NORTHERN IRELAND AFFAIRS COMMITTEE
Invitation to submit written evidence on the UK Government's proposals to tackle legacy issues in Northern Ireland

Written Submission of
the Reverend Dr Gary Mason
and
the Right Reverend Alan Harper O.B.E., F.R.G.S.

EXECUTIVE SUMMARY WITH BIOGRAPHICAL FOOTNOTE

PASTORALIA

Our comments are informed by decades of experience in the exercise of pastoral care in Northern Ireland and the Republic of Ireland, both during the "Troubles" and since the signing of the Good Friday Agreement (GFA) including among victims and survivors of the conflict. [see biographical footnote below]

PRELIMINARY OBSERVATIONS

The principles of the GFA and the Stormont House Agreement (SHA) offer the best foundation available for building a sustainable process towards peace and community reconciliation. Advances achieved through the application of those principles should not be compromised or reversed. It is a matter of regret that the proposals set out in the SHA (23 Dec.2014) and incorporated in the Draft SHA Bill (11 May 2018) have not been implemented. The Secretary of State's Written Statement (18 Mar 2020) may further delay progress, especially since the implementation architecture agreed in the SHA and the Fresh Start Agreement (15 Nov 2015) may be replaced by a new and unexamined approach.

CALL FOR SUBMISSIONS

The generality of tone, imprecision and lack of detail in the Written Statement make response to the Terms of Reference set for this consultation difficult. Whereas the GFA and the SHA were designedly compliant with the European Convention on Human Rights, (ECHR) the proposals in the Written Statement (WS) may be non-compliant. No reference is made in the WS to prior consultation with the Government of the Republic of Ireland, a co-signatory of the GFA and SHA.

The circumstance giving rise to the timing of the issuance of the WS is given as *"the introduction of legislation to provide greater certainty for service personnel and veterans who serve in armed conflicts overseas."*. This raises contentious issues including:

- Is service on UK sovereign territory, solely in support of the civil power, under specific and carefully limited terms of engagement, and under the overarching provisions of UK domestic criminal and civil law to be equated with service overseas where terms of engagement may differ?

- May such an approach undermine discipline and the chain of command by failure properly to respond to infractions of the express terms of engagement?
- Is retrospective legislation possible or appropriate in such cases?
- Do the actions proposed compromise or effect the setting aside of the principle in UK law that no Statute of Limitations is applicable in criminal cases?
- Is not equating the service of military personnel on UK sovereign territory with service in armed conflicts overseas tantamount to recognising the Troubles in Northern Ireland as a war, thereby, inadvertently or otherwise, recognising the legitimacy of the IRA "armed struggle"? "Unintended consequences" may include:
    - the implied change of status for those interned without trial from that of internees to that of prisoners of war;
    - the change of status in respect of murders, bombings and the like from criminal acts of terror to acts of war;
    - the legitimisation of Loyalist acts of violence as acts of defence against an enemy.

It would be a betrayal of the families of innocent victims who themselves refused to resort to violence for it now to be implied that violence may be excused or legitimised.

TERMS OF REFERENCE: FOCUSSED RESPONSE

1

Will the Government's proposed approach meet the needs of victims, survivors and their families?

Compared with the provisions of the Draft SHA Bill those foreshadowed in the WS are inadequately explored. It is unclear as to whether the work of the four independent bodies envisaged in the Draft SHA Bill will be taken forward within the proposed single body, or whether the new body will be a significantly different agency with different and more limited responsibilities. In the absence of clarity, it is hard to conclude that the new proposals are superior to those of the Draft Bill.

Whilst one of the priorities identified by victims and survivors concerns access to information about Troubles related deaths it is difficult to conclude that the single independent body proposed will, necessarily, achieve more speedy outcomes. Furthermore, two of the bodies proposed in the Draft SHA Bill are designed to be separately independent: the HIU and the ICIR. Such independence, not least that of the ICIR which is guaranteed by international treaty, is vital for the maintenance of credibility. **Prima facie, therefore, the proposals and associated architecture in the Draft SHA Bill offer a more satisfactory approach than that of the WS.**

2

What steps can the Government take to ensure that the new legacy body is independent, balanced and open, and complies with the Belfast/Good Friday Agreement and ECHR commitments?

