

## **Summary**

The Ulster Human Rights Watch (UHRW) was created in 2001 and its Chairman is Sir William Wright. The UHRW upholds and promotes human rights and fundamental freedoms and has been recognised as a major human rights organisation in Northern Ireland.

The work of the organisation has expanded so as to justify the development of an Advocacy Service dedicated to working with victims of terrorism. Terrorism has been and remains a major issue in Northern Ireland and the Advocacy Service serves the interests of victims of terrorism in Northern Ireland and across the United Kingdom, whatever their background.

UHRW took an active part in contributing to the Northern Ireland Office consultation on the Legacy of the Past in 2018. Since that time UHRW has maintained its opposition to the NIO proposals and has supported a new approach that would favour moving forward towards truth, justice and acknowledgement for victims of terrorism in Northern Ireland and further afield.

It would appear that the new approach to addressing the legacy of the past, as outlined by the Secretary of State for Northern Ireland, Brandon Lewis MP, on 18 March 2020 is a step in the right direction. UHRW welcomes the Secretary of State's written statement and approves the new approach in principle, pending confirmation that the government has clearly departed from the Stormont House Agreement arrangements.

In this submission UHRW answers the questions raised by the Northern Ireland Affairs Committee, providing its reason for opposing the proposed functions that were to be carried out by the institutions of the Stormont House Agreement, if ever they were to be revived in future arrangements.

UHRW strongly believes that there is another way forward for addressing the legacy of the past, that would benefit victims of terrorism in Northern Ireland and the wider community. For this reason UHRW sets out the basis for a possible alternative.

The answers to the (I) questions will be followed by the gist of a possible (II) alternative.

### **I. Northern Ireland Affairs Committee questions**

#### **A. Whether the Government's proposed approach will meet the needs of victims, survivors and their families**

1. UHRW supports in principle the new approach taken by the Government in dealing with the legacy of the past. However, at this stage, no details have been provided

concerning the proposals. It is suggested that one independent body be created instead of four in order to perform information recovery and investigative aspects of the legacy system and provide every family with a report. If the government approach does not seek to replicate via the institution of one body what was suggested as being delivered through the Stormont House Agreement (SHA), significant progress could be made towards a principled and balanced approach to dealing with the legacy of the past.

2. On the contrary, if the approach chosen by the Government is in furtherance of what was proposed in the SHA, it is unlikely to meet the needs of victims of terrorism and their families (1036 security forces members and 2078 civilians between 1966 and 2001). Innocent victims of terrorism will have limited means to see justice done in their cases. If the proposed approach is in line with the SHA proposals, it will serve the purpose of those who have been and remain opposed to Northern Ireland being part of the United Kingdom.
3. Terrorists and their sympathisers would be able to use these proposals to further their political aims by rewriting the history of Northern Ireland, and discrediting the security forces so as to justify the recourse to terrorism. The investigating mechanism of this one new body would be likely to be used to unveil as much information as possible from the state so as to justify further investigations into the killings of terrorists by the security forces. The suggested arrangements would enhance the possibility of pursuing cases against members of the security forces, particularly police officers, who could be targeted both for allegations of criminal offences and non-criminal misconduct. In the meantime terrorists could be pursued for criminal offences only, since terrorists do not abide by any code of conduct. Furthermore, terrorists could only be convicted of criminal offences if proven guilty beyond reasonable doubt while police officers could be accused of non-criminal misconduct if proven responsible on the balance of probability. This will result in putting members of the security forces at a serious disadvantage compared to terrorists.
4. The information recovery mechanism, if similar to the one suggested in the SHA, would enable terrorists to tell stories that no-one would be able to confirm. The new historical archive, although not mentioned in the Secretary of State's statement, would open the way for terrorists to tell any manner of story, even if it falsely discredits the security forces and the UK government. The aim of reconciliation is unlikely to be achieved if an equivalent of the Implementation Reconciliation Group (IRG), although not mentioned in the Secretary of State's statement, is implemented. The IRG would have been provided with the means of rewriting the history of the Troubles on the basis of information received from the HIU, the ICIR and the OHA. If the new proposals do not fundamentally differ from the proposed SHA institutions, they would be designed to enable terrorists and their sympathisers to achieve their aim of rewriting history. Therefore, if this is the case, it is highly unlikely that victims of terrorism will be willing to engage with the new body.

