Court found that Article 2 did not require the pursuit of misconduct proceedings against a police officer where there had been an inquest and a criminal investigation, and no challenge was made to the adequacy of the criminal investigation or the decision not to prosecute. The Court's conclusion is supported by the ECtHR judgment in Da *Silva v UK (2016) 63 EHRR 12* (§286) which concerned the shooting dead by police officers of Jean Charles de Menezes. The Strasbourg Court, after holding that an effective criminal investigation had been carried out despite decisions not to prosecute the individual officers involved, concluded it was "not necessary [for the Court] to consider the role of private prosecutions or disciplinary proceedings in fulfilling the state's procedural obligations under art.2 of the Convention".

66. The case-law emphasises that the Article 2 procedural obligation is one of means rather than result, it being for the State to determine how that obligation is satisfied in any particular case. The High Court in *Birks* (§65), commenting on part of the judgment of the Divisional Court in *R (Long) v Secretary of State for Defence* [2014] HRLR 20, stated that "the Divisional

Court was not finding that disciplinary action is always a necessary element of the satisfaction of the obligation imposed on the state by Article 2… it was instead holding that the state must make provision for disciplinary proceedings if they are the appropriate means of satisfying the procedural obligation in a given case. Where for example, no criminal investigation was conducted and civil proceedings do not provide proper scrutiny of the circumstances, disciplinary proceedings may well be required."

67. Even if it is accepted that, in principle, police disciplinary proceedings may sometimes be required in order to satisfy the Article 2 procedural requirement, the Department does not consider the prohibition created by clause 40 to materially affect the question of whether the proposals, taken as a whole, are compatible with the Article 2. Conduct by police officers during the Troubles which caused death or serious injury will still be subject to investigation, through the ICRIR review process, and criminal proceedings will still be possible in those individual cases where immunity from prosecution is not granted. The Department's position on the compatibility of the conditional immunity scheme with Article 2 is set out above.

Clause 41 (Release of prisoners)

68. Clause 41 introduces Schedule 11, which amends the Northern Ireland (Sentences Act) 1998 as described above, in particular by reducing to zero the minimum amount of time a person convicted of a relevant offence must spend serving their sentence before being eligible for release on licence. In *Duran v Turkey* ([2008] ECHR 289), the ECtHR found a breach of Article 2 in circumstances where prison officers who beat a detainee to death never served their sentences due to legislation which suspended them. However, because Schedule 11 forms part of a wider package of reconciliation measures and can be presented as an extension of a scheme that was an integral part of the Belfast/Good Friday Agreement, the Department considers that the amendments made by the Schedule are compatible with the Article 2 procedural obligation.

Article 3 Procedural obligation

Clauses 2, 9 – 17 (reviews by the ICRIR into Troubles-related deaths and other harmful conduct); clauses 19 – 21 (conditional immunity scheme); clauses 33 to 37 (prohibitions and restrictions on criminal investigations and prosecutions for Troubles-related offences); clause 39 (inquests, investigations and inquiries); clause 40 (police complaints); and clause 41 (amendment of the Northern Ireland (Sentences) Act 1998).

69. Article 3 ECHR establishes the right not to be subjected to torture, inhuman or degrading treatment or punishment. A procedural obligation very similar to that which arises under Article 2 and discussed above has been established by ECHR and domestic case-law to arise under Article 3. Although not relevant to the restrictions on inquest proceedings or prosecutions for deaths

arising out of conduct forming part of the Troubles, Article 3 is relevant to the conditional immunity scheme in relation to prosecutions for injuries or treatment which would fall under Article 3. It is therefore also relevant to the ability of a victim, and/or the Secretary of State, to request a review into the circumstances of such injuries or other circumstances.

70. The department considers these clauses to be compatible with the Article 3 procedural obligation for the same reasons given above in relation to the equivalent obligation under Article 2.

Article 6

Clause 7 (admissibility of material in criminal proceedings)

Clause 14 (power to require the provision of information), Schedule 4

71. Clause 14 gives the ICRIR the power to issue notices requiring a person to provide the body with information in connection with the exercise of its review function. The information a person may be required to provide includes documents and other physical evidence under that person's control, and written statements. A person may also be required to attend at a given time and place and provide information orally. Where a person fails to comply with a notice the ICRIR has the power to issue a civil (financial) penalty under Schedule 4.

72. The power to impose a financial penalty for failing to comply with a notice raises the question of compatibility with Article 6(1), and with Article 1, Protocol 1, which is discussed separately below. The aim of the power to impose a financial penalty is to encourage cooperation with the evidence-gathering process carried out by the ICRIR in furtherance of its review and reporting function. The Department does not consider that the financial penalty proposed amounts to a criminal sanction. In any event, as the House of Lords said in *R v G [2008]* 3 All ER 1071, the focus of Article 6 of the ECHR is not on the content of the criminal or civil law but on ensuring access to a fair procedure to determine liability.

73. The Department considers that the proposed scheme is compatible with Article 6 because there is a defence of reasonable excuse for failure to comply with the notice; the level of penalty will be flexible and can reflect the circumstances surrounding failure to comply; the level of penalty is not excessive (it may not exceed £1000); there will be a right to object to the decision; and there will be an independent right of appeal to a civil court against both the imposition of the penalty and the level of the penalty. The statutory appeal will operate as a re-hearing of the ICRIR's decision.

