



Northern
Ireland
Office

**A proposal for a Remedial Order to amend the Northern Ireland Troubles
(Legacy and Reconciliation Act) 2023**

December 2024



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Presented to Parliament pursuant to paragraph 3(1) of Schedule 2 to the
Human Rights Act 1998.

December 2024



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Background to the proposed Remedial Order

Introduction

This document presents a draft of a proposed Remedial Order to amend the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (“the Legacy Act”) and make consequential amendments to two other enactments. This is to implement the February 2024 judgment of the High Court in Northern Ireland in *Dillon, McEvoy, McManus, Hughes, Jordan, Gilvary, and Fitzsimmons Application and In the matter of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and the Secretary of State for Northern Ireland [2024] NIKB 11* (“the Dillon judgment”). It also addresses a further incompatibility which the Court of Appeal in Northern Ireland ruled on in September 2024 on appeal in that case. This document gives an explanation of the incompatibility which the proposed Remedial Order seeks to remove, and the reasons for proceeding by way of a Remedial Order, as per paragraph 3(1)(a) of Schedule 2 to the Human Rights Act 1998 (“the HRA”). A Remedial Order is the most appropriate way to implement these changes to primary legislation.

The incompatibility

The High Court in Northern Ireland and the Northern Ireland Court of Appeal held that a number of provisions in the Legacy Act were incompatible with various ECHR provisions:

Immunity and prohibition of criminal enforcement action

Sections 19 of the Legacy Act sets out that a person must be granted immunity from prosecution if certain conditions are met. Section 20 deals with procedural matters in relation to requests for immunity. Various other provisions of the Act are ancillary to these, dealing with the immunity process. Section 41 prohibits criminal enforcement action being taken in respect of Troubles-related offences which are not ‘serious’ or ‘connected’ offences (within the meaning of section 1 of the Act). These provisions, together with sections 7(3), 12, 22, 39 and 42(1) were declared by the High Court as incompatible with articles 2 and 3 of the ECHR.

Bar on civil actions

Section 43(1) of the Legacy Act prohibits Troubles-related civil actions brought on or after the day of the First Reading in the House of Commons of the Bill for the Act (May 2022) from being continued on or after the day the section came into force (November 2023). Section 43(1) was declared by the High Court to be incompatible With article 6 of the ECHR Section 43(2) prohibits Troubles-related civil actions from being brought on or after the day the section came into force

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(November 2023). Section 43(2) was declared incompatible with article 6 of the ECHR by the NI Court of Appeal.

Exclusion of evidence in civil proceedings

Section 8 of the Legacy Act states that material provided to or produced by the Independent Commission for Reconciliation and Information Recovery (ICRIR) in the exercise of its functions is inadmissible in civil and coronial proceedings, and certain inquiries in Scotland. Section 8 was deemed incompatible by the High Court with articles 2, 3 and 6 of the ECHR.

Interim custody orders

Sections 46 and 47 of the Legacy Act make provision in relation to "interim custody orders". These were orders made under Article 4(1) of the Detention of Terrorists (Northern Ireland) Order 1972 or paragraph 11(1) of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973 (the "order-making functions"). In *R v Adams* [2020] UKSC 19, the Supreme Court found that an interim custody order made under Article 4 of the 1972 Order was invalid because the power to make the order had not been exercised by the Secretary of State personally.

Section 46(2) provides that the order-making functions are to be treated as always having been exercisable by authorised Ministers of the Crown as well as by the Secretary of State.

Sections 46(3) and (4) go on to say that an interim custody order is not to be regarded as ever having been unlawful, and the detention of a person under the authority of such an order is not to be regarded as ever having been unlawful, just because an authorised Minister of the Crown exercised any of the order-making functions in relation to the order.

Section 47(1) prohibits a civil action being continued or brought if (or to the extent that) the claim that is to be determined in the action involves an allegation that a person was detained under the authority of an interim custody order and that order was unlawful because an authorised Minister of the Crown exercised any of the order-making functions in relation to the order. Subsection (4) states that no compensation is to be paid in respect of a conviction that has been reversed solely on the ground that an interim custody order was unlawful because an authorised Minister of the Crown exercised any of the order-making functions.

