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IN THE CORONER'S COURT IN NORTHERN IRELAND

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IN THE MATTER OF AN INQUEST INTO THE DEATHS OF JOHN DOUGAL, PATRICK BUTLER, NOEL FITZPATRICK, DAVID McCAFFERTY AND MARGARET GARGAN ('THE SPRINGHILL INQUEST')

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RULING (NUMBER 5)
ON PRIVILEGE AGAINST SELF-INCRIMINATION AND RULE 9 WARNINGS FOR CIVILIAN WITNESSES

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SCOFFIELD J (sitting as a coroner)

Introduction

[1] This is an inquest into five deaths which occurred on 9 July 1972 in the Springhill and Westrock areas of Belfast. A brief summary of the factual background is contained in my ruling of 27 February 2023 ('Ruling No 1'): [2023] NICoroner 24. This ruling concerns my approach to the giving of warnings under rule 9 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 ("the 1963 Rules"). It sets out, and provides reasons for, a ruling I made at an early stage of the oral evidence in this case. It further addresses a more recent application made to me to alter that approach.

Background to the issue

[2] In the course of Ruling No 1, at paras [5] to [11], I summarised the two basic competing narratives in the present inquest. Many of the civilian accounts of the events of that evening state that there was no shooting at soldiers from the area in which the deceased fell. The next of kin ("NOK") of the deceased believe and contend that the shootings were by the Army and were completely unprovoked and unjustified. On the other hand, the witness statements taken from the seven ciphered soldiers by the Royal Military Police Special Investigations Branch on the day following the deaths make the case that there was a prolonged gun attack during the evening of 9 July 1972 by a number of armed civilians on the soldiers who were based in Corry's Wood Yard and that they returned fire. A number of civilian eyewitness accounts may also be argued to support the narrative that civilians were

firing upon the army position in the course of the evening at or about the time that at least some of the deaths occurred – although that is still very much a matter in contention. The contents of at least one version of the Springhill Massacre booklet may also be said to point to gunmen being in the area of Westrock Drive and both members of the Official IRA and Provisional IRA being in attendance.

[3] As a result of the competing contentions, the scope of the inquest has been agreed to require consideration of both the military operation and also whether there was gunfire from paramilitaries, including Republican paramilitaries, and the extent of any paramilitary activity in the area at the time of the deaths.

[4] In light of this, it is unsurprising that witnesses – including civilian witnesses – have been asked whether they were aware of civilian gunmen operating on the ground in the Springhill and Westrock areas at or around the time of the deaths. Counsel for the Ministry of Defence (MOD) in particular have sought to explore this issue with a range of witnesses and, moreover, have asked more general questions about witnesses' knowledge of who (if anyone) from the area was involved with or a member of a variety of unlawful organisations at the relevant time.

[5] The issue came into particular focus with one of the early civilian witnesses who gave oral evidence in the inquest. He was plainly reluctant to answer such questions but, in the event, was prepared to provide me with the names of some persons who he believed may have been involved in an unlawful organisation at the time. He did so by providing these names written on a piece of paper which was given to me; and expressly made clear that he only wished to identify persons in this way where they were since deceased.

[6] This witness's evidence caused a variety of PIPs to reflect upon whether, when such questions were asked, the witness would be entitled to rely upon their privilege against self-incrimination (on the basis discussed below) and should therefore be warned, pursuant to rule 9 of the 1963 Rules, that they were not obliged to answer the question. The PIPs were given an opportunity to reflect upon this and make submissions.

[7] In the event, the PIPs reached an agreed position that a rule 9 warning was required in the circumstances described above. This basic position was uncontroversial. I accepted it and the further oral evidence received in the course of the inquest has proceeded on that basis. There were some ancillary matters in dispute – relating, for instance, to the precise form of questioning which was, or was not, effective to require a warning – upon which I have adjudicated. I set out the outcome of that deliberation below.

Rule 9 of the 1963 Rules and the privilege against self-incrimination

[8] Rule 9 of the 1963 Rules, in its present form, provides as follows:

> "(1) No witness at an inquest shall be obliged to answer any question tending to incriminate himself or his spouse.
>
> (2) Where it appears to the coroner that a witness has been asked such a question, the coroner shall inform the witness that he may refuse to answer."