Attention is drawn to the work of McEvoy et al showing that the proposals in the WS are not GFA and ECHR compliant. Furthermore, whereas a "joined up approach" may seem superficially attractive, **the maintenance of public trust is essential**. **Shortcomings in any one component of a composite agency may undermine respect and trust in the whole or in other components of the whole. This is especially likely to occur if part of the**

background to the formation of the new agency is perceived as deriving from an exercise designed to curtail or otherwise close down the pursuit of any inconvenient truth.

3

Differences between the Government's new proposals and the Draft SHA Bill

The principle differences are explored above and in the main body of the text.

4

Whether and how the Government's proposals will promote reconciliation in Northern Ireland

The declared motivation for setting aside the Draft SHA Bill and announcing a novel, broad brush approach focussing, as it does upon the limitation of veterans to exposure to investigation and exacerbated by the absence of prior consultation, may destabilise the consensus achieved by the SHA. **Taken together this may damage trust and risk setting back reconciliation**.

5

The potential merits of consolidating the bodies envisaged in the SHA into a single organisation

The proposal to create a single organisation is not inevitably flawed but the absence of prior consultation and the vague terms of the WS make it impossible to know whether all the functions identified in the SHA will be discharged by the new body, which may be prioritised (and hence which deprioritised), and whether such relatively diverse functions can be delivered seamlessly and efficiently. **Any new body will be heavily scrutinised and shortcomings in the discharge of any one function may well be attributed to the whole.**

6

The equity of the Government's proposed approach to the re-investigation of cases

Considerable concern is expressed that the proposals threaten the abandonment of the principle that no statute of limitations is applicable in respect of criminal offences. Although the likelihood of new evidence emerging in cases deemed appropriate for closure may seem limited, the opportunity to consider such evidence would be foreclosed. **The outcomes of such determination are that, on the one hand a guilty person may not be pursued and, on the other hand, an innocent person may not be exonerated.**

Normally the decision to proceed to prosecution is taken by the Public Prosecution Service. The Government's new position envisages placing a stop on unresolved cases. The Secretary of State's proposal does not specify who will be empowered to make the determination**. Will this be an independent exercise undertaken by an officer of the court or an internal exercise undertaken by officials of the novel unitary body?**

When a decision is taken to drop further action, how complete will be the information communicated to victims and survivors?

Reference is made in the WS to *"giving participants the confidence and certainty to fully engage with the information recovery process"* thus implying that *participants* had not yet *fully* engaged and that fuller engagement should merit amnesty in exchange for information

thus delivering impunity. **It would be preferable to follow the advice of McEvoy et al, that existing powers of discretion available to the Secretary of State to determine a minimum sentence be exercised to set a tariff of zero years in exchange for a guilty plea, ensuring that both justice and of accountability are delivered.**

7

What legislative steps can the Government take to address what have been described as vexatious claims against veterans?

References to *"vexatious claims", "vexatious litigation*" and *"the cycle of reinvestigations"* are discussed. On the assumption that the three elements are intimately related in the eyes of the Government, and **in light of the fact that legal provisions already exist in civil law to deal with vexatious litigation in all three legal jurisdictions of the UK**, **it does not seem apparent that any additional legislative steps are required. Furthermore, it does not seem appropriate to frame additional legislation solely applicable to veterans who served in the armed forces in Northern Ireland during the Troubles. If there is an additional requirement for a remedy in matters of vexatious litigation, in Northern Ireland or elsewhere in the UK, it should be a remedy available to all.**

