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## **Submission on the Northern Ireland (Legacy and Reconciliation) Bill**

(September 2022)

### **Executive Summary**

This submission deals with key issues that have been raised by the Northern Ireland (Legacy and Reconciliation) Bill with a view to addressing them by way of amendments and recommendations.

A major lacuna of the Bill is the absence of reference to the definition of 'victim and survivor', which should constitute a solid foundation on which the instruments for dealing with the legacy of the past should rest. This could effectively be remedied with the adoption of the definition of 'victim of crime' which is enshrined in the law of the United Kingdom and the Republic of Ireland.

The Bill proposes an independent Commission for Reconciliation and Information Recovery (ICRIR) that raises concerns. Provisions would be made to end criminal investigations and civil proceedings, which appears to be in breach of the State's procedural obligation under Article 2 of the European Convention on Human Rights. The supply of information to the Commission may be used disproportionately to compel retired members of the security forces to provide information. Despite what is being suggested, access to information given to the Commission will be limited and may lead to lengthy and complex legal discovery proceedings. Immunity from prosecution could be granted on demand, without any form of preliminary investigation. Final reports may contain allegations against members of the security forces which will jeopardise the presumption of innocence and right to private and family life that they are entitled to. The progress of historical cases has been significantly hampered over the years by the inefficiency of the Public Prosecution Service in Northern Ireland, whose processes need to be reviewed and improved to match those in operation in other parts of the United Kingdom.

The Bill also provides for the memorialising of the Troubles without vital safeguards, which may result in an attempt to justify terrorism and to re-write the history of Northern Ireland, instead of promoting a peaceful democratic society while advancing towards reconciliation.

The Republic of Ireland should be equally committed to dealing with the legacy of the past, either by instituting a new body that would mirror the ICRIR or consenting to the creation of an International Independent Commission for Reconciliation and Information Recovery.

In order to address these issues, thirteen amendments and two recommendations are hereby submitted.

## I. Definition of Victim of Crime

The definition of victim in the context of the terrorist campaign known as the ‘Troubles’ is a key issue that has not been addressed in the Bill. Victims of crime must be dissociated from perpetrators in order to ensure that the mechanisms put in place for dealing with the legacy of the past deliver for the victims of crime and do not benefit perpetrators.

A major lacuna of the Bill is that it does not make any distinction between victims of terrorism and perpetrators of acts of terrorism due to the ‘Troubles’, which is a euphemism used to designate the campaign of Terrorism. The Bill must take into account the Justice Act (Northern Ireland) 2015, which provides a definition of victim of crime that should now constitute the basis of any new arrangement for successfully dealing with the past in Northern Ireland. Those who were involved in an act of terrorism should not benefit from any new arrangements under the guise that they should be considered and treated as victims on a par with innocent victims of terrorism.

The Victims and Survivors (Northern Ireland) Order 2006 does not provide a definition of victims and survivors but only an interpretation<sup>1</sup>. This wide interpretation of victims and survivors applies to perpetrators of acts of terrorism as well as to innocent victims of acts of terrorism. However, innocent victims of terrorism, who constitute the largest category of victims of the ‘Troubles’, must not be confused with perpetrators of acts of terrorism. The majority of cases of murder or physical/psychological injuries or both resulted from acts of terrorism perpetrated during the terrorist campaign against innocent civilians, politicians, judges, police officers and soldiers or were caused by the security forces engaged in the fight against terrorism. A clear and unambiguous definition of victim of crime including victim of terrorism is therefore required so as to establish an appropriate mechanism for dealing with the legacy of the past which is victims of terrorism-centred and delivers for their needs.

The definition of victim of terrorism prepared by the UHRW<sup>2</sup> is in line with the United Nations Human Rights Council Framework principles for securing the human rights of victims of

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<sup>1</sup> Article 3 of the Victims and Survivors (Northern Ireland) Order 2006 bears as a title: ‘**Interpretation: “victim and survivor”**’.

<sup>2</sup> Ulster Human Rights Watch Advocacy Service Information Booklet, Truth and Justice for Victims and Survivors of Terrorism, 2018:

*“victim of terrorism’ means:*

- 1. A natural person who was killed as the direct result of a terrorist act and was never engaged in any form of terrorist activity and the close relative or a dependent of such a person;*
- 2. A natural person who has suffered physically and/or psychologically as the direct result of a terrorist act and was never engaged in any form of terrorist activity and the close relative or a dependent of such a person;*
- 3. A natural person who was killed or has suffered physically or psychologically as a result of finding him/herself in proximity to a terrorist act being committed or who has been wrongly associated with the perpetration of such an act;*

terrorism<sup>3</sup> and the legislation and guidance provided by the European Union in relation to victims of terrorism<sup>4</sup>.