[9] The rule recognises the protection afforded by the common law to the privilege against self-incrimination and provides for it to be respected in the course of coronial proceedings. Similar provision is also made in section 10(1) of the Civil Evidence Act (Northern Ireland) 1971.

[10] Lecky & Greer, *Coroners' Law and Practice in Northern Ireland* (1998, SLS) addresses this topic at section 9-31 to 9-36. Rule 9 is engaged if the answering of any question would "tend to expose the person concerned to proceedings for an offence." The statutory test is not whether the answer directly incriminates the witness. As stated in *R v Boyes* (1861) 1 B&S 311:

> "… if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question… a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence become the means of bringing home an offence to the party answering."

[11] The operation of the privilege in coronial proceedings in this jurisdiction was recently addressed in the decision of the Court of Appeal in *M4 v Coroners Service for Northern Ireland* [2022] NICA 6. A military witness applied to have a subpoena set aside on the basis of his privilege against self-incrimination. The following passages bear repetition:

> "[27] The decision on whether the claim is upheld or not is made by the judicial officer conducting the proceedings. In *R v Boyes* the classic statement of Cockburn CJ to this effect is framed in the following way:
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> > "To entitle a party called as a witness the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is a reasonable ground to apprehend danger to the witness from his being called to answer … The danger to be apprehended must be real and appreciable

> with reference to the ordinary operation of law in the ordinary course of things – not the danger of an imaginary unsubstantial character, having reference to some extraordinary and barely possible contingency so improbable that no a reasonable man would suffer it to influence his conduct … a merely remote and naked possibility, out of the ordinary course of the law and such that no reasonable man would be affected by, should not be suffered to obstruct the administration of justice."

[28] In more recent times the Supreme Court in *Beghal v Director of Public Prosecutions, Secretary of State for the Home Department and others intervening* [2015] UKSC 49 described the privilege against self-incrimination in paras [60] and [61] as follows:

> "60. The privilege against self-incrimination is firmly established judge-made law dating from the 17th century abolition of the Star Chamber: see *Holdsworth's History of English Law* (3rd ed) (1944) Vol 9, p 200 and *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1, 17. It entitles any person to refuse to answer questions or to yield up documents or objects if to do so would carry a real or appreciable risk of its use in the prosecution of that person or his spouse: In *Re Westinghouse Electric Corporation Uranium Contract Litigation MDL Docket No 235 (Nos 1 and 2)* [1978] AC 547 and *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380. If such level of risk exists, the individual should be allowed "great latitude" in judging for himself the effect of any particular question: *R v Boyes* (1861) 1 B & S 311, 330, cited with approval in *Westinghouse*…"

Application in the present case

[12] The basic reason why it has been considered appropriate to provide a rule 9 warning to civilian witnesses asked about paramilitary activity or membership is because of the provisions of section 5(1) of the Criminal Law Act (Northern Ireland)

1967 ("the 1967 Act"). In its original form, as enacted, section 5(1) provided as follows:

> "Subject to the succeeding provisions of this section, where a person has committed an arrestable offence, it shall be the duty of every other person, who knows or believes –
>
> (a) that the offence or some other arrestable offence has been committed; and
>
> (b) that he has information which is likely to secure, or to be of material assistance in securing, the apprehension, prosecution or conviction of any person for that offence;
>
> to give that information, within a reasonable time, to a constable and if, without reasonable excuse, he fails to do so he shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment according to the gravity of the offence about which he does not give that information…"

[13] The penalties for failing to provide information to the police in breach of this provision were then set out. As is apparent from the portion of the provision which is quoted above, the maximum penalty was graduated by reference to the seriousness of the offence about which information had been withheld. However, the maximum penalties ranged from three years' imprisonment up to ten years' imprisonment.