Sections 46(2), (3) and (4) and 47(1) and (4) were declared by the High Court to be incompatible with the applicant's rights under article 6 of, and Article 1 of Protocol 1 to, the ECHR.

Reasons for amending the Legacy Act

The Government has committed to repeal and replace the Legacy Act. On 29th July 2024 the Secretary of State for Northern Ireland wrote to the Court of Appeal in Northern Ireland to abandon the aspects of the appeal (lodged by the previous government) against the Dillon judgment in the High Court that relate to the declarations of incompatibility set out above. He also made it clear in a Written Ministerial Statement that he would seek to lay a Remedial Order as soon as parliamentary time would allow, and signalled his intention to undertake a period of consultation with all interested parties, including victims and survivors, to seek their views on a practical way forward that can obtain a measure of support across communities in Northern Ireland. This period of consultation is ongoing.

The Court of Appeal in Northern Ireland handed down judgment in September 2024 (on the remaining grounds of the appeal, and on the applicant's cross appeals). On section 43 of the Legacy Act, the Court of Appeal went further than the High Court and declared that subsection (2), which prohibits civil actions being brought after the section came into force, is also incompatible with the ECHR.

Reasons for proposing a Remedial Order

A Remedial Order is an order made under section 10 of the HRA, if a Minister of the Crown considers that there are "compelling reasons" for proceeding under the section, the Minister may by Remedial Order make such amendments to the legislation as the Minister thinks necessary to remove the incompatibility.

The Government considers it important to begin the process of removing these provisions from the statute book swiftly.

Given the expected timescales on new primary legislation and other legislative priorities, the Government considers that a Remedial Order to resolve these matters of incompatibility is the most suitable approach given the ICRIR is established and beginning to take cases.

The terms of the Remedial Order

The proposed Remedial Order would make targeted amendments to the Legacy Act to remove the provisions which have been found by the High Court in Northern Ireland (and, on section 43, the Court of Appeal in Northern Ireland) to be in breach of the ECHR (and make necessary consequential amendments to the Legacy Act and two other enactments).

Reasons for the non- urgent procedure

The Government does not consider it necessary to make use of the urgent procedure under paragraph 4 of Schedule 2 to the HRA to remedy the incompatibility more swiftly. The importance of the effect of the incompatibilities identified by the High Court in Northern Ireland (and the further incompatibility identified by the Court of Appeal in Northern Ireland set out above) has been considered against the need to allow the opportunity for parliamentary scrutiny of the proposed changes and to legislate in an open and transparent manner.

Remedial Order process

Schedule 2 to the HRA sets out the parliamentary process for Remedial Orders. Under the non-urgent procedure, a proposal for a draft order is laid before Parliament for 60 days during which time representations may be made. Following this the draft order, with any revisions the Government wishes to make in light of any representations received, must be laid for a further 60 days. It then needs to be approved by a resolution of each House of Parliament before it can be made.

Draft of the proposed Remedial Order

Draft Order laid before Parliament under paragraph 2(a) of Schedule 2 to the Human Rights Act 1998 (c. 42), for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

No.

The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (Remedial) Order 2024

Made - - - -

Coming into force

The following provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023(a) have been declared(b) under section 4 of the Human Rights Act 1998(c) to be incompatible with a Convention right(d)—

- (a) sections 7(3), 12, 19, 20, 21, 22, 39, 41 and 42(1) (relating to immunity from prosecution and the prohibition of criminal enforcement in respect of certain offences),
- (b) section 8 (relating to the exclusion of evidence in civil proceedings),
- (c) section 43(1) (preventing the continuation of certain civil actions that were brought on or after 17th May 2022(e)),
- (d) sections 46(2), (3) and (4) and 47(1) and (4) (relating to interim custody orders).