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, established minimum standards on the rights, support, and protection of victims of crime and provides in Article 2 a definition of victim of crime that includes victims of terrorism which reads as follows:

*“(a) ‘victim’ means:*

*(i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;*

*(ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person’s death;*

*(iii) ‘family members’ means the spouse, the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings and the dependants of the victim.”*

The Directive was transposed into the national legislation of all European Union member states. As a result, all nations of the United Kingdom and the Republic of Ireland have the same definition of victim of crime, including victim of terrorism, which is provided in Section 29 of the Justice Act (Northern Ireland) 2015.

The definition of victim of crime is the sound foundation on which the Independent Commission for Reconciliation and Information Recovery (ICRIR) and the memorialising of the past can be built.

### **Proposed amendment no. 1**

**The Bill should be based on the definition of victim of crime that includes victims of terrorism, and which is enshrined in the legislation of the United Kingdom and the Republic of Ireland.**

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*4. A natural person who has suffered physically and psychologically as a result of bringing assistance to a victim of a terrorist act.”*

<sup>3</sup> United Nations Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HR/20/14), 4 June 2021.

<sup>4</sup> EU Handbook on Victims of Terrorism 2021, [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/victims-rights\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/victims-rights_en)

## **II. The Independent Commission for Reconciliation and Information Recovery (ICRIR)**

The proposed Independent Commission for Reconciliation and Information Recovery raises concerns in relation to (1) Criminal investigation and legal proceedings, (2) Supply of information, (3) Disclosure of information, (4) Immunity from prosecution and (5) Final Reports. Two other issues that are intrinsically linked to the processes for dealing with the legacy of the past are the (7) role of the Public Prosecution Service in Northern Ireland and the (8) Cooperation from the Republic of Ireland investigating authorities.

### **1. Criminal Investigations and Legal Proceedings**

The limitation of criminal investigations and legal proceedings do not appear to be compliant with the European Convention on Human Rights and require essential amendments to be made.

The Bill aims at limiting criminal investigations as expressed in its introduction, even though there may be opportunities for investigations to be carried out. Section 33 (1) states that no criminal investigation of any Troubles-related offence may be continued or begun throughout the United Kingdom after the coming into force of this section of the Bill or 1<sup>st</sup> May 2023, whichever is the earliest, except through the ICRIR. Section 40 prevents the Police Ombudsman of Northern Ireland from pursuing or completing any investigations they have undertaken. Section 39 is designed to interrupt all inquests that are not at an advanced stage on the day this section of the Bill comes into force or on 1<sup>st</sup> May 2023, whichever is the earliest date. These provisions will affect victims of terrorism whose cases have been under investigation and whose investigations deserve to be pursued to their end.

According to Section 38 all Troubles-related civil action that was brought on or after the day of the First Reading in the House of Commons of the Bill may not be continued on or after the day on which this section comes into force. This provision will prevent victims of terrorism from getting compensation that they are legally entitled to.

Although the Secretary of State made the statement that in his view the provisions of the Bill are compatible with the Convention rights there are legitimate reasons to claim that this does not appear to be the case. The Bill aims at limiting criminal investigations including inquests, while under Article 2 of the European Convention it is the duty of the State to carry out effective and efficient investigations to bring perpetrators to justice whenever this is possible to do so.

The obligation of the State to protect the right to life under Article 2 of the Convention must be read in conjunction with the State's general duty under Article 1 of the Convention which is to:

“secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”.

This implies that there should be some form of effective official investigation when individuals are killed as a result of violence or the use of force<sup>5</sup>.

The procedural obligation of the State under Article 2 of the European Convention implies that an effective investigation must (1) be carried out by an independent authority, (2) be capable of leading to the identification of those responsible, (3) take steps to secure evidence, (4) avoid any deficiency in the investigation, (5) be based on an exhaustive analysis of relevant documents, (6) ensure state authorities act of their own motion, be done with (7) promptness and guarantee a sufficient element of (8) public scrutiny.

### 1. An independent authority:

For an investigation to be independent it is necessary that the persons responsible for the investigation and those carrying out that investigation should be independent from those who are implicated in the events.<sup>6</sup> This means that there should not be a hierarchical or institutional link between the suspects and those investigating the incident and that there should also be practical independence.<sup>7</sup>

### 2. Identification of those responsible

The investigation must be effective so as to be capable of leading to the identification and punishment of those responsible.<sup>8</sup>

### 3. Taking steps to secure evidence

The State authorities must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence.<sup>9</sup>

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<sup>5</sup> *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, *Application no. 18984/91*, § 161; *Kaya v. Turkey*, judgment of 19 February 1998, *Application no. 22729/93*, *Reports of Judgments and Decisions* 1998-I, p. 324, § 86; *Paul and Audrey Edwards v. United Kingdom*, judgment of 14 March 2002, *Application 46477/99*, § 69.