5. The suggested measures to redress the discrepancy of treatment between victims of terrorism and perpetrators as well as between terrorists and former members of the security forces are as follows:

- The interpretation of victims and survivors provided in the Victims and Survivors Order (NI) 2006 should be amended so as to ensure innocent victims of terrorism, including former members of the security forces who were murdered or injured, are not put on an equal footing with perpetrators of acts of terrorism, who under this order are equally victims and survivors;
- A definition of victim of terrorism compliant with the definition of victim of crime provided in the Justice Act (Northern Ireland) 2015 should replace the interpretation of victims provided in the Victims and Survivors Order (NI) 2006;
- Fundamental principles compliant with common law principles should be approved in order to provide a framework for the development of institutions for investigating the past that would serve the needs and purposes of victims of terrorism and does not provide terrorists and their sympathisers with further means of undermining the State and security forces;
- Systemic issues raising significant questions of public interest relevant to the Troubles in relation to the fight against terrorism (rather than the conduct of retired police officers) should be investigated by an independent public body dealing exclusively with police issues, such as the Office of the Police Ombudsman for Northern Ireland (OPONI);
- Appropriate support should be provided for retired members of the security forces when criminal procedures are brought against them or their conduct is being investigated;
- The proposal of having an information recovery mechanism, similar to that proposed for the ICIR, in order to retrieve information that can never be tested and confirmed as true should be abandoned;
- No opportunity should be given to those who intend to rewrite the history of the Troubles and justify recourse to terrorism in Northern Ireland by creating a history archive that will be protected against legal action in defamation;

If these measures are implemented, following the Secretary of State written statement, there would be the potential to meet the needs of victims of terrorism, including members of the security forces, and to encourage them to take part in new processes for dealing with the past in Northern Ireland and they could have a major positive contribution to society at large, even opening the way towards reconciliation.

**B. 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**

6. The system for dealing with issues of the past through various institutions, such as the PSNI, OPONI, the Coroners Service, etc., having their particular remit and area of expertise is the right approach. The main institutions currently dealing with the past in Northern Ireland and fulfilling their particular functions are outlined below:
- The PSNI Legacy Investigation Branch (LIB) is part of the Chief Constable's statutory obligation to deal with the past in Northern Ireland. The LIB is entrusted with a caseload made up of more than 3200 cases of homicide that occurred in Northern Ireland between 1 January 1969 and 1 March 2004. The LIB reviews these cases and where credible evidence exists, they investigate them further. Once an investigation has been carried out and new compelling evidence exists, the file is referred to the Public Prosecution Service (PPS) who makes the decision as to whether or not to prosecute the suspect(s) and for what offence. The cases are managed and progressed by detectives using a Case Sequencing Model which takes a number of factors into consideration. The LIB should fulfil its obligations under Article 2 of the European Convention on Human Rights, as it operates using the Family Guidance Document, the Family Engagement Strategy and the Conflict of Interest Policy Document. It should be noted that the reason for the delay in the review and investigation of historical cases *is due to a lack of funding*.
  - The Office of Police Ombudsman for Northern Ireland (OPONI) Historical Investigations Directorate (HID) considers matters in which members of the RUC may have been responsible for deaths or serious criminality in the past and in particular between 1968 and 1998. The Directorate receives complaints of a grave and exceptional nature from members of the public about police conduct during this period, including allegations of police involvement in murder, attempted murder, as well as conspiracy and incitement to murder. It is suggested that the procedures and purpose of historical investigations be reviewed in relation to historical investigations. Police conduct should no longer be the focus of attention, as the analysis of systemic issues of significant public interest in relation to dealing with terrorism should be prioritised. At the present moment the Police Ombudsman carries a caseload of over 425 cases. The greatest impediment for advancing the investigation of cases is the fact that the Directorate *is severely underfunded*. If adequate funding was provided the Directorate could deal with the backlog of cases within three to five years.
  - The Legacy Inquest Unit (LIU) within the Coroners Service for Northern Ireland now deals with legacy inquests in Northern Ireland. The LIU is a reformed inquest process proposed by the Lord Chief Justice, who also became the President of the Coroner's Courts in 2016. According to the Lord Chief Justice, legacy inquests could be dealt with within five years now that appropriate funding has been provided.