Biographical Footnote

Gary Mason has spent 33 years of pastoral ministry in the inner city of Belfast, never more than 200 metres from an interface or "peace line." From 1999 until 2014 He was Superintendent of the East Belfast Mission and, among many other things, drove forward the Skainos project, the largest faith-based redevelopment project in Western Europe with a vision to create an urban social justice centre in a post-conflict society as a model of co-existence and shared space. He is the founder and Director of "Rethinking Conflict" and works internationally with partners in in Israel, Palestine, the USA and Ireland, sharing lessons from the Irish peace process. Much of Gary Mason's work and ministry has been to act as a "critical friend" to those who have used violence to pursue their political ends. He works and serves on the Board of Action for Community Transformation (ACT), an initiative through which members of the Protestant para-military group who were involved in the conflict, the Ulster Volunteer Force, can demonstrate transformation and positive citizen-ship. He is also Chair of Northern Ireland Alternatives - a Restorative Justice programme He firmly believes that serving as a critical friend and offering alternatives is an effective way of moving people away from violence. He sees his role as engagement, but not endorsement.

Alan Harper came to NI from England in 1966. Until 1974 he was a member of the Archaeological Survey of NI. In 1975 he entered Trinity College, Dublin to study for ordination in the Church of Ireland. He was ordained in 1978. His wide parochial experience began in Portrush and continued in Moville, Co Donegal, Christ Church Londonderry (a parish that includes The Bogside, Creggan and Rosemount), and Malone, Belfast, serving there for 16 years including 7 years as Archdeacon of Connor. He chaired the C of I Subcommittee on Sectarianism leading to the "Hard Gospel Project", focussing upon sectarianism and living positively with difference. He became Bishop of Connor in 2002 and Archbishop of Armagh and Primate of All Ireland in 2007.Throughout, he has engaged in peace building and reconciliation. In 2008 he welcomed HM the Queen to Armagh on the occasion of the Service of the Royal Maundy, the first recorded as taking place in Ireland. Uniquely, the leaders of the Four Main Churches participated in the service and recipients of Maundy Money came from all the main denominations. That same year he welcomed the President of Ireland, HE Mary McAleese, to the General Synod, the first time the Synod has been addressed by a Head of State. Alan Harper retired in 2012 but remains involved in peace building, working with Gary Mason and other "critical friends" in engagement with Loyalist ex-combatants. He has a personal interest in education and educational underachievement in marginalised communities. He is currently facilitating joint research by Stranmillis and St Mary's University Colleges examining the contrasting educational experiences of Loyalist and Republican ex-prisoners.

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Invitation to submit written evidence on the UK Government's proposals to tackle legacy issues in Northern Ireland

Full Written Submission of,
the Reverend Dr Gary Mason
and
the Right Reverend Alan Harper OBE, FRGS.

ACKNOWLEDGEMENT
We wish to express our gratitude to the Northern Ireland Affairs Committee (NIAC) for the opportunity to submit written evidence on the Government's proposals to tackle legacy issues in Northern Ireland as set out in the Written Statement (WS) issued by the Secretary of State for Northern Ireland on 18 March 2020. We express particular gratitude for the undertaking by the NIAC to *"do all in its power to help to ensure that forthcoming legislation is balanced, fair and appropriate to the circumstances in Northern Ireland."*

PASTORALIA
In setting out our comments we stress that our observations are informed by decades of experience in the exercise pastoral care, conflict mitigation and peace building in a variety of community settings in both Northern Ireland and the Republic of Ireland [see the Biographical Footnote annexed to the Executive Summary]. We have encountered and interacted with many victims of the conflict in Northern Ireland not only during the three decades of violence but also through the decades since the signing of the Belfast/Good Friday Agreement (GFA). We are acutely conscious that as time passes it becomes increasingly difficult for victims and survivors to receive the sort of "closure" they may require and we wish to express our concern that the Secretary of State's most recent proposals could lead to a further attenuation of the processes required and to further delay and legal wrangling.