<sup>6</sup> *Güleç v. Turkey*, judgment of 27 July 1998, *Application no. 54/1997/838/1044*, §§ 81-82; *Oğur v. Turkey* [GC], judgment 20 May 1999, *Application no. 21594/93*, §§ 91-92.

<sup>7</sup> *Ergi v. Turkey*, judgment of 28 July 1998, *Application no. 23818/94*, *Reports* 1998-IV, pp. 1778-79, §§ 83-84; *McKerr v. United Kingdom*, judgment 4 May 2001, *Application no. 28883/95*, § 128; *Hugh Jordan v. United Kingdom*, judgment 4 May 2001, *Application no. 24746/94*, § 120; *Kelly and Others v. United Kingdom*, judgment 4 May 2001, *Application 30054/96*, § 114; *Paul and Audrey Edwards v. United Kingdom*, cited above, § 70.

<sup>8</sup> *Oğur v. Turkey* [GC], cited above, § 88; *Paul and Audrey Edwards v. United Kingdom*, cited above, § 71.

<sup>9</sup> *Salman v. Turkey* [GC], judgment of 27 June 2000, *Application no. 21986/93*, § 106, ECHR 2000-VII; *Tanrıkulu v. Turkey* [GC], judgment of 8 July 1999, *Application no. 23763/94*, § 109, ECHR 1999-IV; *Gül v. Turkey*, judgment of 14 December 2000, *Application no. 22676/93*, § 89; *Paul and Audrey Edwards v. United Kingdom*, cited above, § 71; *Branko Tomašić and Others v. Croatia*, judgment of 15 January 2009, *Application no. 46598/06*, § 62; *Mikhalkova and Others v. Ukraine*, judgment of 13 January 2011, *Application no. 10919/05*, § 42.

#### **4. Avoid any deficiency in the investigation**

Any deficiency in the investigation which undermines its ability to establish those responsible will risk falling foul of the required standard for an effective investigation to take place.<sup>10</sup>

#### **5. Complete analysis of all relevant documents**

The investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of enquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible.<sup>11</sup> Nevertheless, the European Court of Human Rights explains that the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of each particular case. They must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work.<sup>12</sup>

#### **6. State authorities to act of their own motion**

Whatever investigation is carried out, the State authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.<sup>13</sup>

#### **7. Promptness**

A requirement of promptness and reasonable expedition is implicit in this context.<sup>14</sup> While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities when investigating a use of lethal force may generally be regarded as essential to maintain public confidence in their adherence to the rule of law and in preventing any appearance that unlawful acts have been tolerated.<sup>15</sup>

#### **8. Public scrutiny**

For the same reasons, the European Court of Human Rights indicates that there must be a sufficient element of public scrutiny in the investigation of its results in order to secure accountability in practice as well as in theory. The degree of public scrutiny required may well

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<sup>10</sup> *Paul and Audrey Edwards v. United Kingdom*, cited above, § 71; *Branko Tomašić and Others v. Croatia*, cited above, § 62; *Mikhalkova and Others v. Ukraine*, cited above, § 42; *Finogenov and Others v. Russia*, judgment of 4 June 2012, *Application no. 18299/03, 27311/03*, § 271.

<sup>11</sup> *Kolevi v. Bulgaria*, judgment of 5 November 2009, *Application no. 1108/02*, § 201.

<sup>12</sup> *Velcea and Mazăre v. Romania*, judgment of 1 December 2009, *Application no. 64301/01*, § 105; *Finogenov and Others v. Russia*, cited above, § 272.

<sup>13</sup> *Paul and Audrey Edwards v. United Kingdom*, cited above, § 69.

<sup>14</sup> *Yaşa v. Turkey*, judgment of 2 September 1998, *Application no. 22495/93*, *Reports 1998-VI*, pp. 2439-40, §§ 102-04; *Çakıcı v. Turkey* [GC], judgement of 8 July 1999, *Application no. 23657/94*, §§ 80, 87 and 106, ECHR 1999-IV; *Tanrikulu*, cited above, § 109; *Mahmut Kaya v. Turkey*, judgment of 28 March 2000, *Application no. 22535/93*, §§ 106-07.

<sup>15</sup> *Hugh Jordan*, cited above, §§ 108, 136-40; *Paul and Audrey Edwards v. United Kingdom*, cited above, § 72.

vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.<sup>16</sup>

Without substantial amendments allowing for thorough investigation to be carried out, it appears inevitable that the Courts in the United Kingdom will be asked to assess the compatibility of the Bill with the European Convention of Human Rights and the jurisprudence of the European Convention on Human Rights.