74. The powers under clause 14 could be used to compel written or oral testimony, which could include self-incriminating statements. Accordingly, the clause engages rights under Article 6(1) and (3)(c) ECHR, as part of

which the right against self-incrimination in criminal proceedings is regarded by the Strasbourg Court as implicit (see e.g. *Saunders v United Kingdom* (1997) 23 EHRR; *Volaw* (2019) [UKPC] 29).

75. In order to safeguard this right, and rather than create a carve-out which would exempt someone from having to provide self-incriminating information in response to a notice served under clause 14, clause 7(2) creates a restriction prohibiting the use of information obtained from a person using the clause 14 power against that person in criminal proceedings. This is modelled on similar provision elsewhere. It should be noted that the protection provided by clause 7(2) is broader than that which is arguably required for compatibility with Article 6 ECHR, in that it applies to all material obtained using the clause 14 power, including pre-existing documents, and applies in respect of any criminal proceedings against the person concerned. However, its purpose is not simply to ensure compatibility with Article 6 but also to avoid the chilling effect, in terms of a person's willingness to be frank and open about the past, which might otherwise occur if the protection was significantly narrower.

76. The prohibition created by clause 7(2) only applies to use against the defendant in criminal proceedings, and therefore it does not interfere with the use of exculpatory material by the defence, including in any application or proceedings seeking to overturn a conviction. Subsections (3) and (4) of the same clause create further restrictions on the admissibly of certain categories of information obtained by ICRIR in criminal proceedings, subject to certain exceptions. These restrictions do not give rise to ECHR Article 6 issues, noting that in no circumstances do the provisions restrict the use of material by the defendant in criminal proceedings.

Clause 38 (Tort, delict and fatal accidents)

77. Clause 38 of the Bill prohibits Troubles-related civil actions founded on tort, delict, the Fatal Accidents (Northern Ireland) Order 1977, Fatal Accidents Act 1976 and equivalent causes of actions under foreign law from being brought after commencement. Claims filed between the Bill's first reading and the date of commencement, except those where final judgment has been delivered before that date, will also be prohibited from continuing. Claims filed before the Bill's first reading will not be affected by the prohibition, which will apply to proceedings in Northern Ireland, England, Wales and Scotland. Where a claim is brought arguably in contravention of the prohibition, it will be for the court hearing the case to determine whether the prohibition applies.

78. Article 6(1) confers on individuals a right to submit disputes as to their civil rights and obligations for determination by a court or tribunal. The ECtHR has held that the right of access to a court is an inherent aspect of the safeguards enshrined in Article 6 and is related to the principles of the rule of law and the

avoidance of arbitrary power which underlie the ECHR (see *Golder v UK* (1975) 1 EHRR 524).

79. The right of access is not absolute. It may be subject to restrictions, but those restrictions:

    a. must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired; and

    b. must pursue a legitimate aim and be proportionate to that aim.

80. Claims in tort and equivalent claims for personal injury, ill treatment (including compensation for illegal State acts) have consistently been held to be "civil rights" for the purposes of article 6 (see *Axen v Germany* (1983) 6 EHRR 1996, *Tomasi v France* (1993) 15 EHRR 1 ; *Aksoy v Turkey* (1997) 23 EHRR 553; *Georgiadis v Greece* (1997) 24 EHRR 606; and *Werner v Austria* (1997) 26 EHRR 310).

81. Article 6 does not provide any guarantees as to the content of civil rights and cannot be used to create a substantive right which has no legal basis in the relevant State (see *W v UK* (1987) 10 EHRR 29 and *TP and KM v UK* [2001] 2 FLR 549). Rather, it provides a right of access to a court in relation to civil rights recognised (or arguably recognised) in the State's domestic law. As a result, whilst Article 6 will apply to procedural restrictions on the enforcement of an existing right, it will generally not apply to limitations of the right's substantive content (see *Roche v UK* App no. 32555/96, 10 October 2005).

82. Any limitation period prevents a person vindicating their civil rights after a particular period of time. In effect, clause 38 operates as a limitation period as it prohibits claims relating to certain types of event occurring before 10 April 1998 from being pursued. The Department therefore considers that this clause will engage Article 6.

83. Statutory limitation periods are generally considered to be legitimate restrictions on the right of access to a court (see, for example, *Anderton v Clwyd County Council* [2002] EWCA Civ 933 at [31]). The ECtHR has in some cases found very short limitation periods to be in breach of Article 6 (see, for example, *Perez da Rada Cavanilles v Spain* (1998) 29 EHRR 109 (three-day time limit) and *De Geuoffre de la Pradille v France* (1992) Series No. A 253 (three-month time limit)).

84. However, the ECtHR has usually upheld the compatibility of lengthy limitation periods, even if they are absolute. The leading authority remains *Stubbings v UK (1996)* 23 EHRR 213. In that case victims of sexual abuse argued that psychological after-effects of childhood abuse prevented them from realising they had cause of action against abusers until after expiry of applicable limitation period. The Strasbourg Court upheld the absolute six year time limit

applicable to personal injury claims resulting from intentional torts (such as trespass to the person), despite the existence of the flexible discretion in section 33 of the Limitation Act 1980, had the claim been one of negligence. The absolute limitation period was held to be within the margin of appreciation of the State, and was not unduly short. Whilst acknowledging the psychological difficulties victims of child abuse may have in bringing legal claims, the Court approved the need in civil litigation for limitation periods because they ensured legal certainty and finality, the avoidance of stale claims and preventing injustice where events in the distant past involved unreliable and incomplete evidence because of the passage of time.