PRELIMINARY OBSERVATIONS
We strongly believe that, difficult though it was always going to be to build a sustainable process towards peace and community reconciliation in Northern Ireland, the principles of the GFA and the Stormont House Agreement (SHA) offer the best foundations available. Those principles, and the practices inherent therein, have been developed and deployed conscientiously by many excellent people seeking to bring a measure of "closure" for those who have suffered loss. It is important that the advances achieved through the application of such principles and practices should not be compromised or reversed. Like the Secretary of State, we are concerned that the longer the processes drag on the more likely it is that the number of people who can bring information to the table will diminish, further jeopardising information retrieval and therefore meaningful resolution. Thus, it is a matter of regret to us that the proposals set out in the SHA, published on 23 December 2014 and included in the Draft SHA Bill introduced in the House of Commons on 11 May 2018, have not been implemented. Delay in implementing the SHA and its accompanying institutional

architecture has already exceeded five years and the change of direction indicated in the Written Statement is likely further to delay progress. The Statement declares, *"We have heard from many across Northern Ireland and the rest of the United Kingdom that the current approach is not working well for anyone, and that it erodes confidence in public institutions that exist to support society as a whole."* To the extent that this may be true (and we have not seen the evidence upon which the assertion is based), it cannot have assisted matters that, five and a half years after the publication of the SHA, and four and a half years after the publication of the Fresh Start Agreement of 15 November 2015, the provisions and the architecture for implementing those provisions as set out in the Draft Bill have not been delivered so that the efficacy of its comprehensive approach cannot be assessed.

CALL FOR SUBMISSIONS

We note that the invitation seeks submissions in respect of the following issues:

- Whether the Government's proposed approach will meet the needs of victims, survivors and their families;
- What steps the Government can take to ensure that the proposed new legacy body is independent, balanced and open, and complies with the Belfast/Good Friday Agreement and ECHR commitments;
- The differences between the Government's new proposals and the draft Stormont House Agreement Bill;
- Whether and how the Government's proposals will promote reconciliation in Northern Ireland;
- The potential merits of consolidating the bodies envisaged in the SHA into a single organisation;
- The equity of the Government's proposed approach to the re-investigation of cases;
- What legislative steps the Government can take to address what have been described as vexatious claims against veterans.

In welcoming this call for written evidence, we draw attention to the inherent difficulty of responding to the specifics of the Terms of Reference set by the Committee because of the character of the Written Statement itself, its generality of tone and the imprecision and lack of detail contained therein. We express the following concerns:

- The requirement for the Government's proposed new approach arises only because of the failure of Her Majesty's Government to enact the provisions set out in the Draft SHA Bill as published on 11 May 2018.
- The terms of the Draft Bill, unlike those of the Written Statement, offer clear specifics designed to align with the principles and details of the SHA itself. The SHA, in turn, is carefully aligned with the GFA, and both are designedly compliant with the European Convention on Human Rights[1](ECHR). Only when the terms of any proposed Bill are published will it be possible to adjudicate whether the new approach is designed to be fully compliant with the GFA, the SHA and the ECHR, but

[1] For the avoidance of doubt, the ECHR derives from and is a pillar of the Council of Europe not of the European Union. In 1951 the UK became the first state to ratify and adopt the ECHR.

a recent study[2] is critical of the proposals as they currently stand, deeming them to be non-compliant with Article 2.