The compliance with the European Convention on Human Rights is a fundamental issue that must be addressed immediately if the ICRIR is to endure the test of time without being brought to an abrupt end as was the case with the defunct Historical Enquiries Team (HET).

### **Proposed amendment no. 2**

**The ICRIR should be able to exercise its functions in compliance with the procedural obligation of Article 2 of the European Convention of Human Rights: investigations should be carried out by an independent authority, be capable of leading to the identification of those responsible, take all reasonable steps to secure evidence, avoid any deficiency in the investigation, be based on an exhaustive analysis of all relevant documents, ensure state authorities act of their own motion with promptness and guarantee a sufficient element of public scrutiny.**

### **Proposed amendment no. 3**

**Section 33 of the Bill should be amended to ensure that the investigation of any Troubles-related case may be carried out whenever it is possible to progress the investigation.**

### **Proposed amendment no. 4**

**Section 38 of the Bill should be repealed so as to allow civil claims to be made whenever this is justified.**

### **Proposed amendment no. 5**

**Section 39 of the Bill should be amended to allow inquests to progress and for new inquests to be to be carried out when this is required by law.**

## **2. Supply of information**

The supply of information as suggested in the Bill is likely to be used disproportionately against members of the security forces and requires amendment.

According to Section 14 of the Bill members of the security forces could be compelled to attend meetings to provide information and produce documents or any other thing in the person's custody or under the person's control. The same person may also be compelled to

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<sup>16</sup> *Paul and Audrey Edwards v. United Kingdom* § 72, 73; *Mikhalkova and Others v. Ukraine*, cited above, § 43; *McCann v. U.K.*, cited above, § 162.

provide evidence in the form of a written statement and any documents as well as produce any other thing in the person's custody or under the person's control.

It is undeniable that the security forces, the Royal Ulster Constabulary (RUC) and Army, who operated in Northern Ireland in order to combat terrorism, kept records of any incident or intervention they carried out, since they were accountable by law. On the contrary, terrorist organisations did not keep records of their criminal activities, but hid or destroyed them.

Therefore, to this day it is possible to recover information related to incidents that prompted the intervention of the security forces concerning the circumstances at the scene of a terrorist crime, the identity of members of the security forces involved in dealing with the incident, the decisions they made at the time, the use of force whenever this was necessary and other actions they took. While records exist within the security forces and can be found and used as evidence to investigate Troubles-related incidents, terrorist organisations continue to conceal what they know and the identity of those who were involved in terrorist crimes.

For these reasons there is no doubt that those who will be compelled to provide information and statements will be primarily members of the security forces who can easily be identified due to records that could be accessed by the ICIR.

### **Proposed amendment no. 6**

**Section 14 should be amended so as to ensure that members of the security forces can only be compelled to attend meetings, provide information, written statements or documents if there is sufficient evidence that they were involved in the commission of a criminal offence. Section 14 should be directed against those for whom there is evidence and intelligence that they were involved in terrorist activities.**

### **3. Access to Information**

The process for relevant authorities to make available to the ICIR information that may be disclosed or withheld from final reports is likely to be open to legal challenge and requires amendment.

According to Section 5 (1) a relevant authority must make available to the ICIR such (a) information, (b) documents, and (c) other material, as the Commissioner for Investigations may reasonably require for the purposes of, or in connection with, the exercise of the review function or the immunity function.

However, according to Section 5 (2) a relevant authority may also make available to the ICIR any (a) information, (b) documents, and (c) other material, which, in the view of that authority, may be needed for the purposes of, or in connection with, the exercise of the review function or the immunity function.



Once the information has been passed on to the ICIR by the relevant authority, Section 25 (1) provides that the ICIR may disclose any information it holds to any other person. However, disclosure must not be made if any of prohibitions A to F (as mentioned in Section 25 (3) to (9)) applies to the disclosure of information concerned.

Schedule 5 sets out which disclosures are permitted and provides the Secretary of State with power to permit disclosure of sensitive information, information which, if disclosed, would risk prejudicing, or would prejudice, the national security interests of the United Kingdom and information provided by the security service and secret intelligence service in any part of the UK.

If material is withheld as a result of a decision taken by the Secretary of State of Northern Ireland, then the affected report must describe the material which has been prohibited. The decision to withhold information can then be appealed by the person who requested a review of their case or who is eligible to request a review of the case. The appeal will take the form of a judicial review before the High Court of Northern Ireland, who will review the Secretary of State's decision but will not rule on whether disclosure should be permitted.

It is inevitable that such a complex process of disclosure of information which can then be withheld by the ICIR is highly likely to generate a multiplicity of lengthy and complex legal challenges in the High Court. Instead of building confidence, this process will generate distrust, frustration and suspicion.