The Secretary of State has abandoned the appeal that was brought against the declarations made under section 4 of the Human Rights Act 1998 in relation to those provisions.

Section 43(2) of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (preventing the bringing of certain civil actions on or after 18th November 2023(f)) has also been declared(g) under section 4 of the Human Rights Act 1998 to be incompatible with a Convention right.

(a) 2023 c. 41.

(b) By the High Court in Northern Ireland in the case of *Dillon, McEvoy, McManus, Hughes, Jordan, Gilvary, and Fitzsimmons Application and In the matter of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and the Secretary of State for Northern Ireland* [2024] NIKB 11.

(c) 1998 c. 42. There are amendments to section 4(5) but none are relevant.

(d) For the definition of “the Convention rights”, see section 1 of the Human Rights Act 1998, as amended by S.I. 2004/1574 and S.I. 2003/1887. For the definition of “the Convention”, see section 21(1) of that Act. There are amendments to section 21(1) but none are relevant.

(e) 17th May 2022 was the date of First Reading in the House of Commons of the Bill for the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023.

(f) 18th November 2023 was the date on which section 43 came into force.

(g) By the Court of Appeal in Northern Ireland *In the Matter of an Application by Martina Dillon and others - NI Troubles (Legacy and Reconciliation) Act 2023* [2024] NICA 59.

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The Secretary of State considers that there are compelling reasons for proceeding by way of a remedial order^(a) to make such amendments to the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 as the Secretary of State considers are necessary to remove the incompatibility.

In accordance with paragraph 2(a) of Schedule 2 to the Human Rights Act 1998, a draft of this instrument was laid before Parliament and was approved by resolution of each House of Parliament, a document containing a draft of this instrument having previously been laid before Parliament in accordance with paragraph 3(1) of that Schedule.

Accordingly, the Secretary of State makes the following Order, in exercise of the powers conferred by section 10(2) of, and paragraph 1(1), (2) and (3) of Schedule 2 to, the Human Rights Act 1998.

Citation, commencement, interpretation and extent

1.—(1) This Order may be cited as the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (Remedial) Order 2024 and comes into force [...].

(2) In this Order “the 2023 Act” means the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023.

(3) An amendment made by this Order has the same extent as the provision amended.

Removal of provision relating to immunity from prosecution etc

2.—(1) The 2023 Act is amended as follows.

(2) In section 2 (the Independent Commission for Reconciliation and Information Recovery)—

(a) in subsection (5), omit paragraph (d);

(b) in subsection (10), omit paragraphs (f) to (h).

(3) In section 4 (actions of the ICRIIR: safeguards) omit subsection (3).

(4) In section 5 (full disclosure to the ICRIIR)—

(a) in subsection (1), omit “or the immunity function”;

(b) in subsection (2), omit “or the immunity function”.

(5) In section 7 (admissibility of material in criminal proceedings)—

(a) omit subsection (3);

(b) in subsection (4), omit the words from “; and subsections” to the end;

(c) in subsection (11), in the definition of “other material”, omit paragraph (b) and the “and” before it.

(6) In section 11 (requests for reviews: general provision)—

(a) in subsection (4)—

(i) in paragraph (a), omit the words from “(whether” to “section 12)”;

(ii) in paragraph (b), for “request (or subsequent request)” substitute “subsequent request”;

(iii) in the words after paragraph (b), for “that” substitute “the subsequent”;

(b) in subsection (5)—

(a) For the definition of “remedial order”, see section 21(1) of the Human Rights Act 1998. There are amendments to section 21(1) but none are relevant.