- The parties to the SHA include the sovereign governments of the UK and the Republic of Ireland. No reference is made by the Secretary of State in his Written Statement to any prior consultation with the Government of the Republic of Ireland. This may prove particularly regrettable since the SHA also provides for and anticipates certain actions to be taken in the Republic by the authorities of the Republic.
- The prevenient circumstance giving rise at least to the timing of the issuance of the Written Statement is described in the Statement as *"the introduction of legislation to provide greater certainty for service personnel and veterans who serve in armed conflicts overseas."* This is characterised as triggering the need to set out *"how we propose to address the legacy of the past in Northern Ireland in a way that focuses on reconciliation, delivers for victims, and ends the cycle of reinvestigation into the Troubles in Northern Ireland that has failed victims and veterans alike – ensuring equal treatment of Northern Ireland veterans and those who served overseas."* There are many contentious issues that are raised by an approach that hints at but does not specify amnesty.
    - The first of these issues is the matter of whether service on UK sovereign territory, solely in support of the civil power, under specific and carefully limited terms of engagement, and under the overarching provisions of UK domestic criminal and civil law may be equated with service overseas where terms of engagement may differ;
    - The second is whether, from an armed services perspective, such an approach may undermine discipline and compromise the chain of command by failure properly to respond to infractions of the express terms of engagement;
    - The third is whether retrospective legislation is possible or appropriate in such cases;
    - The fourth is whether or not the actions proposed, especially the formal and permanent closure of case files, may compromise, or effect the setting aside of, a fundamental principle of UK criminal law, namely that no Statute of Limitations is applicable in criminal cases.[3]
    - The fifth is whether equating the service of military personnel on UK sovereign territory with service in armed conflicts overseas is not tantamount to recognising that the Troubles in Northern Ireland were indeed something that successive governments have been at pains to deny, that is to say a war. Clearly, to do so would change the context of the conflict from that essentially of defence against a criminal conspiracy to overthrow the democratic institutions of the state to that of war, and thereby, inadvertently

[2] McEvoy K., Holder D., Mallinder L., Bryson A,. Gormally B. and McKeown G.: Prosecution, Imprisonment and the Stormont House Agreement. Belfast April 2020

[3] It is understood that, unlike other European Countries, the UK has no statute of limitations for any criminal offence. There has been discussion, but no action, on the issue of whether a statute of limitations should apply in rape and sexual assault cases that rely solely on personal testimonies and have no surviving physical or scientific evidence due to the passage of time. There has been no discussion, let alone consensus, around the application of a statute of limitations in respect of unlawful killing

or otherwise, to recognise the legitimacy of what the IRA frequently referred to as "the armed struggle" and always sought to characterise and categorise as a war. **The offence that would be given and the fresh hurt that would be visited upon victims and survivors of IRA violence by such an "unintended consequence" is incalculable.**

- Included among such "unintended consequences" is
  - the implied change of status for those interned without trial from that of internee to that of prisoners of war;
  - the change of status in respect of murders, bombings and the like from criminal acts of terror to acts of war;
  - the legitimisation of Loyalist acts of violence as acts of defence against an enemy. **The families of innocent victims who refused to resort to violence would find it a betrayal to find it now implied that such violence is to be excused or legitimised.**

TERMS OF REFERENCE: FOCUSSED RESPONSE

Turning in order, therefore, to the Terms of Reference for submissions as set by the NIAC, the following focussed responses to the specific issues raised are offered.

1
Will the Government's proposed approach meet the needs of victims, survivors and their families?

The honest answer to this question is that a definitive conclusion cannot be reached. Whereas the content and provisions of the Draft SHA Bill are known, those of the proposed legislation are inadequately explored and obscure. It is impossible to know whether the creation of a single, perhaps monolithic, independent body to ensure *"the most efficient and joined-up approach…[to] oversee and manage both the information recovery and investigative aspects of the legacy system, and provide every family with a report with information concerning the death of their loved one"* will prove a more effective vehicle than that proposed in the Draft Bill. In particular, it remains unclear as to whether the work of the four independent bodies envisaged in the Draft SHA Bill will be taken forward within the proposed single body or whether, in fact, the new body will be a significantly different agency with different and perhaps more limited responsibilities. The Draft Bill proposed the following:

- An independent Historical Investigations Unit (HIU) that will take forward outstanding investigations into Troubles related deaths.
- An Independent Commission on Information Recovery (ICIR), established by international agreement between the UK and Irish governments, that will enable victims and survivors of the Troubles to seek and privately to receive information about the Troubles related deaths of their next of kin.
- An Oral History Archive (OHA) to enable people from all backgrounds to share experiences and narratives related to the Troubles and to draw together oral history projects.
- An Implementation and Reconciliation Group (IRG) to promote reconciliation and commission a report on patterns and themes from independent academic experts.