For the ICIR to be able to carry out effective and efficient criminal investigations while at the same time gaining and retaining the confidence of victims of terrorism affected by the Troubles, the following amendments are required as outlined below.

#### **Proposed amendment no. 7**

**The ICIR should be given access to all materials held by Government agencies: PSNI (RUC SB), MI5, MOD (intelligence as well as court files and PPS files).**

#### **Proposed amendment no. 8**

**The ICIR should have power to establish whether any forensic opportunities exist to identify perpetrators, seek to identify potential witnesses in order to help find perpetrators, carry out its functions to nationally recognised standards, have the ability to be thorough, objective and pursue cases to their end, without overlooking opportunities, and informs victims and families so as to give them reassurance that no reasonable opportunity has been missed.**

### **4. Immunity from prosecution**

The granting of immunity from prosecution appears to be an 'amnesty on demand' which must be amended.

Section 18 of the Bill states that the decision to grant immunity from prosecution is made by the Immunity Requests Panel if the three following conditions are met:

- Condition A: a person has made a request to the Immunity Requests Panel to be granted immunity from prosecution;
- Condition B: the Immunity Requests Panel is satisfied that the ICRIR is in possession of an account that describes a conduct forming part of the Troubles which is true to the best of the person's knowledge and belief. The person does not need to provide any evidence to support the account and the account does not need to provide any further information that is not already known by the ICRIR. According to Section 20 (2), in forming a view on the truth of the person's account, the Immunity Requests Panel must take into account any other information in the ICRIR's possession that is relevant (including information which the person has previously given to a person other than the ICRIR) (Section 20 (2)). However, in order to form a view of the truth of the person's account, the Immunity Requests Panel is not required to seek information from another person (Section 20 (4)). The panel has no obligation to verify the veracity of the account as it just needs to be satisfied that the information received is true to the best of the person's knowledge and belief. This is one of the most disturbing provisions of the Bill, leading to immunity being granted on demand to anyone who provides an account that does not need to be corroborated by evidence or even verified by the panel.
- Condition C: The panel needs to be satisfied that the person's disclosed conduct would expose that person to a criminal investigation of, or to the prosecution for a particular serious or connected Troubles-related offence identified by the panel. This provision appears to run contrary to the State procedural obligation under Article 2 of the European Convention, which is to secure evidence and ensure those responsible for having committed a crime are identified and prosecuted.

### **Proposed amendment no. 9**

**Before making a decision on a request for immunity the Immunity Requests Panel must ensure that this will only be granted following a thorough investigation to verify information, statements and documents provided by the person making the request. If the investigation reveals that the person is likely to have committed a serious offence, immunity will not be granted but prosecution would follow.**

## **5. Final reports**

The ICRIR must produce a final report on the findings of the review that may have an adverse impact on individuals mentioned in the report and for this reason an amendment is required.

Section 15 (6) of the Bill provides that if the final report contains material criticising an individual, even if that individual has never been tried nor convicted of any Troubles-related offence, the draft of the report should be given to the individual criticised. The individual will have the opportunity to make representations. However, the ICRIR will have the final decision

as to whether to exclude any material and will not be under any obligation to give any revised version of the final report to that individual (Section 15 (10)).

Allegations made against innocent members of the security forces are likely to result in the violation of the presumption of innocence, protected under Article 6 of the European Convention on Human Rights. The mention of their names may also cause an unjustified and disproportionate interference in the right to private and family life of members of the security forces, in breach of Article 8 of the European Convention on Human Rights.

The ICIR will have access to extensive information concerning members of the security forces involved in dealing with Troubles-related incidents. As has been the case in several reports produced by the Police Ombudsman of Northern Ireland, those who are likely to be referred to will be members of the security forces, not those involved in terrorism.

### **Proposed amendment no. 10**

**The Bill should not give any possibility to criticise individuals as long as they have not been convicted after a due process of law. The investigation of crimes alleged to have been committed by members of the security forces during the Troubles must protect the presumption of innocence and the right to private and family life in compliance with Articles 6 and 8 of the European Convention on Human Rights.**

## **6. Public Prosecution Service**

The Public Prosecution Service of Northern Ireland is significantly slower in dealing with cases than its counterparts in the rest of the United Kingdom. It is a well-known fact that the criminal investigations carried out by Operation Kenova have resulted in more than thirty referrals being made to the Public Prosecution Service against terrorist individuals for Troubles-related crimes. Although these cases meet the evidential and public interest tests to offer a realistic prospect of conviction, the Public Prosecution Service has been unable to progress any of them.

### **Recommendation no. 1**

**Since the Public Prosecution Service of Northern Ireland operates under the Department of Justice in Northern Ireland, it is a devolved matter that has an essential part in the overall process leading to justice being rendered and its functions must be reviewed so as to make it as efficient as all other prosecution service operating in the rest of the United Kingdom.**

## **III. Memorialising the Troubles**

The memorialisation of the Troubles is to be done by way of a work programme comprising oral history records, memorialisation strategy and academic research. The major lacuna of the Bill in this area as in others, is that it makes no reference as to who is considered to be a victim.