85. These considerations are directly applicable to those claims to which clause 38 applies. All such claims will relate to events that occurred at least 23 years ago and the imposition of the prohibition will ensure certainty and finality, avoid stale claims and reliance on unreliable evidence.

86. There are also some examples of long absolute limitation periods which the Strasbourg Court has found to be a violation of the Convention in particular circumstances. In *Roman v Finland [2013]* 1 FCR 309, a Finnish rigid limitation period of five years in relation to paternity suits was held to be a breach of Article 8 because of the disproportionality of a rigid five year limit (commencing when the claimant reached adulthood) for a young person gradually coming to realise that they wished to identify their biological father. In *Mocanu v Romania* [2014] ECHR 1181 the Court considered the permissibility, under Article 3 ECHR, of criminal amnesties in cases concerning torture or ill-treatment. Citing *Roman* the Court suggested that it is "difficult to accept inflexible limitation periods admitting of no exceptions". It did not, however, cite any of its Article 6 case law or seek to reconcile that observation with *Stubbings*.

87. On that basis the Department is of the view that the Court would accept that *Stubbings* remains the authoritative statement of principle in relation to Article 6 and that long absolute limitation periods are generally compatible with Article 6.

88. The Department takes the view that the effect of the prohibition created by clause 38, including on claims filed before commencement but after the Bill's introduction, is proportionate to the legitimate aim of promoting reconciliation in Northern Ireland for the following reasons:

    a. The current high volume of litigation is detrimental to reconciliation. When a settlement or a verdict is reached in a civil claim renewed attention is often drawn to events and crucially, to grievances, from the past which contribute to the inability of Northern Ireland to reconcile itself with the Troubles. The often adversarial nature of these processes, and the resource-intensive, indirect nature of State disclosure processes means that Plaintiffs in Northern Ireland are often

left frustrated and wondering whether cover-ups are taking place. These processes do not serve the purpose of reconciliation and in fact, could be said to further entrench different groups to their positions and feed distrust. Reducing the scale of civil litigation and bringing it to an end sooner will therefore aid reconciliation, by helping to draw a line under the past and preventing the trial of very stale claims.

b. The new process of reviews by the ICRIR presents a better prospect of obtaining information and closure for victims, compared with civil litigation. The Department considers that perpetrators are unlikely to cooperate if there is any chance their testimony will be admissible in civil proceedings against them. The ICRIR will be able to act faster compared with the civil justice system, which is presently overloaded, and ensure that relevant information is secured that might otherwise be lost if civil cases were to proceed at their current slow pace.

Clause 18 (applications from immunity from prosecution)

89. The determination by the ICRIR of a person's application for immunity from prosecution under clause 18 arguably engages the civil limb of Article 6(1) ECHR on the basis it amounts the determination of a civil right. However, the Department considers it unlikely that a court would reach this conclusion.

90. Although the scope of the civil limb of Article 6(1) has been progressively expanded over time, it remains the case that a "hard core of public-authority prerogatives" fall outside the scope of the civil limb of Article 6, because no "civil" right or obligation is engaged. Matters falling outside the scope of the civil limb of Article 6(1) include tax disputes, the regulation of the ability of aliens to enter and stay within the territory of a contracting party, and the imposition of reporting restrictions in criminal proceedings. In *Montcornet de Caumont v France* Application No.: 59290/00, 13 June 2003, a case concerning an individual who was refused the benefit of a legislative amnesty following conviction for a road traffic offence, the ECtHR held that Article 6 did not apply to the subsequent domestic proceedings because they neither involved a dispute over "civil rights or obligations" or the "determination of a criminal charge", but the execution of a sentence. Although the case is not directly on point as it related to an individual already convicted, the ECtHR has also described amnesty legislation which results in the termination of pending criminal proceedings as a "sovereign act" adopted as part of the State's "criminal policy". That indicates such amnesties do not have a "civil" character.

91. The Department considers that in any event, were a court to hold that Article 6 was engaged by the process of determining an application under the condition immunity scheme, and that the immunity requests panel or the process applied by it did not for some reason achieve the necessary Article 6 standards, judicial review proceedings would be capable of being adapted by

the court such as to ensure that it had “full jurisdiction” for the purposes of meeting the requirements of Article 6.

Article 8

Clause 6 and Schedule 2: operational powers of the Commissioner for Investigations and other members of the ICRIR

92. Clause 6, together with Schedule 2, confers on the Commissioner for Investigations of ICRIR all the powers and privileges of a constable, whether at common law or under a statutory provision. The Commissioner has in turn power to designate an ICRIR officer with some or all of those powers. It will be open to the Commissioner for Investigations to decide precisely what powers to exercise and who to designate in order to effectively exercise its functions. It is acknowledged that exercise of a number of these powers, in particular a search of private property without requiring the consent of the relevant person, will engage Article 8 – the right to respect for private and family life, home and correspondence.

93. However, the Department’s position is that where these provisions present an interference with Article 8 it is necessary and proportionate in order to further a legitimate aim (as set out in Article 8(2)) and that the safeguards which are built into the relevant clauses protect against any concerns regarding the proportionality of the powers.