[14] An "arrestable offence" for the purposes of section 5(1) was defined, at the time of its enactment, in section 2 of the 1967 Act. These included offences, or attempted offences, for which a court may sentence the offender to a term of five years' imprisonment or more. This definition was later amended, by Schedule 6 to the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE"), to reflect the definition of "arrestable offence" in Article 26 of PACE. For relevant purposes the definition from 1989 onwards related to offences for which an offender could be sentence to imprisonment for a term of five years or more. The Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007 changed the position again. The concept of "arrestable offence" was removed (see para 13 of Schedule 1 to that Order) and replaced with the concept of a "relevant offence" which, again, included an offence for which a person of 21 years or over may be sentenced to imprisonment for a term of five years.

[15] Meanwhile, in 1972 it was an offence to be a member of certain unlawful organisations. Regulation 24A of the Regulations contained within the Schedule to

the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 ("the 1922 Act"), as amended, made it an offence to become or remain a member of an unlawful association or to do any act with a view to promoting or calculated to promote the objects of an unlawful association. This regulation was introduced into the principal regulations by the Unlawful Associations Regulation (Northern Ireland) 1922 (SR 2022/35) made by the Minister of Home Affairs on 22 May 1922. It deemed, inter alia, the Irish Republican Army, Cumann na m'Ban and Fianna na h'Eireann to be unlawful associations. Section 2(2) of the 1922 Act made it an offence to act in contravention of the regulations. (These provisions are discussed in the House of Lords' decisions in *McEldowney v Forde* [1969] UKHL 6.)

[16] Section 2(3) of the 1922 Act also imposed a reporting obligation in the following terms:

> "It shall be the duty of any person who knows, or has good reason for believing, that some other person is acting, has acted, or is about to act, in contravention of any provisions of the regulations to inform the civil authority of the fact, and if he fails to do so he shall be guilty of an offence against the regulations."

[17] Whilst offences against the Special Powers Regulations were initially only triable summarily, with a maximum penalty of two years' imprisonment, this changed in 1943. Sections 1 and 2 of the Civil Authorities (Special Powers) Act (Northern Ireland) 1943 amended sections 3 and 4 of the 1922 Act such that an offence against the regulations could be tried on indictment and, on conviction, carried a sentence of imprisonment of up to 14 years.

[18] The result of this analysis is that if a civilian witness in 1972 was aware of a person's membership of an unlawful organisation, or an act which they carried out in breach of the Special Powers Regulations (including any act done with a view to promoting or calculated to promote the objects of an unlawful association) which would include participation in the activities of the IRA and other such organisations, and the civilian failed to inform the authorities of what they knew, they are highly likely to have been guilty of an offence under the 1922 Act or the 1967 Act. (Examples of prosecutions under section 5 of the 1967 Act in relation to terrorist offences include *R v Donnelly* [1986] NI 54 and *R v McLean* [1992] NI 68.) Later provisions in emergency legislation, including the Prevention of Terrorism (Temporary Provisions) Acts 1976 and further similar legislation, also created non-reporting offences in respect of acts of terrorism, which did not require the index offence to carry a particular sentence.

[19] In view of this, the PIPs agreed that such witnesses were entitled to be given a rule 9 warning where they were asked a question which invited them to disclose their knowledge of (what would have appeared to them to have been) unlawful acts in circumstances where they had not, or may not have, reported this to the

appropriate authorities at the time or within a reasonable time thereafter. This included questions about known memberships of unlawful organisations (what we would now describe as 'proscribed' or paramilitary organisations) If required to answer any such question, they may therefore be required to give an answer which would tend to incriminate them.

[20] There was not quite the same level of unanimity in relation to the question of whether a witness could rely on the privilege in relation to knowledge or evidence of a firearms offence of which they were aware, for instance that a civilian had unlawfully been in possession of or had used a firearm. However, it seemed to me plain that non-reporting of these offences would also give rise to risk of prosecution if the witness had had information which might have been of material assistance to the police in apprehending an offender. That would apply whether the offender was engaged in an act of terrorism, or potentially attempted murder, or even some lesser offence under the Firearms Act (Northern Ireland) 1969. Offences in the latter category included possession of a firearm with intent to injure under section 14 (with a maximum sentence of 14 years); carrying a firearm with criminal intent under section 26 (with a maximum sentence of 10 years); or carrying a loaded firearm in a public place (with a maximum sentence of 5 years).