## 1. Oral history

There will be a designated persons whose duty it will be to secure a study of Troubles-related oral history records contained in current collections and to ensure that Troubles-related oral history records are created (Section 42 (1) (a) and (b)). The oral records will have to represent all communities. It is proposed that a catalogue of publicly accessible Troubles-related oral history records is produced and made available on a website to be used by the public (Section 42 (1) (d)).

Such a widely open oral history archive in relation to the Troubles raises legitimate serious concerns. This archive may be used by terrorists and their sympathisers to tell their stories, glorify terrorist activities they were involved in, justify their engagement in terrorist activities, and vilify the security forces. There are no safeguards in the Bill that would prevent anyone from making false allegations and defamatory accusations against those whose duty was to fight terrorism and protect the human rights and fundamental freedoms of law-abiding people and maintain democracy. The Bill does not provide any means by which the veracity of the stories to be included in this archive could be verified.

The oral history records may well lead to revision of the history of the Troubles and result in the abuse of rights by individuals to destroy the rights and freedoms of others which is prohibited by Article 17 of the European Convention on Human Rights.

### **Proposed amendment no. 11**

**The definition of victim of crime as enshrined in the domestic laws of the United Kingdom and the Republic of Ireland should define the framework within which the oral archive can be created. It would ensure that it will not be used as a means to justify terrorism and re-write the history of the Troubles. Also, contributions by way of historical records should only be made provided there is a process to verify the veracity of what is being said in order to prevent false allegations and defamation. (The Legacy of the Past Record created by the Ulster Human Rights Watch in the Public Record Office of Northern Ireland provides an example of what can be done in this vital area.)<sup>17</sup>**

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<sup>17</sup> The Legacy of the Past Record created by Ulster Human Rights Watch within the Public Record Office of Northern Ireland (PRONI) has been established to receive narratives and audio-visual recordings from victims of terrorism with the necessary safeguards, so as not to be used as a means of rewriting the history of the Troubles with a process designed to verify the accuracy of the narratives and audio-visual recordings in compliance with data protection legislation, the law on defamation and Article 17 of the European Convention on Human Rights.

## **2. Memorialisation strategy**

The designated persons must secure a study of relevant memorialisation activities for the purpose of marking, commemorating or providing information or education about Troubles-related incidents and events, make recommendations about the initiation and carrying out of relevant memorialisation activities, and issue a report setting out the findings and recommendations to be given to the Secretary of State (Section 43 (1) (a) to (d)). The process by which the study is carried out and recommendations made must allow consideration to be given to the promotion of reconciliation in Northern Ireland (Section 43 (4) (a)).

The proposed study suffers the same fundamental deficiency as that of the oral history records. There is no framework which guarantees that memorialisation activities currently taking place in Northern Ireland in certain sections of the community to commemorate terrorists and their activities will be excluded from the strategy.

### **Proposed amendment no. 12**

**The memorialising strategy must be conducted in compliance with human rights and fundamental freedoms requirements within a democratic society and must therefore exclude any reference to the commemoration of terrorist activities. Safeguards against the memorialisation of terrorism aiming at glorifying and justifying terrorism should be included. The memorialising strategy should be dedicated to supporting victims of terrorism and the prevention of terrorism and radicalisation.**

## **3. Academic research**

The designated persons must secure terms of reference are set for academic research into the Troubles (Section 45). The terms of reference must require the researchers to take account of ICRIR final reports in carrying out their research. The researchers will have to produce an analysis of patterns and themes emerging from the relevant events and conduct (Section 45 (6)). Researchers will produce a report on the outcome of the academic research after seven years (Section 45 (1)(e)). Due to the absence of proper safeguards to prevent terrorists and their sympathisers from influencing the work programme, this last report may well be an attempt to justify terrorism and to re-write the history of Northern Ireland in breach of Article 17 of the European Convention on Human Rights.

Section 48 provides that an Advisory Forum will be established to provide views to the designated persons when carrying out the Troubles-related work programme. The Advisory Forum will be made up of persons who represent the views of victims and survivors of events and conduct forming part of the Troubles (Section 48 (2) (a)). Once again, the Bill does not provide the definition of victims and survivors in order to identify those who may be entitled to be part of the Advisory Forum. In order to avoid this same issue that has hampered the work of the Victims and Survivors Forum in advising the Commissioner for Victims and

Survivors, it is necessary that only innocent victims and survivors of crimes be entitled to participate in the Advisory Forum. Due to the use of the interpretation of victim and survivor provided in the Victims and Survivors (Northern Ireland) Order 2006, people who had been members of terrorist organisations were accepted as members of the Forum. This failure can only be avoided if the definition of victim of crime is the one referred to in the Bill.