94. The Department considers that the legitimate aim of conferring police powers on ICRIR officers is to enable the ICRIR to effectively carry out its investigations into Troubles-related deaths and serious injuries, including consideration of all relevant circumstances surrounding an application for immunity and in connection with a referral to prosecutors. This will enable the state to meet its obligations under Articles 2 and 3, and thereby uphold the rights and freedoms of the families of those killed in the Troubles, or those who were themselves seriously injured. Without having effective powers, there may well be relevant evidence which is withheld from the investigations. Furthermore, the thorough investigation by the ICRIR of past offences will assist in the prevention of crime and disorder.

95. While the range of powers available to police constables (and therefore to designated ICRIR officers) is broad, the Department considers that the legislation provides sufficient safeguard against abuse as to be in accordance with the law.

96. The powers can be exercised in relation to all of ICRIR’s functions, excluding the production of the historical record. Whereas police constables exercise their powers in connection with investigations, prevention of all types of crime, treatment of those in custody and deal with relatively minor public order and public safety issues, the function of ICRIR officers is likely to be far more limited. In light of ICRIR’s functions, it is likely that many of the powers

available to constables, relating to general public safety or maintenance of public order will never be used.

97. There are other limits on use of the powers. The designations themselves may be made subject to limitations specified on the face of the designation: either on which operational powers the officer has; or on the purpose for which those powers may be exercised. The Commissioner for Investigations may only designate an ICRIR officer with powers if he or she is satisfied that the officer is a suitable person to designate and has received adequate training. In additional, any safeguards in legislation which are expressed to apply to constables (e.g. PACE Codes of Practice) will by, virtue of a general deeming provision, apply equally to anyone designated with police powers by this Bill.

98. The Department therefore considers that powers conferred (or which may be conferred) on officers of the ICRIR under these provisions is both necessary and proportionate in order to achieve the legitimate aims outlined above.

Clause 30 (retention of biometrics)

99. Clause 30 confers an order-making power on the Secretary of State to permit retention of certain collections of biometric material collected pre-commencement ("legacy biometrics") for the sole purpose of use by the ICRIR in the investigation of Troubles-related deaths or serious injuries.

100. The Protection of Freedoms Act 2012 ("POFA") introduced strict controls on the circumstances in which the police can retain the fingerprints and DNA samples and profiles of people who have not been convicted, and the periods for which they can do so, in England and Wales.

101. In Northern Ireland, the Department of Justice brought forward broadly similar legislative proposals which received Royal Assent on 25 April 2013 in the Criminal Justice (Northern Ireland) Act 2013, but these provisions were never commenced. The United Kingdom remains under examination by the Council of Europe Committee of Ministers in relation to this ongoing delay and has explained in correspondence that it is due in part to the ongoing work to resolve legacy issues in Northern Ireland. The Department understands that it is the intention of the Department of Justice to bring in new legislation to implement the wider destruction regime for Northern Ireland to ensure compliance with the decisions in *S and Marper v. UK* (2009) 48 E.H.R.R. 50 and *Gaughran v UK (*Application No. 45245/15, judgment 13 February 2020*),* both discussed below. It is anticipated that this legislation will be introduced in October 2022, provided this is politically possible, and will become statute in the autumn of 2023.

102. Once those provisions are commenced and accompanying regulations made, save for material which requires a national security determination, legacy biometrics will be set to be destroyed. Clause 30 allows the Secretary of State

to save some of those biometrics from deletion for a defined purpose (carrying out ICRIR functions with the exception of compiling the historical record) and for a finite period (to be specified in regulations, which can be earlier but must be no later than shortly after the conclusion of ICRIR's work).

103. The biometrics which will be capable of preservation are those which would otherwise fall to be destroyed under specified destruction provisions, which largely relate to the (expected) destruction of biometrics taken in Northern Ireland. Secondary legislation will make further provision about the precise categories of material to be retained. It is envisaged this will specify age of the offender, and other limitations on retention (to the extent possible within the constraints of the database) since it will not be possible to determine in advance which biometrics are strictly Troubles-related until the ICRIR has completed its investigations. It is also envisaged that custody of the database will pass from PSNI to the ICRIR under the information-sharing power in clause 14, although a final decision on custody is to be made by the ICRIR.

104. The retention of fingerprints and DNA profiles engages Article 8 ECHR. In *S and Marper*, the ECtHR found that the interference caused by retaining biometric material was in accordance with law and pursued a legitimate aim (prevention and detection of crime), but it was not necessary and proportionate. The "blanket and indiscriminate" retention of DNA and other biometric data from individuals who had not been convicted of a criminal offence was held to have violated Article 8 ECHR.

105. In that case, the ECtHR noted that the power did not have regard to the nature or gravity of the offence, nor the age of the suspected offender; that the retention was not time limited, and material was retained indefinitely whatever the nature or seriousness of the offence; that there were limited possibilities for an acquitted individual to have the data removed; and that there was no provision for independent review of justification of retention.

106. The ECtHR's reasoning in *Marper* was based on a number of different features of the old retention regime which, in combination, led to the conclusion that the regime was indiscriminate, 'blanket', and open ended. But *Marper* is not authority for the proposition that it is impermissible to retain any such data in relation to suspects who are not convicted - there is scope for a regime to be designed in relation to non-convicted persons which involves retention of the data but is nevertheless compatible.