My earlier ruling on how I would approach these rule 9 issues

[21] In light of the various submissions I had received on the matter, I provided a ruling to the following effect on 6 March 2023:

(a) First, since all parties agreed that a rule 9 warning should be given if a witness was asked to name someone they knew or believed to be in the IRA or another unlawful association, I would give such a warning where that line of questioning was being pursued.

(b) Second, I accepted the submission on behalf of the NOK that the same issue arose where a witness was asked whether they saw someone unlawfully in possession of a firearm. Such knowledge, where there was then a failure to report this, raised the same issue of a non-disclosure offence; and I did not consider there to be a distinction to be drawn between a firearms offence and a membership offence in this regard.

(c) Third, where a witness had already mentioned seeing a gunman in their interview with my investigator or a signed statement arising from such an interview, I nonetheless proposed to give a rule 9 warning if they were then asked to confirm that in oral evidence. There was an argument that prior disclosure of the information may have resulted in the witness's privilege having been waived or, in the alternative, in the risk of prosecution not being materially increased by the disclosure being confirmed in oral evidence in court. However, on balance, I was of the view that a witness should not be required on oath to prove that they made the earlier statement without their

being given a warning. (This was particularly so where, as I understood it, it was unlikely that the witness would have been given such a warning by the coroner's investigator. I understand that, since this issue has been brought into focus, my investigator has adopted a different process and will now much more routinely give warnings, even in the course of a voluntary interview where such a warning is unlikely to be required as a matter of law, when in this kind of territory.) If necessary, in cases where such a statement has been made at interview or in a signed statement but *not* adopted on oath, that portion of the statement could be proved by other means, in which case the material evidence would still be before me. The question of the weight to be afforded to it would then depend upon all of the circumstances. Some authority suggested that it was open to a witness to claim the privilege even if they had previously answered, without objection, questions which they had not been obliged to answer (see, for instance, *Garbett* (1847) 1 Den CC 236; Blackstone at section F10.6; and Archbold at section 12-4); although other authority suggested that it was possible for the privilege to be lost in this way (see, for instance, *O Ltd v Z* (2005) 2005 WL 1104114; and *R v Lincolnshire Coroner, ex parte Hay* [1999] All ER (D) 173). As noted above, it seemed to me that repeating a matter oneself, on oath, was such as to materially increase the risk of prosecution.

(d) Fourth, where the witness was asked to provide further information over and above what was in their statement (for instance by being asked if they knew the identity of a gunman whom they had mentioned or to provide that identity), I would again give a warning. To my mind, the likelihood of prosecution was greater, or increased, if an individual failed to report information about a named individual, rather than failing to report an unknown gunman whom they had seen. In the former instance, the information would be much more likely to be useful in arresting and prosecuting the gunman. I considered there was a material increase in risk in this situation or, at least, that any doubt should be resolved in favour of a warning being given.

(e) Fifth, I was not minded to give a general warning at the start of a witness's evidence since the giving of any warning may prove to be unnecessary. In addition, adopting that course may have a chilling effect. Where a warning was required, it would have to be repeated in any event if a question engaging rule 9 was later asked.

[22] I recognised that where a witness declined to answer a question on the basis of the privilege against self-incrimination that would likely affect, at least to some degree, the ability of the inquest to investigate fully some of the matters within scope. I considered that there may be force in the MOD's submission that the prospect of a prosecution in these cases may be slim. However, I did not consider the risk so fanciful as to not engage the privilege (ie "of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible

contingency so improbable that no reasonable man would suffer it to influence his conduct", using the words of Cockburn CJ in *R v Boyes*). It was in my view an appreciable risk. The relevant risk is that of prosecution, not conviction; and it is not necessary to show that criminal proceedings are likely (see para [113] of Lord Kerr's opinion in the *Beghal* case).

[23] Where the privilege is engaged, it follows as a matter of law that a witness is entitled to assert it. The circumstances in which their evidence is given now is, strictly speaking, irrelevant to the public interest test in terms of whether a prosecution should ensue, although the passage of time would be a highly relevant factor. A difficulty, however, was that the public interest in prosecution may depend to some degree on the outcome of this inquest, which is presently unknown. (For instance, in the hypothetical event that the Army's case was found to be substantially correct, and it was clear that there had been widespread civilian suppression or concealment of relevant facts, the public interest in prosecution of those responsible for withholding information might be seen in a different light.) I could not proceed on the basis that the risk of prosecution was so negligible that the privilege was not engaged.