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- (i) in paragraph (a), for “that request (or subsequent request)” substitute “the subsequent request”;
 - (ii) in paragraph (b), omit “, in a case where the ICRIR is carrying out the review following a request,”;
 - (c) in subsection (6)—
 - (i) in paragraph (a), omit the words from “(whether” to “section 12)”;
 - (ii) in paragraph (b), for “request (or subsequent request)” substitute “subsequent request”;
 - (iii) in the words after paragraph (b), for “that” substitute “the subsequent”;
 - (d) in subsection (7), in the words before paragraph (a), for “that” substitute “the subsequent”;
 - (e) in subsection (8), for “that request (or subsequent request)” substitute “the subsequent request”.
- (7) Omit section 12 (reviews in connection with requests for immunity from prosecution).
- (8) In section 13 (conduct of reviews)—
- (a) in subsection (2), omit the words from “, whether” to the end;
 - (b) in subsection (9), omit paragraph (c);
 - (c) in subsection (12), omit paragraph (b).
- (9) In section 16 (consultation on reports)—
- (a) in subsection (1), for the words from “a review” to “section 9 or 10” substitute “any review”;
 - (b) in subsection (2), omit the words from “carried out” to “section 12(2)”;
 - (c) in subsection (3), omit the words from “carried out” to “section 12(3)”.
- (10) In section 17 (issuing and publication of reports)—
- (a) in subsection (2), omit “If the review was carried out following a request made under section 9 or 10,”;
 - (b) omit subsections (3) to (6);
 - (c) in subsection (7), omit “, or statement of the manner in which a review was carried out,”;
 - (d) omit subsections (8) and (9).
- (11) In section 18 (reports: general provision)—
- (a) in subsection (2)—
 - (i) in paragraph (a), omit “and (3)”;
 - (ii) omit paragraph (b) and the “or” before it;
 - (b) in subsection (4), omit “, or the statement is not to be published,”;
 - (c) in subsection (5)(b), omit “or statement of the manner in which a review was carried out”;
 - (d) for subsection (7) substitute—
 - “(7) For the purposes of this section—
 - (a) the circumstances in which a public prosecution of P is to be regarded as continuing include circumstances where the trial which forms part of the prosecution ends without P being convicted or acquitted or any other verdict being given and either—

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- (i) the period for the prosecution to seek a retrial is continuing (without a retrial having been sought), or
 - (ii) the prosecution have sought a retrial;
 - (b) the circumstances in which a public prosecution of P is to be regarded as not continuing include—
 - (i) circumstances where the trial which forms part of the prosecution ends with P being convicted or acquitted or with another verdict being given, and
 - (ii) circumstances where the trial ends without P being convicted or acquitted or any other verdict being given and the period for the prosecution to seek a retrial ends without a retrial having been sought.”.
- (12) Omit sections 19 to 22 and the italic heading before section 19 (immunity from prosecution).
- (13) Before section 23 insert—

“Personal statements”.
- (14) In section 23 (personal statements by persons affected by deaths etc)—
 - (a) in subsection (1), omit paragraph (c);
 - (b) in subsection (5), omit paragraph (b) and the “or” before it;
 - (c) in subsection (7), omit paragraph (b) and the “or” before it.
- (15) In section 24 (publication of personal statements) in subsection (10)(a), omit sub-paragraph (ii) and the “or” before it.
- (16) In section 25 (information for prosecutors) in subsection (5), omit the words from “unless” to the end.
- (17) Omit sections 26 and 27 and the italic heading before section 26 (grants of immunity: revocation and offence of making false statement).
- (18) Omit section 39 (grant of immunity: prohibition of criminal enforcement action).
- (19) In section 40 (no grant of immunity: restrictions on criminal enforcement action)—
 - (a) in the heading, for “No grant of immunity:” substitute “Serious or connected Troubles-related offences:”;
 - (b) in subsection (1), omit the words from “unless” to the end.
- (20) Omit section 41 (other Troubles-related offences: prohibition of criminal enforcement action).
- (21) In section 42 (general provision and saving for ongoing pre-commencement action)—
 - (a) in subsection (1), for “any of sections 38 to 41” substitute “section 38 or 40”;
 - (b) in subsection (2), for “sections 39 to 41” substitute “section 40”;
 - (c) in subsection (4), omit “or 41”;
 - (d) in subsection (5), for “, 40 or 41” substitute “or 40”.
- (22) In section 52 (academic research) in subsection (9), in the definition of “ICRIR reports”, omit paragraph (b) and the “and” before it.
- (23) In section 60 (interpretation) in the table in subsection (1), omit the entries for—
 - (a) “immunity function”;
 - (b) “immunity requests panel”.
- (24) In Schedule 1 (the ICRIR, the Commissioners and ICRIR officers)—