107. More recently, the ECtHR considered retention of biometric material again in *Gaughran*. In that case, the Court held that the indefinite retention of biometric data of all convicted persons violated Article 8. However, there were also comments made about the proportionality of retaining DNA in Northern Ireland for use in the investigation of historic cases; the court drew a direct comparison between the justification for that and retaining biometrics to use generally in the investigation of "cold cases". In relation to the particular need

to retain biometrics in Northern Ireland for legacy investigations, and the relevance of that argument to the proportionality of interference with Article 8 rights, the ECtHR said:

> *"92. …the Court considers that the necessity to preserve parts of the DNA database for the purposes of historic investigations is not significantly different to the general arguments advanced that retaining biometric data is helpful for investigating other types of 'cold cases', examples of which were included as case studies illustrating the Government's general argument set out above (see paragraph 89).*
>
> *93. The Court recalls in general terms that it has found in the context of the positive obligation arising under Article 2 that the public interest in investigating and possibly obtaining the prosecution and conviction of perpetrators of unlawful killings many years after the events is firmly recognised... Investigating 'cold cases', is also in the public interest, in the general sense of combating crime... However, also in the context of unlawful killings the Court has underlined that the police must discharge their duties in a manner which is compatible with the rights and freedoms of other individuals... Indeed, without respect for the requisite proportionality vis-à-vis the legitimate aims assigned to such mechanisms, their advantages would be outweighed by the serious breaches which they would cause to the rights and freedoms which States must guarantee under the Convention to persons under their jurisdiction..."*

108. The Department considers that, notwithstanding the observations of the Court in *Gaughran*, the exercise of the power created by clause 30 to provide for the retention of legacy biometrics is compatible with Article 8. In *Gaughran* the Court was not directly concerned with the proposal contemplated in this Bill, but rather a legislative regime in which biometrics were retained for the general purpose of prevention and detection of all crime. Further, the Court seemed to assume that Troubles-related "cold cases" were like any other – a comparison which the Department does not consider to be apt, and, importantly, *Gaughran* is a single chamber judgment and does not represent a clear and consistent line of decisions.

109. The Department is satisfied there is a strong evidential basis for the proposed retention of legacy biometrics under clause 30, as an exception to the post *Marper/Gaughran* general retention regime.

110. The historical nature of the deaths with which the ICRIR is concerned - deaths and serious injuries between 1968 and 1998 - create particular difficulties because the evidential trail has significantly narrowed. Advice received by the Northern Ireland Office from an experienced senior operational officer, charged with managing legacy investigations on behalf of the PSNI, is that forensic evidence is "the strongest single strand in legacy investigations". Having analysed the specific challenges in relying on other strands of evidence in historic murder investigations, he concluded that "unlike the other strands, [forensic evidence] is capable of providing corroborative evidence which is not impacted by fear, memory fade or organisational capacity. This creates the potential for offenders to be identified and prosecuted successfully." Even though investigations carried out by the ICRIR will not

result in prosecutions in cases where immunity is granted, they are still the State's way of carrying out Article 2 compliant investigations into deaths, and this justification therefore applies equally to ICRIR investigations.

111. The kinds of incidents with which the ICRIR is concerned, many of which are bombings and shootings, are likely to rely on DNA or fingerprint evidence. The PSNI advises that the concept of DNA was unexplored during the majority of the Troubles and it is therefore likely that a relative lack of care was taken by terrorists (and criminals generally) with saliva, blood and other cellular material. Forensic Science Northern Ireland have similarly advised that in relation to older cases, even those offenders who were otherwise forensically aware would not have been taking 'DNA precautions' to avoid detection, as that technology was unknown at the time. The Department understands that developments in DNA profiling techniques over the last 30 years mean that exhibits previously determined as providing no forensic opportunities become potentially useful. This combined advice means that DNA will be particularly useful in relation to the cases examined by the ICRIR because in such cases there is a greater chance than in present day cases that offenders will not have guarded against leaving DNA traces on exhibits collected at crime scenes.

112. The Department considers that this evidence base is sufficient to justify some kind of exception to the new retention regime, and that the proposed retention regime in clause 30 can be justified as proportionate, and distinguished from *Marper*, based on the following limitations:

113. Time-limited retention: The Court in *Marper* was concerned that the retention was not time-limited. Under clause 30, the biometrics would be retained as a maximum for the period that ICRIR is carrying out this work. However, regulations made clause 30 can provide that preserved material can be destroyed during that period as well. In addition, there will be a duty on the ICRIR to carry out periodic reviews on the continued need to retain any material which has been preserved.

114. Limited purpose of retention: The proposal is that material can only be used for the purpose of the ICRIR's investigations into deaths or serious injuries falling within its remit, including consideration of all relevant circumstances surrounding an application for immunity and in connection with a referral to prosecutors. The ICRIR will be involved not in the detection of all crime, but only in the detection of crimes relating to deaths or serious injuries during the period of the Troubles in Northern Ireland, which by their nature are likely to be serious crimes and may therefore engage the Article 2/3 procedural obligation. Thus retention of this set of biometrics is necessary to protect the rights of the families (of those who died) or the people who themselves sustained a serious injury during the time of the Troubles.

115. Data rather than samples: The Court in *Marper* considered that the greatest interference with private life was caused by the retention of DNA samples (that is, the actual biological material taken from individuals) – the Court was concerned that the retention of cellular samples is particularly intrusive given the wealth of genetic and health information contained therein. In relation to DNA, the Department is proposing to allow for the retention of the database of profiles derived from samples, rather than the individual samples used to create those profiles.