[24] I was invited by the MOD to consider asking the Public Prosecution Service ("PPS") for a view on whether a prosecution or prosecutions were likely. I decided not to take that course for a number of reasons. Firstly, I doubted whether the PPS would, or could, give a clear-cut answer to such an enquiry; and it would be entitled not to do so in the absence of concrete facts and, perhaps also, in the absence of the findings of this inquest. Unless the PPS entirely and unequivocally ruled out a prosecution, which in my view was unlikely, its view would not really take the matter any further. Seeking a formal undertaking that no prosecution would follow or rely upon incriminating witness testimony is more commonly pursued in a public inquiry. Neither I, nor the legal representatives instructed on my behalf, was aware of any precedent for doing so in an inquest. I further doubted whether a response to any such request would be provided quickly. At that time, therefore, I proposed simply to proceed by giving warnings but indicated that I would keep the matter under review once it became more clear what effect (if any) that was having on the quality of the evidence to be given to me.

[25] I also indicated that, when a warning was given, I intended to make the witness aware that it would be of assistance to the inquest process if they chose to answer; but, at the same time, to make clear that this was entirely a matter for them.

[26] In light of how the questioning of further witnesses developed, I was then required to consider an additional issue, namely whether a rule 9 warning was required be given prior to a witness being asked whether – <u>if</u> they knew someone to be in an unlawful organisation – they would be prepared to disclose that in evidence in these proceedings. This arose when a witness was asked to confirm their willingness or otherwise to disclose such information (if and in the event that they were aware of illegal activity on the part of another). It was argued that this was not

itself a question which invited the witness to self-incriminate. I made an initial determination that the privilege against self-incrimination should be explained to the witness in advance of answering such a question since, in fairness to the witness, they should not be required to commit to an answer without appreciating the nature of that privilege and the potential jeopardy they may be in if they were to make such disclosures now but did not report (and should have reported) matters to the police in the past. A further issue was whether the witness might misunderstand the question or, having correctly understood it, might nonetheless jump ahead and answer a question they anticipated would be posed later (without a warning having been given).

[27] The answer to the query whether a question of the nature identified above itself requires a warning under rule 9 is not immediately apparent. However, I considered the better view to be that it does require a warning for the simple reason that, if the witness's answer was "No, I would not disclose that information even if I knew it", that is likely to increase the risk of prosecution if it was otherwise possible to prove that the witness had relevant information which should have been reported.

[28] In addition, I considered that a question in that form was likely to be either unnecessary or a means of seeking to circumvent the assertion of the relevant privilege. If the witness had such information and was prepared to disclose it to me (after having been asked a direct question and having been warned), that would become apparent. If they did not have such information, it was likely (in my view) that they would simply choose to answer a direct question to that effect. However, if the witness was not prepared to answer a direct question about what they knew after having been given a rule 9 warning, it should not be clear whether they have such knowledge and would not provide it or whether they would simply rather not disclose whether they had any knowledge at all. Asking the witness whether they would disclose such information if they had it seemed to me to be an artful means of seeking to go behind the privilege to find out which of those two scenarios might be in play. If the result was that it became clear, or was suggestive that, the witness did have information they were not prepared to share, that was likely to increase the risk of prosecution for a non-reporting offence (or, at least, the witness was entitled to the leeway of considering that to be the case).

The request to revise my approach

[29] On 23 November 2023, the NOK made an application that I revise the approach which had been adopted further to the ruling on 6 March (described above). Ms Quinlivan KC, who made the submissions on behalf of the NOK in respect of this, accepted that the approach which had been followed had been with the agreement of the NOK and reflected their understanding of the legal position. Nonetheless, she indicated that, having observed some civilian witnesses relying on their privilege against self-incrimination, the NOK and their representatives were concerned that receipt of a rule 9 warning may be having a chilling effect on the

evidence being given, in that some witnesses may become "a little bit panicked" at the thought of self-incrimination and feel it safer simply to rely upon their privilege than answer questions. The concern was that the inquest may not be receiving as full evidence, or as full an account, as is desirable. Ms Quinlivan also helpfully made clear, beyond doubt, that her instructions were that the NOK of the deceased wanted witnesses to provide as much information as they could in order to assist the inquest in getting to the bottom of what happened on the night of 9 July 1972: "The position of the families is they want the truth; they want the whole truth."