In the absence of more clarity about the body proposed by the Secretary of State to replace the Draft SHA proposals it is hard to conclude that the new proposals are superior. Admittedly, one of the priorities most frequently identified by victims and survivors concerns access to information about Troubles related deaths. However, it is difficult to conclude that the single independent body proposed by the Secretary of State will, necessarily, be better placed to achieve this and achieve it more speedily.

The Draft SHA Bill proposed two separately independent bodies. The first of these bodies is the HIU the independence of which is a guarantor of singularity of purpose and freedom from susceptibility to extraneous interference. Such independence is a key to the maintenance of trust and confidence in the process.

The second, the ICIR, is envisaged as established by international agreement. The independence of the ICIR is equally essential and the international character of its constitution is highly important because of its capacity to establish the level of credibility required in a divided society for the information retrieval exercise to be accepted with confidence. It is to be feared that an information retrieval institution whose independence is vouched for solely by the UK Government will not be likely to be accorded, in so contested a space, the comparable respect and credibility of one that is founded and operative with international guarantors.

Prima facie, therefore, the proposals and the associated architecture set out in the Draft SHA Bill offer a significantly more satisfactory approach than does that advocated by the Secretary of State.

2
What steps can the Government take to ensure that the new legacy body is independent, balanced and open, and complies with the Belfast/Good Friday Agreement and ECHR commitments?

We first draw attention to the analysis by McEvoy et al (referenced in Footnote 1 above) which shows that the Secretary of State's new proposals are not GFA or ECHR compliant whereas the proposals in the Draft SHA Bill are compliant.

Furthermore, whilst a "joined up approach" may seem superficially attractive, the creation of an authority tasked with discharging a number of different and highly sensitive functions including criminal investigation, information retrieval, the communication of sensitive information to *"families who want to know what happened to their loved ones",* and the promotion of reconciliation may not be conducive to efficiency. **Because public trust is of the essence in each of these endeavours, shortcomings in any one component of a composite agency may undermine respect and trust in the composite whole itself or in other components of the whole. This is especially likely to occur if part of the background to the formation of the new, single, composite agency is perceived as deriving from an exercise designed to curtail or otherwise close down the pursuit of any inconvenient truth**.

3
The differences between the Government's new proposals and the Draft SHA Bill

Attention has already been drawn above to the principle differences between the new proposals and the Draft Bill. The W.S. offers little clarity: no indication as to whether all functions agreed in the SHA will be carried out or carried out with equal vigour and rigour; no independent scrutiny severally of each of the functions; no apparent justification for the new policy itself other than to guillotine the investigative process and close files; and no guarantee of complete disclosure of information held on file.

4
Whether and how the Government's proposals will promote reconciliation in Northern Ireland

It seems extremely unlikely that reconciliation will be promoted by the Government's recent proposals. It seems more likely that what will be assumed about the motivation for the setting aside of the SHA Draft Bill and the announcement of the novel approach and broad-brush proposals contained in the Written Statement may result in destabilising the local consensus achieved by the SHA and its proposed architecture. Furthermore, such destabilisation is likely to be exacerbated by the absence of consultation prior to the issuing of the Written Statement. **Taken together these factors seem likely to damage trust and risk setting back reconciliation**.

5
The potential merits of consolidating the bodies envisaged in the SHA into a single organisation

The potential for enhanced outcomes resulting from the consolidation of the bodies envisaged in the SHA has been undermined by the absence of prior consultation. This is not to say that the proposal to create a single organisation is inevitably flawed. However, subject to what the somewhat vague terms of the Written Statement might encompass, it is impossible to know whether all of the functions identified in the SHA are to be consolidated within a single body and whether the exercise of the relatively diverse functions can be organised in a seamless and efficient fashion. Nor is it wholly clear which functions will be accorded priority and therefore pursued with vigour and which may be accorded subsidiary status. **It is clear, however, that the work of the new body will be heavily scrutinised and that shortcomings in the discharge of any one function may well be attributable and attributed to the whole.**