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- (a) in paragraph 4, omit sub-paragraph (4);
 - (b) in paragraph 13, omit sub-paragraph (2).
- (25) In Schedule 3 (family members) in paragraph 7—
- (a) in sub-paragraph (1), for “15 or 17” substitute “16”;
 - (b) in sub-paragraph (2)(b)(ii), omit “or section 17(4)”;
 - (c) in sub-paragraph (3), for “15 or 17” substitute “16”.
- (26) Omit Schedule 5 (no immunity in certain circumstances).
- (27) In Schedule 12 (prisoner release) omit—
- (a) paragraph 2(2);
 - (b) paragraph 3(2).
- (28) In Schedule 13 (amendments) omit paragraph 11.

Removal of restrictions on admissibility in civil proceedings of material obtained by the ICIR

3. In the 2023 Act, omit section 8 (admissibility of material in civil proceedings).

Removal of bars on bringing civil claims relating to the Troubles

- 4.—(1) The 2023 Act is amended as follows.
- (2) For the italic heading before section 43 substitute “Inquests and police complaints”.
 - (3) Omit section 43 (tort, delict and fatal accident actions).
 - (4) Omit Schedule 9 (determination of whether the prohibition on civil actions applies).
 - (5) Omit Schedule 10 (civil actions to which the 2008 Mediation Directive applies).
 - (6) In Schedule 13 (amendments), omit Part 2.

Removal of provisions relating to interim custody orders

5. In the 2023 Act, omit sections 46 and 47 and the italic heading before section 46 (interim custody orders).

Amendments of other enactments

6. The Schedule makes amendments of other enactments that are consequential on those made of the 2023 Act.

[Date]

[xxx]
[Minister]
Northern Ireland Office

SCHEDULE

Article 6

Amendments of other enactments

Prescription and Limitation (Scotland) Act 1973

1. In the Prescription and Limitation (Scotland) Act 1973(a), omit section 23C(b) (actions relating to the Northern Ireland Troubles).

Limitation Act 1980

2. In the Limitation Act 1980(c), omit section 27D(d) (actions relating to the Northern Ireland Troubles).

Foreign Limitation Periods Act 1984

3. In the Foreign Limitation Periods Act 1984(e), omit section 4A(f) (actions relating to the Northern Ireland Troubles).

Merchant Shipping Act 1995

4. In the Merchant Shipping Act 1995(g), in section 190 (time limit for proceedings against ship owner or ships) omit subsection (7)(h).

Northern Ireland (Sentences) Act 1998

5.—(1) The Northern Ireland (Sentences) Act 1998(i) is amended as follows.

(2) In section 3(j) (applications for declaration of eligibility for release)—

(a) for subsection (6A) substitute—

“(6A) An offence is a qualifying offence if subsection (7) or (7A) applies to the offence.”;

(b) omit subsection (6B).

(3) In Schedule 3 (sentences passed outside Northern Ireland) in paragraph 2(k) —

(a) for sub-paragraph (A1) substitute—

“(A1) An offence is equivalent to a qualifying offence if sub-paragraph (1) or (1A) applies to the offence.”;

(b) omit sub-paragraph (A2).

(a) 1973 c. 52.

(b) Section 23C was inserted by paragraph 12 of Schedule 13 to the 2023 Act.

(c) 1980 c. 58.

(d) Section 27D was inserted by paragraph 13 of Schedule 13 to the 2023 Act.

(e) 1984 c. 16.

(f) Section 4A was inserted by paragraph 14 of Schedule 13 to the 2023 Act.

(g) 1995 c. 21.