116. These limitations are set out on the face of the Bill. Additionally, the Department currently intends to narrow down the snapshot of retained biometrics by making further provision in secondary legislation. It is envisaged that the power could be used to limit retention by age of the suspected offender (persons over 18 at the time of arrest), and by reference to whether the biometric material relates to a person who was convicted of an offence (not just charged). Owing to the technical difficulties with the PSNI database, it is at present not possible to link the biometric material to the precise offence for which a person was charged in every case. Work is, however, underway and it may be possible to narrow down the criteria for retention more by the time the secondary legislation is being drafted. The Department considers adding further limitations in secondary legislation (rather than primary) to be compatible with the requirement that any interference is "in accordance with the law".

117. Accordingly the Department considers that the interference with Article 8 resulting from the proposed retention regime enabled by clause 30 is in accordance with the law and is necessary and proportionate to ensure public safety, prevent disorder and crime and uphold the rights and freedoms of others.

Article 14

Clauses 2, 9 – 17 (reviews by the ICRIR into Troubles-related deaths and other harmful conduct); clauses 19 – 21 (conditional immunity scheme); clauses 33 to 39 (prohibitions and restrictions on criminal investigations, prosecutions, inquests and civil proceedings); and clause 39 (inquests, investigations and inquiries);

118. The application of the conditional immunity scheme (clauses 19 to 21), prohibitions and restrictions on criminal investigations, prosecutions, inquests and civil proceedings (clauses 33 to 39) and the remit of the ICRIR in relation to reviews (clauses 2, 9 to 17) has been drawn by reference to events or conduct forming part of the Troubles, defined in clause 1 by reference to certain parameters. Inevitably there will be cases that fall outside of these parameters, and which are therefore treated differently, thus potentially engaging Article 14 ECHR where the application of these clauses falls within

the ambit of other Convention rights, such as Articles 2 and 3 as discussed above.

119. The Department has carefully considered the range of circumstances to which these measures should apply and considers the parameters decided upon are the most appropriate and justifiable in the circumstances. The following factors have been specifically considered.

120. The conditional immunity scheme and the prohibitions and restrictions on certain Troubles-related investigations and proceedings will apply across the whole of the UK, and the ICRIR has a UK-wide remit. Historically, Troubles-related incidents were not confined to Northern Ireland and a UK-wide approach ensures that there is no difference in treatment between the people who were involved in incidents taking place anywhere in the UK.

121. The date range for the Troubles under the Bill is 1 January 1966 to 10 April 1998. This is probably the most challenging of the parameters to draw, as there is no universally agreed definition of the start and end of the Troubles. With regards to the start date, the generally accepted time is the late 1960s. Prior to 1966, the main active group was the Official IRA but in 1966 the Ulster Volunteer Force, Ulster Protestant Volunteers and Red Hand Commando became active, when the conflict became multidimensional. In 1966, the UVF declared war on the Official IRA and carried out fire-bombings and shootings on Catholics. The Department believes that 1 January 1966 therefore serves as the most representative start date, nothing that the Northern Ireland Executive's new Troubles Permanent Disablement Scheme also takes 1966 as its starting point. With regard to the end date, 10 April 1998 is the date that the Belfast/Good Friday Agreement was signed. This landmark event heralded a new era for Northern Ireland and is also widely seen as the end of the Troubles. Various paramilitary groups declared ceasefires before and after it was signed, and it marked the start of weapons decommissioning and the British Army's substantial withdrawal.

122. Events relating to the constitutional status of Northern Ireland, and to political or sectarian hostility between people there, certainly took place before 1966 and after 1998; however, the requirement for certainty of the application of the measures and the ICRIR's remit necessitates setting clear temporal parameters. The Department have concluded that these parameters represent the most rational and widely accepted dates.

123. The definition of events or conduct forming part of the Troubles is drawn entirely neutrally and is capable of applying to conduct carried by any individual or group regardless of their affiliation, or any member of the security forces. Accordingly, the Department does not believe that there is any

reasonable basis to argue that the measures in the Bill will result in differential treatment on the basis of religion, race or nationality.

124. There is, however, likely to be some differing impacts of the conditional immunity scheme and the restrictions and prohibitions on investigations and legal proceedings in practice. The vast majority of legal proceedings relating to the Troubles are prosecutions against individuals acting for the State (veterans) or civil claims against the State. Record-keeping by the State, the traceability of its personnel and its disclosure obligations in legal proceedings enables investigations into State activities to be significantly more effective than equivalent enquiries into paramilitary activity, where groups keep no records. The inevitable outcome is that as there are significantly more legal proceedings capable of being brought against the State and State agents, the measures will take effect on many more cases directed against the State and its agents than against paramilitary groups and their members.

125. The Department considers that this overall practical impact is an unavoidable reflection of the current state of affairs rather than a discriminatory outcome of these provisions. The application of these measures will be uniform regardless of an individual's political or religious affiliation, and a particular individual from one side of the conflict will not be disadvantaged in comparison to another on the other side. The Department does not therefore consider there to be a discriminatory impact in law.