6
The equity of the Government's proposed approach to the re-investigation of cases

The key passage in the Statement by the Secretary of State reads as follows: *"Only cases in which there is a realistic prospect of a prosecution as a result of new compelling evidence would proceed to full police investigation and if necessary, prosecution. Cases which do not reach this threshold, or subsequently are not referred for prosecution, would be closed and no further investigations or prosecutions would be possible – though family reports would still be provided to the victim's loved ones. Such an approach would give all participants the confidence and certainty to fully engage with the information recovery process"*

The passage raises a number of issues:

First, and as noted above and in Footnote 3, the spectre is raised of the abandonment of the principle that in UK law there is no statute of limitations in respect of criminal offences. Cases deemed not to reach a threshold and so not referred for prosecution would be closed and neither further investigation nor prosecution would occur. Once closed, it would appear that further investigation or prosecution of such cases would be deemed impossible even in the unlikely event that new evidence might appear. **The outcomes of this determination are that, on the one hand a guilty person may not be pursued and, on the other hand, an innocent person may not be exonerated.**

Second, the passage in question raises issues of accountability. Normally, in the investigation of a crime, the decision as to whether a prosecution may be brought is taken by the Public Prosecution Service. The Government's new position envisages what might be characterised as a "cull", putting a stop on certain unresolved cases. The Secretary of State's proposal does not specify who will be empowered to make the determination**. Will this be an independent exercise undertaken by an officer of the court or an internal exercise undertaken by officials of the novel unitary body?**

Third, when a determination is made that further action should not be pursued, would the full information deriving from the investigation be communicated to victims and survivors of the crime concerned? Would the name or names of any individual or individuals identified in the file be communicated to victims and survivors along with the reasons for closing the file? Will anyone named in such a file be made aware of the closure of the file and of any information disclosed to victims and survivors?

Fourth, the final sentence in the quoted section raises a quite different issue. Reference is made to *"giving participants the confidence and certainty to fully engage with the information recovery process."* That sentence appears to imply first that "participants" had not, so far, engaged fully; and, second, that such "fuller" engagement would merit the granting of amnesty in exchange for fresh information. It would be a supreme irony for the UK Government to grant amnesty from prosecution as a reward for the provision of evidence of guilt. To do so would be to deliver impunity. **It would be significantly more morally acceptable to follow the advice of McEvoy et al, namely that the existing power of discretion available to the Secretary of State to determine a minimum sentence upon conviction should be exercised enabling a tariff to be set at zero years, and that such a "plea bargain" would be available in exchange for a plea of guilty, thus ensuring that the interests both of justice and of accountability are served.**

7
What legislative steps can the Government take to address what have been described as vexatious claims against veterans?

It is worth noting that the use of the word "vexatious" and the term "vexatious claims" is avoided in the Secretary of State's Written Statement. Rather, mention is made of *"the cycle of reinvestigations"* whilst maintaining that *"there must always be a route to justice"* and that *"the Government will ensure that the investigations which are necessary are effective and thorough, but quick, so we are able to move beyond the cycle of investigations that has, to date, undermined attempts to come to terms with the past."*

Leaving aside the issue of whether the, so called, *"cycle of investigations"* has indeed *"undermined attempts to come to terms with the past"* which, at the very least, must be regarded as moot, it seems not inappropriate to draw attention to the potential ambiguity inherent in the use of the word "cycle" in respect of both "reinvestigations" and "investigations". Such imprecision is unhelpful.