(h) Section 190(7) was inserted by paragraph 17 of Schedule 13 to the 2023 Act.

(i) 1998 c. 35.

(j) Section 3 was amended by paragraph 2 of Schedule 12 to the 2023 Act.

(k) Paragraph 2 was amended by paragraph 3 of Schedule 12 to the 2023 Act.

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Sentencing Act 2020

6. In the Sentencing Act 2020(a), in section 379(b) (behaviour orders) in the table in subsection (1), omit the entry for section 26 of the 2023 Act and the heading before it.

Foreign Limitation Periods (Northern Ireland) Order 1985

7. In the Foreign Limitation Periods (Northern Ireland) Order 1985(c), omit Article 5A(d) (actions relating to the Northern Ireland Troubles).

Limitation (Northern Ireland) Order 1989

8. In the Limitation (Northern Ireland) Order 1989(e), omit Article 73A(f) (actions relating to the Northern Ireland Troubles).

(a) 2020 c. 17.

(b) Section 379 was amended by paragraph 11 of Schedule 12 to the 2023 Act. There are other amendments but none are relevant.

(c) S.I. 1985/754 (N.I. 5).

(d) Article 5A was inserted by paragraph 15 of Schedule 13 to the 2023 Act.

(e) S.I. 1989/1339 (N.I. 11).

(f) Article 73A was inserted by paragraph 16 of Schedule 13 to the 2023 Act.

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EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes changes to the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (“the 2023 Act”) (c. 41) following judgments of the High Court, and the Court of Appeal, in Northern Ireland that certain provisions of the Act are in breach of the European Convention on Human Rights (“the Convention”).

In the case of *Dillon, McEvoy, McManus, Hughes, Jordan, Gilvary, and Fitzsimmons Application and In the matter of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and the Secretary of State for Northern Ireland* [2024] NIKB 11, the High Court in Northern Ireland made declarations pursuant to section 4 of the Human Rights Act 1998 (the “1998 Act”) (c. 42) that:

- (a) sections 7(3), 12, 19, 20, 21, 22, 39, 41 and 42(1) (relating to immunity from prosecution and the prohibition of criminal enforcement in respect of certain offences) are incompatible with articles 2 and 3 of the Convention;
- (b) section 8 (relating to the exclusion of evidence in civil proceedings) is incompatible with articles 2, 3 and 6 of the Convention;
- (c) section 43(1) (preventing the continuation of certain civil actions that were brought on or after 17th May 2022) is incompatible with article 6 of the Convention;
- (d) sections 46(2), (3) and (4) and 47(1) and (4) (relating to interim custody orders) is incompatible with article 6 of, and Article 1 of Protocol 1 to, the Convention.

In *the Matter of an Application by Martina Dillon and others - NI Troubles (Legacy and Reconciliation) Act 2023* [2024] NICA 59, the Court of Appeal in Northern Ireland made a declaration pursuant to section 4 of the 1998 Act that section 43(2) (preventing the bringing of certain civil actions on or after 18th November 2023) is incompatible with article 6 of the Convention.

Article 2 of this Order repeals the provisions of the 2023 Act relating to immunity from prosecution. It also makes amendments to other provisions of the 2023 Act consequential on the omission of the immunity provisions.

Article 3 repeals section 8 of the 2023 Act, which provides for the inadmissibility in certain proceedings of material obtained or produced by the Independent Commission for Reconciliation and Information Recovery in the exercise of its functions. The Independent Commission for Reconciliation and Information Recovery is established by, and its functions are set out in, section 2 of the 2023 Act.

Article 4 repeals section 43 of the 2023 Act. Section 43(1) prohibits the continuation of certain civil actions which were brought on or after 17th May 2022, being the date of the 2023 Act’s first reading as a Bill in the House of Commons. Section 43(2) prohibits the bringing of certain civil actions on or after 18th November 2023, being the date on which section 43 came into force. Article 4 also repeals Schedules 9 and 10, and Part 2 of Schedule 13, to the 2023 Act in consequence of the omission of section 43.