126. The effect of clauses 33 and 36 is to create a total prohibition on all criminal investigations and prosecutions for all Troubles-related offences not defined as serious (see clause 1(5)(b)), unless they are connected with a serious offence. Put another way, only Troubles-related offences connected to a death or other serious harmful conduct will, in future, be capable of investigation and prosecution (where there has been an ICRIR review and where immunity from prosecution has not been granted under the conditional immunity scheme).

127. This creates a difference in treatment between those who have committed serious or connected Troubles-related offences and those who have committed other offences, in terms of the possibility of future prosecution. In terms of the application of Article 14, the Department is of the view that the status of having committed an offence which was or was not linked to a death or other harmful conduct is unlikely to be considered an "other status" within the meaning of Article 14 of the ECHR. It was not a personal or identifiable characteristic but simply a description of the difference in treatment.

128. In any event, the Department does not consider the two groups to be in an analogous position because non-serious offences which were connected to deaths or other harmful conduct were more significant in light of their context,

justifying the difference in approach. Further, the State's procedural obligation under Articles 2/3 of the ECHR would be more likely to be engaged, such that there a greater imperative for the recovery of information through the ICRIR review process and the conditional immunity scheme. The Department considers that those factors would be very likely to justify any discrimination in any event.

Clause 41 (Amendment of the Northern Ireland (Sentences) Act 1998)

129. The amendments to the Northern Ireland (Sentences) Act 1998 redraw the parameters of who is eligible to apply for early release under that Act. It currently applies to those convicted of a qualifying offence committed between 1973 and 1998; this Bill extends that back to qualifying offences committed from 1966 to 1998. That Act also currently requires that a person must be serving either a life sentence or a determinate sentence of at least 5 years' imprisonment; this Bill removes that minimum for determinate sentences prisoners, making a person serving any length of sentence eligible to apply. The Bill also removes the requirement for a successful applicant to have served a proportion of their sentence before being entitled to release. Accordingly, the provisions of this Bill remove several existing criteria which require differential treatment. By increasing the temporal parameters of the Act, differential treatment between offences committed at different times during the Troubles is also removed. While the new temporal parameters exclude those who committed offences earlier and later, the Department's view is that that differential treatment justified for the reasons given above. Temporal parameters for "the Troubles" must necessarily be drawn, and the Department's views is that this date range is the most widely recognised and uncontroversial.

Clause 30 (retention of biometrics)

130. The purpose and effect of the power to regulation for the retention of legacy biometrics is explained above, in relation to Article 8. The Department considers that Article 14 may also be engaged given the proposed retention regime under clause 30 would operate only in Northern Ireland, meaning a difference in treatment with respect to biometrics gathered elsewhere in the United Kingdom. That may mean, for example, that a person whose prints were historically collected in Northern Ireland would have those prints retained for a further 5 years, whereas a person whose prints were historically collected in England and Wales, would have had their prints deleted. In this instance, the Department would maintain that the place where prints and samples are taken does not constitute an "other status" under Article 14. Furthermore, even if the complainant could show the difference in treatment was indirectly discriminatory (because it was more likely that a person usually resident in Northern Ireland would have their prints taken there or because it

was indirectly discriminatory on the grounds of nationality), the Department considers that such a difference in treatment was justified. It is necessary to retain the prints in connection with the investigation of Troubles-related deaths and serious injuries, and the fact that relevant prints could have been already deleted in England and Wales under a separate legislative regime does not make it any less necessary to retain the prints that are held.

Article 1, Protocol 1

Clause 14 (power to require the provision of information), Schedule 4

131. The purpose and effect of clause 14 is described above in relation to Article 6. There is a separate question whether the power in Schedule 4 to impose a financial penalty for failing to comply with a notice under that clause engages Article 1, Protocol 1 of the ECHR, to the extent that the levying of civil penalties impacts on an individual's peaceful enjoyment of their possessions.

132. In the case of International *Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 the Court of Appeal held that a civil penalty regime established to penalise hauliers and drivers carrying clandestine entrants into the UK was penal in nature. Further specific concerns that the Court had with the regime were the scale and inflexibility of the penalty, without the possibility of mitigation or the right for the penalty to be determined by an independent tribunal, and the fact that the scheme imposed an excessive burden on the carriers and drivers which was disproportionate to the objective to be achieved, and was therefore a breach of Article 1, Protocol 1.

133. The Department does not consider it to be clear that A1P1 would be engaged by the proposed scheme, where there is flexibility as to the size of the fine. However, it considers that any potential interference with rights under that Article can be justified on the basis any penalty will have been imposed in accordance with the law, in the public interest, and will be a proportionate means of achieving the (legitimate) aim being pursued. That is to encourage full cooperation and disclosure in relation to investigations by the ICRIR into deaths and serious injuries relating to the Troubles, including where those investigations constitute the State's way of meeting its obligations under Article 2 and 3 ECHR.

Clause 38 (civil claims)

134. Article 1 of Protocol 1 ("A1P1") protects individuals from interference with their existing possessions. Whilst an enforceable judgment will constitute a possession for the purposes of A1P1, prior to obtaining a judgment a potential claimant can only have, at best, a legitimate expectation of a particular

outcome in accordance with the law (*R (PCSU) v Minister for the Civil Service* [2011] EWHC 2041 (QB)).