### **Proposed amendment no. 13**

**This academic research should not be used as a means of rewriting the history of the Troubles, and undermining or discrediting the security forces, whose duty was to protect the rights and freedoms of law-abiding people against terrorism; or to justify terrorism. The academic research should address the issue of terrorism and the threat it represents for the furtherance of human rights in a democratic society. The research should be done with a view to recommending the implementation of policies and educational programmes for the purpose of combating terrorism and radicalisation and promoting peace and freedom within a democratic society.**

#### **IV. Cooperation between UK and ROI investigating authorities**

Although most terrorist activities took place in Northern Ireland, the territory of the Republic of Ireland was used during the Troubles by terrorist organisations to plan and prepare terrorist attacks that were carried out in Northern Ireland and as a safe haven for terrorists. Many cases have a cross-border connection and the contribution of the Republic of Ireland in dealing with the legacy of the past is crucial.

To date with a view to cooperating with Troubles-related investigation dealt with in Northern Ireland and particularly legacy inquests, the Republic of Ireland has made limited commitments to such as:

- The use of the 2000 European Union Convention on Mutual Assistance in Criminal Matters to respond to requests for assistance that have been given effect by the Criminal Justice (Mutual Assistance) Act 2008.
- The disclosure of information consistent with its constitutional obligations.
- New legislation to facilitate cooperation by An Garda Síochána with Coroner's inquests in Northern Ireland.
- New legislation to provide for the protection from defamation and other proceedings for persons making oral contributions to the Oral History Archive. As already mentioned UHRW is opposed to such protection being introduced, as it will enable terrorists and their sympathisers to produce accounts glorifying their exploits, vilifying the police and security forces and causing harm and distress to victims of terrorism.
- The establishment of a cooperation agreement between An Garda Síochána and the SHA proposed HIU for information exchange in criminal and non-criminal matters.

- New legislation to give effect to the international agreement between the UK and the ROI to provide for the establishment of the SHA proposed ICIR.

However, apart from these minor legislative changes that have to do with the functioning of some institutions set up in Northern Ireland for dealing with the past, the ROI has failed, so far, to set up equivalent institutions mirroring those that exist in Northern Ireland for addressing the legacy of the past.

## **Recommendation no. 2**

**Institutions equivalent to those that exist or are being proposed to be established for addressing the legacy of the past in the United Kingdom should be implemented in the Republic of Ireland. This could take the form of an organisation similar to the ICIR, which could be transformed into an International Independent Commission for Reconciliation and Information Recovery (IICRIR). The memorialising of the Troubles work programme should apply in the same way to the Republic of Ireland.**

## **Proposed amendments**

### **Proposed amendment no. 1**

**The Bill should be based on the definition of victim of crime that includes victims of terrorism, and which is enshrined in the legislation of the United Kingdom and the Republic of Ireland.**

### **Proposed amendment no. 2**

**The ICRIIR should be able to exercise its functions in compliance with the procedural obligation of Article 2 of the European Convention of Human Rights: investigations should be carried out by an independent authority, be capable of leading to the identification of those responsible, take all reasonable steps to secure evidence, avoid any deficiency in the investigation, be based on an exhaustive analysis of all relevant documents, ensures state authorities act of their own motion with promptness and guarantee a sufficient element of public scrutiny.**

### **Proposed amendment no. 3**

**Section 33 of the Bill should be amended to ensure that the investigation of any Troubles-related case may be carried out whenever it is possible to progress the investigation.**

### **Proposed amendment no. 4**

**Section 38 of the Bill should be repealed so as to allow civil claims to be made whenever this is justified.**

### **Proposed amendment no. 5**

**Section 39 of the Bill should be amended to allow inquests to progress and for new inquests to be to be carried out when this is required.**

### **Proposed amendment no. 6**

**Section 14 should be amended so as to ensure that members of the security forces can only be compelled to attend meetings, provide information, written statements or documents if there is sufficient evidence that they were involved in the commission of a criminal offence. Section 14 should be directed against those for whom there is evidence and intelligence that they were involved in terrorist activities.**

### **Proposed amendment no. 7**

**The ICRIIR should be given access to all materials held by Government agencies: PSNI (RUC SB), MI5, MOD (intelligence as well as court files and PPS files)**



#### **Proposed amendment no. 8**

**The ICRIIR should have power to establish whether any forensic opportunities exist to identify perpetrators, seek to identify potential witnesses in order to help find perpetrators, carry out its functions to nationally recognised standards, have the ability to be thorough, objective and pursue cases to their end, without overlooking opportunities, and informs victims and families so as to give them reassurance that no reasonable opportunity has been missed.**