Article 5 repeals sections 46 and 47 of the 2023 Act, which relate to the validity of, and legal proceedings and claims for compensation connected to the validity of, interim custody orders. An ‘interim custody order’ is an order made under Article 4 of the Detention of Terrorists

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(Northern Ireland) Order 1972 (S.I. 1972/1632 (N.I. 15)) or paragraph 11 of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973 (c. 53).

Article 6 introduces the Schedule, which makes amendments to various enactments that are consequential on the amendments of the 2023 Act made by this Order.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the public, private or voluntary sector is foreseen

Explanatory Memorandum for the proposed Remedial Order

EXPLANATORY MEMORANDUM TO

The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (Remedial) Order 2024

2024 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Northern Ireland Office and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Human Rights.

2. Declaration

2.1 Rt. Hon. Hilary Benn, Secretary of State at the Northern Ireland Office, confirms that this Explanatory Memorandum meets the required standard.

2.2 Deborah Magill, Deputy Director at the Northern Ireland Office confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Steven Squire-Law at the Northern Ireland Office (email: legacy.group@nio.gov.uk) can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This Order will remove a number of provisions from the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ('the Act') which were found - by the High Court in Northern Ireland and the Court of Appeal in Northern Ireland - to be incompatible with the European Convention on Human Rights. More details on the findings of the court are to be found in Section 6.

Where does the legislation extend to, and apply?

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4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is Northern Ireland, England and Wales, and Scotland.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is Northern Ireland, England and Wales, and Scotland.

5. Policy Context

What is being done and why?

5.1 The Act was introduced by the previous government in June 2022 and received Royal Assent in September 2023. It stopped Troubles related criminal investigations, civil cases and inquests and, in their place, created a new independent body - the Independent Commission for Reconciliation and Information Recovery ('the ICIR') - which is tasked with carrying out reviews of Troubles-related deaths and serious injuries.

5.2 The High Court in Northern Ireland, in Dillon, McEvoy, McManus, Hughes, Jordan, Gilvary, and Fitzsimmons Application and In the matter of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and the Secretary of State for Northern Ireland [2024] NIKB 11 declared the following provisions of the Act incompatible with Convention rights:

Sections 7(3), 12, 19-22, 39 and 42(1) – provisions on immunity from prosecution;

Sections 8 - inadmissibility of material provided to, or obtained by, the ICIR in civil and coronial proceedings;

Section 41- prohibition of criminal enforcement action for lesser offences;

Section 43(1) - prohibition on continuing certain civil actions brought between May 2022 and November 2023);

Section 46(2), (3) and (4), and 47(1) and (4) - provisions on interim custody orders.

5.3 So far as section 43 is concerned, the Court of Appeal went further than the High Court and found that section 43(2) was also incompatible with Convention rights. This is the prohibition on bringing certain civil actions after November 2023.

5.4 The Government is committed to repealing and replacing the Legacy Act, and to implementing legacy mechanisms that are compliant with human rights and are supported by communities across Northern Ireland. It is absolutely clear that changes to the Act are necessary to ensure it is human rights compliant, and the Government is committed to bringing forward a remedial order under the Human Rights Act as soon as possible, to give more families confidence to engage with the ICIR.

What was the previous policy, how is this different?

5.5 The Act halted Troubles-related criminal investigations, prosecutions, civil cases and some inquests. Civil cases were halted from the point at which the Bill was introduced in May 2022. In their place, the Act established the ICRIR as the sole body responsible for investigating Troubles-related deaths and serious injuries; its primary role being to recover as much information as possible. As part of its range of powers, the ICRIR could grant immunity from prosecution for Troubles-related offences if individuals provided information that was deemed - by the ICRIR - to be true to the best of their knowledge and belief.