- The Attorney General for Northern Ireland can direct a coroner to hold an inquest into a death, no matter how long it has been since the person died or when a previous inquest has already taken place during the Troubles. The key issue considered by the Attorney General in directing a coroner to hold an inquest is whether he has reason to believe that the deceased person has died in circumstances that, in his opinion, make the holding of an inquest advisable.
  - The Public Record Office for Northern Ireland (PRONI) holds public and private records. It holds many Court and inquest records relating to the Troubles in Northern Ireland. These records can be accessed and released to the public under the Freedom of Information Act 2000 (FOIA) and/or the Court Files Privileged Access Rules (2016).
  - The Public Prosecution Service's (PPS) role is to decide whether or not to prosecute people who have committed a criminal offence, including those related to the Troubles, once the investigation has been carried out by the police. It makes the decision concerning the appropriate charges and has the responsibility for prosecuting the defendants when they are brought to court. The test for prosecution must be met if there is sufficient evidence (the Evidential Test) and if it is in the public interest (the Public Interest Test).
  - The Courts in Northern Ireland deal with all criminal and civil cases, including judicial reviews related to the Troubles.
7. Each one of these institutions have their own specific functions and responsibilities in relation to dealing with the past. Therefore, Legacy Inquests, PSNI-LIB and OPONI-HID investigations should be considered, while also taking into account the other institutions that are part of the overall system for dealing with the past at the present time. Although the system appears complex, information could be made available to the public and particularly to victims of terrorism in order to explain how it works and how to access the relevant institution. Improvement of the mechanisms that are already in place for investigating the past is required, including the rules that apply to both the PSNI Legacy Investigation Branch and the Office of the Police Ombudsman for Northern Ireland, and can be achieved within a reasonable period of time. A complicated new system that will only deal with some parts of the legacy of the past is not desirable and will not serve the interests of victims of terrorism.
8. Rather than simplifying the existing system, the proposals for dealing with the past, if based on the Stormont House Agreement, will make it more convoluted. The SHA proposals would have created four new bodies for dealing with the past (the Historical Investigations Unit (HIU), the Independent Commission on Information Retrieval (ICIR), the Oral History Archive (OHA) established by the Public Record Office for Northern Ireland and the Implementation and Reconciliation Group (IGR) in addition to those mentioned above that already exist). The new proposal made by the Secretary of State for Northern Ireland, if they revive the SHA arrangements, would bring together under one new body the functions of the four SHA bodies

mentioned above. This would have a limited impact in suppressing part of the activities of the LIB and the OPONI-HID, which will continue to perform their duties in order to address a number of fatal Troubles-related incidents and all non-fatal Troubles-related incidents.

9. If the new government proposals depart from the SHA proposals, then the LIB and OPONI-HID could continue to perform their duties and adequate funding should be provided to them, since the *lack of funding* is the main reason for the backlog of cases and delay in processing cases on their part. Adequate funding, with updated operational rules, would enable these institutions to process historical cases within three to five years to the satisfaction of victims of terrorism while progressing towards truth, acknowledgement and reconciliation.

### **C. The differences between the Government's new proposals and the draft Stormont House Agreement Bill**

10. In 2018 the UHRW analysed the proposals to establish four new bodies to address the past. Rather than providing a significant improvement on current arrangements as suggested, it was submitted that these proposals would have had an adverse and detrimental impact on victims of terrorism, both civilians and former members of the armed forces and police officers. It was strongly believed, among the victims of terrorism, that these proposals would undermine the due process of law and would provide the means by which those who have engaged in terrorism and their sympathisers could justify terrorism and rewrite the history of the terrorist campaign in Northern Ireland. If implemented, these proposals would have alienated victims of terrorism, including former members of the security forces. The conclusion of the analysis of each one of the four bodies carried out by the UHRW was as follows.
11. The **Historical Investigations Unit (HIU)** would carry out criminal investigations and non-criminal misconduct investigations against former police officers, thus equating investigations into terrorist activities with investigations into police misconduct. The HIU would only consider a limited number of cases related to deaths only. All cases of serious injury would remain within the remit of the Legacy Investigation Branch and the Office of the Police Ombudsman for Northern Ireland. The HIU would investigate the activities of the police firstly by way of a criminal investigation and secondly by way of a misconduct investigation, while terrorists would only be investigated once for criminal activities.
12. The **Independent Commission on Information Retrieval (ICIR)** would seek and receive information that victims' families would not be able to verify, since its activities would be shrouded in secrecy. Confessions made by terrorists would not be available to be used in court. A de facto amnesty would be immediately granted to any terrorist who confesses to his crime, since he would not be able to be prosecuted on the basis of this evidence. There would be no legal remedy available to challenge the information released by the ICIR.

13. The **Oral History Archive** (OHA) would offer the possibility to terrorists and their sympathisers to tell stories glorifying their terrorist activities, justifying their actions and vilifying the security forces. They would be given the opportunity to provide narratives that would help to rewrite the history of the Northern Ireland Troubles while being protected from legal action in defamation.
14. Finally, after five years the **Implementation and Reconciliation Group** (IRG) would be given the task of ensuring the delivery of a final report, the academic report, on the basis of all reports received from the legacy institutions (HIU, ICIR, OHA and the Coroner's Service), and other limited specified material. The academic report would likely be a reflection of what would have been provided by the legacy institutions, justifying terrorism and rewriting the history of the terrorist campaign in Northern Ireland.
15. These four institutions, which appeared to be designed to favour those who have engaged in terrorism and their sympathisers, would inevitably have had the adverse impact of marginalising victims of terrorism, including former members of the armed forces and police officers. If the new and unique body mentioned in the Government proposals is to exercise the same functions as these four bodies, then these proposals do not appear fundamentally different from the SHA proposals. However, if the new government proposals are to create a unique body that would only deal with the recovery of information and investigation of historical cases, this may prove to represent progress towards a positive and satisfactory outcome.