135. A legitimate expectation may amount to a possession under A1P1 in certain circumstances. In *R (Reilly) v Secretary of State for Work and Pensions* [2016] EWCA Civ 413 , the Court of Appeal held that retrospective legislation that removed a cause of action from persons who had not, at the time the law came into effect, brought their claim, was not incompatible with A1P1 because a claim should not be regarded as an asset unless there is a practical certainty as to the claimant's entitlement. The Court of Appeal also said that a legitimate expectation based on the existence of a good arguable case is not enough and a right which has never legally accrued is not a possession.

136. The Department's view, therefore, is that the claims excluded by virtue of the operation of the civil prohibition created by clause 38 are unlikely to be considered sufficiently certain to be regarded as possessions for the purposes of A1P1. Even if the measures do engage A1P1, the Department considers that the prohibition would be a justified interference with any A1P1 rights for the same reasons set out above in relation to Article 6.

Other international human rights instruments

UN Convention Against Torture

137. The UK is a party to the UN Convention against Torture ("UNCAT") and ratified it on 8 December 1988. With the exception of Articles 4-5 (which deal with criminalising torture) UNCAT is not incorporated into domestic law. While it may be used as an aid to the interpretation of the ECHR it is not directly enforceable in the domestic courts or in the ECtHR itself. The UK has also not made a declaration under Article 22 of UNCAT, enabling individuals to present complaints against it to the Committee against Torture ("CAT"). Any claim that the UK has breached UNCAT would, therefore, have to be pursued on the international plane by other states or by the relevant committees.

138. Under Article 2(1) of UNCAT, the UK is obliged to take *"take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."*

139. The content of that general obligation is particularised in Article 14, which provides that the UK *"shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."*

140. As the prohibition on civil actions will, in principle, remove an avenue for pursuing tortious claim for damages in respect of torture, the Department considers that the right to redress and compensation under Article 14 of UNCAT is potentially engaged.

141. The Department's view is that UNCAT obligations will only be potentially relevant to a small number of possible claims within the scope of the prohibition as they must concern acts of torture committed by public officials between 8 December 1988 and 10 April 1998. This is because:

    a. UNCAT was ratified by the UK on 8 December 1988 and decisions of the CAT approved by the International Court of Justice indicate that the right to redress does not arise in respect of events occurring before ratification; and

    b. The definition of torture in Article 1(1) of UNCAT requires that it be *"inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*".

142. The CAT has indicated in general comments that it is inconsistent with the effective application of Article 14 of UNCAT to apply any limitation period to torture claims. In *A v Boznia and Herzegovina* (2019) CAT/C/67/D/854/2017, the CAT followed that approach in a case in which a limitation period which expired five years after the injured party learned about the damage and the identity of the person who caused it are time-barred.

143. These comments could give rise to an argument that introducing any limitation period would be inconsistent with the UK's obligations under UNCAT.

144. However, it should be noted that the appellate courts have given limited weight to general comments made by the CAT. As Lord Bingham pointed out in *Jones v Saudi Arabia* [2007] 1 AC 270 at §157 in the context of general comments by the CAT recommending that Canada review its provision of compensation to victims of torture:

    "[the CAT] is not an exclusively legal and not an adjudicative body; its power under article 19 is to make general comments; the committee did not, in making this recommendation, advance any analysis or interpretation of article 14 of the Convention; and it was no more than a recommendation. Whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight."

145. Although there is no specific limitation period specified in UNCAT, public international law recognises that claims may be barred by virtue of the passage of time even where a treaty does not lay down any specific time limit.

146. The US Supreme Court has held, it is "a well-established rule of international law… that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State". There is no contrary indication in UNCAT, which says nothing about the procedural rules governing claims under Article 14.

147. Similarly, in *Mutua v Foreign and Commonwealth Office* [2012] EWHC 2678 (QB), in the context of an application to extend time under s.33 of the Limitation Act, McCombe J held at §157 that "I can find no customary rule of international law that prohibits the imposition in domestic law of [a] just rule of limitation in civil actions".

148. On this basis the Department considers that limitation periods may be applied to claims within the scope of UNCAT. There are strong justifications for the limitation period imposed by the civil prohibition (see above) and the Department is therefore of the view that the civil prohibition is compatible with the United Kingdom's obligations UNCAT.

International Convention on Civil and Political Rights

149. The UK is a party to the International Covenant on Civil and Political Rights ("ICCPR") and ratified it on 20 May 1976. The ICCPR is not incorporated into domestic law. While it may be used as an aid to the interpretation of the ECHR it is not directly enforceable in the domestic courts or in the ECtHR itself. The UK has not ratified the First Optional Protocol to the ICCPR permitting individual complaints to the Human Rights Committee ("HRC"). Any claim that the UK has breached the ICCPR will, therefore, have to be pursued on the international plane by other states or by the relevant committees.

150. The ICCPR contains provisions enshrining various substantive rights:

Article 6(1) protects the right to life:

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Article 7 prohibits torture and inhuman treatment:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 9(1) protects the right to liberty:

> “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

151. Article 2(3)(a) of the ICCPR then requires signatory States to provide an effective remedy in respect of breaches of the rights contained in it. These rights to an effective remedy are currently discharged through a combination of criminal and civil proceedings. Measures in the Bill will prohibit civil claims and, where immunity is granted, criminal proceedings relating to conduct forming part of the Troubles and therefore potentially impinge on these rights.

152. The Department considers that, despite the absence of specific limitation period in the ICCPR, imposing a limitation period is consistent with the obligation to provide an effective remedy for the reasons given above in relation to UNCAT.

Northern Ireland Office

16 May 2022