The term "vexatious", whilst not present in the Written Statement, is to be found in earlier Government statements. The Queen's Speech at the State Opening of Parliament on 19 December 2019 included the following: *"My Government…will bring forward proposals to tackle vexatious claims that undermine our Armed Forces and will continue to seek better ways of dealing with legacy issues that provide better outcomes for victims and survivors."*

The Briefing Notes accompanying the text of the Queen's Speech contained the following section:

Historical allegations/Vexatious litigation

● *The Government is strongly opposed to our Service personnel and veterans being subject to the threat of vexatious litigation in the form of repeated investigations and potential prosecution arising from historical military operations many years after the events in question.*

● *We launched a 12-week public consultation in July 2019 on proposed legal protections for Armed Forces personnel and veterans who have served in operations outside the UK and we are working at pace to respond.*

● *Veterans can rightly expect the Government to pay the fullest and closest attention to this and we will bring forward comprehensive legislation as soon as possible to bring an end to the unfair pursuit of our Armed Forces through vexatious litigation.*

● *To deal with NI legacy issues we will seek the prompt implementation of the Stormont House Agreement in order to provide both reconciliation for victims and greater certainty for military veterans.*

Whereas, in the Queen's Speech, as delivered, the term *"vexatious claims"* is employed, the Briefing Notes refer to *"vexatious litigation".*

The term "litigation" is commonly associated with proceedings under civil law. A definition of litigation may be characterised as: *a means of resolving a dispute between one or more parties who are unable to settle it between them by agreement. Litigation is the process of fighting or defending a case in a civil court of law.*

Within the overall compass of civil law there is comprised the category known as tort. *A tort in common law jurisdiction, is a civil wrong that causes a claimant to suffer loss or harm, resulting in legal liability for the person who commits a tortious act. It can include the intentional infliction of emotional distress, negligence, financial losses, injuries, invasion of privacy and many other things. Tort law, a suit where the purpose of a legal action is to*

obtain a private civil remedy such as damages, may be compared with criminal law, which deals with criminal wrongs that are punishable by the state. Tort law may also be contrasted with contract law, which also provides a civil remedy after breach of duty; but whereas the contractual obligation is one chosen by the parties, the obligation in both tort and crime is imposed by the state. In both contract and tort, successful claimants must show that they have suffered foreseeable loss or harm as a direct result of the breach of duty.

The term "vexatious litigation" is generally held as describing *a legal action which is brought solely to harass or subdue an adversary. It may take the form of a primary or frivolous legal action or may be a repetitive, burdensome and unwarranted filing of meritless motions in a matter which is otherwise meritorious. The filing of vexatious litigation is considered an abuse of the judicial process and may result in sanctions against an offender. A single action, even a frivolous one, is usually not enough to raise a litigant to the level of being declared vexatious. Rather, a pattern of frivolous legal actions is typically required to rise to the level of vexatious.*

In England and Wales there are two methods to control vexatious litigants:

- *Civil Restraint Orders made by the courts themselves on the applicants or the courts initiative; and*
- *Vexatious Litigation Orders made by the High Court on the application of the Attorney General.*

Thus, in England and Wales the Civil Procedure Rules give judges the power to issue a civil restraint order against individuals who have issued multiple applications that are deemed "totally without merit". In N.I., the 1978 Judicature (Northern Ireland) Act provides powers enabling the Attorney General for Northern Ireland to seek an order from the High Court that an individual be declared a vexatious litigant where they have "habitually and persistently and without any reasonable grounds instituted vexatious legal proceedings" in the High Court or in any other court or tribunal[4].

In light of what is set out above, without prejudice to any judgement as to whether what is described as *"the cycle of reinvestigations"* should be deemed legally vexatious, and on the assumption that references in the Queen's Speech to "vexatious claims" and in the Briefing Notes to "vexatious litigation" mean the same thing, it does not seem apparent that additional legislative steps are required to address the issue of vexatious claims made against veterans. Nor does it seem appropriate to frame additional legislation solely applicable to veterans who served in Northern Ireland during the Troubles. If there is a requirement for an additional remedy in matters of vexatious litigation, whether in NI or elsewhere in the UK, then it should be a remedy available to all.

May 2020

[4] See for example the NI Appeal Court ruling of 30.11.2015 before Lord Chief Justice Morgan and Lords Justice Weatherup and Weir. Neutral Citation Number (2015] NICA 69. Appellant: William John Morrow; Respondent: Attorney General for NI