#### **Proposed amendment no. 9**

**Before making a decision on a request for immunity the Immunity Requests Panel must ensure that this will only be granted following a thorough investigation to verify information, statements and documents provided by the person making the request. If the investigation reveals that the person is likely to have committed a serious offence, immunity will not be granted but prosecution would follow.**

#### **Proposed amendment no. 10**

**The Bill should not give any possibility to criticise individuals as long as they have not been convicted after a due process of law. The investigation of crimes alleged to have been committed by members of the security forces during the Troubles must protect the presumption of innocence and the right to private and family life in compliance with Articles 6 and 8 of the European Convention on Human Rights.**

#### **Proposed amendment no. 11**

**The definition of victim of crime as enshrined in the domestic laws of the United Kingdom and the Republic of Ireland should define the framework within which the oral archive can be created. It would ensure that it will not be used as a means to justify terrorism and re-write the history of the Troubles. Also, contributions by way of historical records should only be made provided there is a process to verify the veracity of what is being said in order to prevent false allegations and defamation. (The Legacy of the Past Record created by the Ulster Human Rights Watch in the Public Record Office of Northern Ireland provides an example of what can be done in this vital area.)**

#### **Proposed amendment no. 12**

**The memorialising strategy must be conducted in compliance with human rights and fundamental freedoms requirements within a democratic society and must therefore exclude any reference to the commemoration of terrorist activities. Safeguards against the memorialisation of terrorism aiming at glorifying and justifying terrorism should be included. The memorialising strategy should be dedicated to supporting victims of terrorism and the prevention of terrorism and radicalisation.**

### **Proposed amendment no. 13**

**This academic research should not be used as a means of rewriting the history of the Troubles, and undermining or discrediting the security forces, whose duty was to protect the rights and freedoms of law-abiding people against terrorism; or to justify terrorism. The academic research should address the issue of terrorism and the threat it represents for the furtherance of human rights in a democratic society. The research should be done with a view to recommending the implementation of policies and educational programmes for the purpose of combating terrorism and radicalisation and promoting peace and freedom within a democratic society.**

## **Recommendations**

### **Recommendation no. 1**

**Since the Public Prosecution Service of Northern Ireland operates under the Department of Justice in Northern Ireland, it is a devolved matter that has an essential part in the overall process leading to justice being rendered and its functions must be reviewed so as to make it as efficient as all other prosecution service operating in the rest of the United Kingdom.**

### **Recommendation no. 2**

**Institutions equivalent to those that exist or are being proposed to be established for addressing the legacy of the past in the United Kingdom should be implemented in the Republic of Ireland. This could take the form of an organisation similar to the ICIR, which could be transformed into an International Independent Commission for Reconciliation and Information Recovery (IICIR). The memorialising of the Troubles work programme should apply in the same way to the Republic of Ireland.**

# The Northern Ireland (Legacy and Reconciliation) Bill is not acceptable for Victims of Terrorism in Northern Ireland

- TRUTH COMPROMISED 
- JUSTICE DENIED 
- ACKNOWLEDGMENT DECLINED 
- BREACHES ARTICLE 2 ECHR 
- BREACH OF ARTICLE 6 ECHR 
- BREACH OF ARTICLE 8 ECHR 
- BREACH OF ARTICLE 17 ECHR 
- REVISIONISM/REWRITING OF HISTORY 
- JUSTIFICATION OF TERRORISM 
- DEFAMATION OF INNOCENT VICTIMS 
- WITCH-HUNT OF SECURITY FORCES 
- INQUEST AND COMPENSATION DENIED 
- ROI NOT ACCOUNTABLE 
- NO POTENTIAL FOR RECONCILIATION 

# Proposed Amendments will make the Northern Ireland (Legacy and Reconciliation) Bill acceptable for Victims of Terrorism in Northern Ireland

- TRUTH
- JUSTICE
- ACKNOWLEDGMENT
- FAIR IMPLEMENTATION OF ARTICLE 2 ECHR
- COMPLIANT WITH ARTICLE 6 ECHR
- COMPLIANT WITH ARTICLE 8 ECHR
- COMPLIANT WITH ARTICLE 17 ECHR
- HISTORY OF NI TERRORISM WRITTEN AND TOLD
- TERRORISM EXPOSED AND DENOUNCED
- SUPPORT FOR INNOCENT VICTIMS
- RECOGNITION OF SECURITY FORCES IN FIGHTING TERRORISM
- PRACTICAL AND COST-EFFECTIVE STRUCTURES
- INQUEST MAINTAINED & COMPENSATION ADDRESSED
- ROI ACCOUNTABILITY SECURED
- POTENTIAL FOR RECONCILIATION