[30] The NOK accept that, where the privilege arises, a witness must be advised of it and is entitled to claim it. The issue, however, is whether the previously appreciable risk of prosecution for a non-reporting offence has now become entirely hypothetical or fanciful as a result of the enactment of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the Legacy Act"). In other words, the NOK invite me to conclude that, in light of the passage of the Legacy Act, the previous risk of prosecution which had entitled civilian witnesses to a warning had dissipated to the degree that the privilege no longer arises (ie the risk is now fanciful or imaginary). I have not been persuaded of this, for the reasons given below.

[31] The NOK submit that the Legacy Act has significantly changed the landscape because "in the vast majority of cases where a Rule 9 warning has been given, the persons being warned will have protection from criminal prosecution under the Act." The Act is designed, inter alia, to limit criminal investigations and proceedings. Section 63(3) of the Act brings into force the relevant provisions of Part 3 on 1 May 2024. The most relevant provision within Part 3 for present purposes is section 41, which imposes a prohibition on criminal enforcement action in relation to Troubles-related offences which are not "serious" or "connected" such offences. Section 41 is in the following terms:

> "(1) This section applies in relation to a Troubles-related offence unless it is a serious or connected Troubles-related offence.
>
> (2) No criminal enforcement action may be taken against any person in respect of the offence.
>
> (3) This section has effect subject to section 42(4) (pre-commencement criminal enforcement action)."

[32] Section 42(4) sets out the circumstances in which section 41 does not prevent criminal enforcement. In essence, this is where a public prosecution for the offence has begun before 1 May 2024.

[33] The definition of "Troubles-related" for the purposes of the Act is found within section 1(5)(a). This includes an offence under the law of Northern Ireland where the conduct which constitutes the offence was "to any extent conduct forming

part of the Troubles." "The Troubles" is also defined. It refers to "the events and conduct that related to Northern Ireland affairs" which occurred between 1 January 1966 and 10 April 1998, including "any event or conduct during that period which was connected with" preventing, investigating or otherwise dealing with the consequences of any other event or conduct relating to Northern Ireland affairs. "Northern Ireland affairs" means the constitutional status of Northern Ireland, or political or sectarian hostility between people in Northern Ireland. I proceed on the basis that membership of an unlawful association and possession and use of firearms for the purpose of that organisation or for the purpose of attacking the security forces falls within this definition, as would an offence consisting of the failure to report or provide information about such offences.

[34] An important distinction drawn within the Legacy Act, particularly as regards potential immunity from prosecution, is the distinction between "serious" Troubles-related offences and "connected" Troubles-related offences on the one hand and "other" Troubles-related offences (which are neither serious nor connected) on the other. These concepts are again defined within section 1(5). A serious offence is one of murder, manslaughter or culpable homicide; another offence that was committed by causing the death of a person; or an offence committed by causing a person to suffer serious physical or mental harm. A connected offence is one which relates to, or is otherwise connected with, a serious Troubles-related offence (whether it and the serious offence were committed by the same person or different persons) but is not itself a serious Troubles-related offence. For this purpose, one offence is to be regarded as connected with another offence, in particular, if both offences formed part of the same event.

[35] In the NOK's submission, the type of potential offending which has given rise to rule 9 warnings on the part of civilian witnesses (at least to date) would constitute other Troubles-related offences. In those cases, an application for immunity from prosecution is not required to be made to the Independent Commission for Reconciliation and Information Recovery ("ICRIR"). Rather, persons in potential jeopardy of prosecution for such offending will simply benefit from the general immunity conferred by section 41(2). (This is to be contrasted with someone who committed a serious or connected offence, whose immunity is not automatic but contingent upon an application to the ICRIR under section 19 of the Legacy Act and various conditions being met.)