5.6 The Act also made it clear that compensation claims could no longer be brought against the Government for 'interim custody orders'. Those orders, which were used during the Troubles to authorise the detention of individuals, signed by a Minister other than the Secretary of State for Northern Ireland under Article 4 of the Detention of Terrorists (Northern Ireland) Order 1972 (S.I. 1972/1632 (N.I. 15)) or paragraph 11 of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973 (c. 53), were valid.

5.7 This Order would make amendments to the Act to remove the provisions which have been found by the High Court in Northern Ireland (and, in the case of section 43, the Court of Appeal in Northern Ireland) to be in breach of the ECHR (and make necessary consequential changes).

6. Legislative and Legal Context

How has the law changed?

6.1 The proposed Remedial Order would amend the Act to ensure that the provisions which have been found by the High Court in Northern Ireland (and, in the case of section 43, the Court of Appeal in Northern Ireland) to be in breach of the ECHR are removed.

The High Court in Northern Ireland made declarations pursuant to section 4 of the Human Rights Act 1998 (c. 42) that:

- (a) sections 7(3), 12, 19, 20, 21, 22, 39, 41 and 42(1) (relating to immunity from prosecution and the prohibition of criminal enforcement in respect of certain offences) are incompatible with articles 2 and 3 of the Convention;
- (b) section 8 (relating to the exclusion of evidence in civil proceedings) is incompatible with articles 2, 3 and 6 of the Convention;

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(c) section 43(1) (preventing the continuation of certain civil actions that were brought on or after 17th May 2022) is incompatible with article 6 of the Convention;

(d) sections 46(2), (3) and (4) and 47(1) and (4) (relating to interim custody orders) are incompatible with article 6 of, and Article 1 of Protocol 1 to, the Convention.

6.2 In addition, on section 43, the Court of Appeal in Northern Ireland found that subsection (2) (preventing the bringing of certain civil actions on or after 18th November 2023) is also incompatible with article 6 of the Convention.

6.3 Article 2 of this Order removes the provisions of the Act relating to immunity from prosecution. It also makes amendments to other provisions of the Act consequential on the omission of the immunity provisions.

6.4 Article 3 removes section 8 of the Act, which provides for the inadmissibility in certain proceedings of material obtained or produced by the ICIR in the exercise of its functions. The ICIR is established by, and its functions are set out in, section 2 of the Act.

6.5 Article 4 removes section 43 of the Act, which prohibits (i) the continuation of certain civil actions which were brought on or after 17th May 2022, being the date of the Act's first reading as a Bill in the House of Commons, and (ii) the bringing of certain civil actions on or after the day the section came into force. Consequential to that, it removes all of Schedules 9 and 10, and Part 2 of Schedule 12, from the Act.

6.6 Article 5 removes sections 46 and 47 of the Act, which relate to the validity of, and legal proceedings and claims for compensation connected to the validity of, interim custody orders.

6.7 Article 6 introduces the Schedule, which make amendments to various other enactments consequential on the amendments made by Articles 2 and 4.

Why was this approach taken to change the law?

7. A Remedial Order is an order made under Section 10 of the Human Rights Act that amends primary or subordinate legislation that has been found by domestic courts to be incompatible with Convention rights. Although the provisions in question (with the exception of those which relate to interim custody orders) have been disapplied by the Northern Ireland High Court, the Government considers it important to remove these provisions from the statute book swiftly.

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Summary of consultation outcome and methodology

7.1 The Government has not conducted a separate consultation exercise as it would not be proportionate to do so for targeted amendments which are required to implement court judgments.

8. Applicable Guidance

8.1 The Government will not be publishing guidance on this instrument.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because this Order is required to implement a court judgement.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies.

9.3 The legislation does not impact small or micro businesses.

9.4 There is no, or no significant, impact on the public, private or voluntary sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The effect of this amendment will be monitored by the Northern Ireland Office.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 This Order is laid pursuant to the power in section 10 of the Human Rights Act 1998 and will be of special interest to the Joint Committee on Human rights.

12. European Convention on Human Rights

12.1 “In my view the provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (Remedial) Order 2024 are compatible with the Convention rights.”

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”).

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