[36] This argument is superficially attractive. However, I do not accept it. The reasons why I do not consider that the changes discussed above are sufficient to persuade me that a civilian witness should not be entitled to rely upon their privilege (as those who have done in the inquest proceedings to date have) are as follows.

[37] In the first instance, the operative provisions of the Legacy Act have not yet commenced. The provision made in section 44 of that Act (amending the Coroners Act (Northern Ireland) 1959) is such that on 1 May 2024, unless a certain stage of this

inquest has been reached, I will be required to close the inquest. Accordingly, the immunity provisions will not be in force at any point at which a witness is providing oral testimony in the course of this inquest. It is possible that a prosecution could be commenced in an appropriate case before the immunity provisions assume legal force. Although this might be unlikely, as noted above, the unlikelihood of a prosecution is not the test, unless it is so unlikely as to be fanciful. It would certainly be impossible for me to assure a witness that potentially incriminating admissions to less serious offences would not result in any criminal charges being brought before May. In this regard, I also note that a public prosecution for an offence is "begun" for this purpose when a prosecutor makes the decision to prosecute the individual for that offence (see section 42(6)(b)). This could occur at a relatively early stage.

[38] Secondly, it also cannot be assumed that a witness with information about criminal activity would be able to avail of the immunity conferred by section 41. That will depend upon what the witness saw or knew, what they did, and what may have flowed from that. For instance, questions about knowledge of the actions of a civilian gunman might quickly move to what, if anything, the witness did in the circumstances by way of their own participation or encouragement, which might in turn engage secondary liability for offences which were serious or connected offences. In circumstances where a live line of enquiry is whether any of the deaths were caused or contributed to by civilian gunfire, it cannot simply be assumed that all relevant offences are "other" Troubles-related offences within the Legacy Act's taxonomy. As discussed above, significant latitude should be allowed to the witness in judging the effect of a question which might, although seemingly innocuous, afford a link in a chain which might bring home an offence (in this case, a more serious offence) against them.

[39] Thirdly, the NOK's submissions proceed on the basis that the immunity from prosecution conferred by section 41 will come into force and remain in force. For the moment, I do not believe I can operate on that firm assumption. This is for two reasons:

(a) There are a number of legal challenges presently before the High Court in Northern Ireland challenging the legality of provision made by the Legacy Act, including in particular the immunity provisions. Whilst one element of these challenges relates to incompatibility with the ECHR (in respect of which, even if successful, the most intrusive relief available is likely to be a declaration of incompatibility under section 4 of the Human Rights Act 1998 ("HRA")), there are other elements to the challenges which, at least arguably, might result in portions of the Act no longer being given legal effect. These include, in particular, an argument that the immunity provisions are in breach of rights protected under Article 2 of the Northern Ireland Protocol (now the Windsor Framework) in circumstances where section 7A of the European Union (Withdrawal) Act 2018 would permit or require offending provisions of a domestic Act of Parliament to be disapplied (much as would have been the case where, in light of the principle of supremacy of EU law, a domestic

Act would have been disapplied where it was in breach of EU law whilst the United Kingdom was a member of the European Union).

(b) In addition, there remains the possibility that the Legacy Act, or certain of its provisions, might in future be repealed or amended. This could arise if, for instance, the High Court granted a declaration of incompatibility in relation to the immunity provisions under section 4 of the HRA and the government (or a subsequent government) decided to address this by way of remedial order. In addition, as discussed in the course of the hearing in relation to this application, it seems that there have been public statements on behalf of His Majesty's Opposition to the effect that, if the Labour Party is invited to form the next government after the general election expected this year, they would or might well repeal some or all of the Legacy Act.

[40] If a witness were denied the opportunity to rely upon their privilege against self-incrimination on the basis of provisions of the Legacy Act which were later disapplied, repealed or amended, so that they no longer provided the protection from prosecution it is currently expected they will, the witness would be placed in an extremely invidious position.

[41] For these reasons, I consider it proper to continue to provide rule 9 warnings to witnesses in the same manner as I have been doing to date. As I made clear in the course of the hearing on this issue, although I have already sought to strike the correct balance in this regard, I am open to any suggestion that might encourage witnesses to be forthcoming in their evidence to any extent which does not materially undermine the exercise of their legal rights.