#### **D. Whether and how the Government's proposals will promote reconciliation in Northern Ireland**

16. Reconciliation is the bringing together of different ideas and/or the bringing together of people who were set apart and come together again. If it is to be understood on the basis of a Judeo-Christian interpretation of the word it would imply that there is an acknowledgement of wrongdoing on the part of perpetrators that opens the way to reconciliation with their victims. In the context of the Troubles what is required is an acknowledgement that terrorism was wrong and can never be justified. Those who engaged in terrorism should acknowledge their wrongdoings and those who suffered physically or psychologically as a result should forgive perpetrators. This would bring about reconciliation and closure.
17. Unfortunately, if the Stormont House Agreement proposals are to be maintained, it is unlikely that the Government's proposals will help in achieving reconciliation. The SHA proposals envisaged that on the basis of all the various reports produced by the HIU, the ICIR, and the OHA over a period of at least five years, to which would be added the Coroners' Court Service reports and the reports from the Research Project developed with the historical archive, the academic group appointed by the IRG would produce a final report, the academic report, with the assistance of the ESRC. It was very likely that the end result of the proposed mechanism would have been disproportionately based on reports which support terrorists and their sympathisers and would have tended to provide a justification for engaging in terrorism, while

tarnishing the reputation of the security forces, particularly the police. Thankfully, it seems that the Secretary of State's declaration indicates the government is moving away from such a process, which in any case could not deliver reconciliation. It must be accepted that reconciliation is not something the government can achieve by way of policy or legislation, but something they can help to happen between people who have the freedom to make the final decision as to whether they want to be reconciled or not.

18. The rewriting of the history of Northern Ireland would do nothing to promote reconciliation but would on the contrary increase distrust, anger and division within Northern Ireland society.

**E. The potential merits of consolidating the bodies envisaged in the Stormont House Agreement into a single organisation**

19. UHRW welcomes the Secretary of State's statement in that it appears to depart from the SHA arrangements and will not lead to the creation of a new and unique body encompassing all the functions of the bodies suggested in the SHA. However, if the proposed new body is meant to carry out all the functions that were attributed to the four bodies proposed in the SHA, then it is likely to have an adverse impact.
20. The consolidation of the four bodies into one cannot be contemplated as the way forward. The Stormont House Agreement already included the consolidation of the functions carried out by the PSNI-LIB and the OPONI-HID. These proposals were deemed unacceptable because they would have resulted in a system heavily imbalanced against former members of the security forces and in particular former police officers. The consolidation of review and investigation functions of the PSNI-LIB and OPONI-HID, information recovery of the ICIR, storytelling of the OHA and reconciliation of the IRG would further serve the purpose of those who opposed the State and seek to justify terrorism by re-writing the history of Northern Ireland. Bringing together all these different functions, within the same body, would prevent any possibility of having any proper oversight and accountability. The outcome of such a process would only generate frustration for victims of terrorism, who once again would be let down by the new proposed arrangements.

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

21. If the Government's proposed approach to the re-investigation of cases is the same as that proposed in the SHA agreement, UHRW would not support its proposals. It is not possible at this stage to make any informed comment on what the government proposes until details are made available.

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

22. It should be noted that the issue of the treatment of veterans, as mentioned by the Secretary of State in his statement, is to be treated separately from the issue of dealing with the legacy of the past as a result of the Troubles in Northern Ireland.
23. However, it has been made clear on numerous occasions that members of the security forces, whether army personnel or police officers, do not want to see a statute of limitation being introduced in legislation. Members of the security forces do not consider themselves as being above the law and believe that if the law has been broken those who are responsible for doing so, regardless of their status, should be prosecuted.
24. Although a statute of limitations for offences can be enforced, there are limits in international law as to what offences it should apply to. There is no statute of limitation possible for the crime of genocide, but other crimes, including murder can be subject to a statute of limitation. In the case of the Troubles, it is strongly believed that a statute of limitation should not apply.
25. The Government should enforce any measure that would prevent equating perpetrators of acts of terrorism with their victims. For this reason the interpretation of victim in the Victims and Survivors (Northern Ireland) Order 2006 should be replaced by a definition of victims of terrorism that would include members of the security forces that were either murdered or injured as a result of an act of terrorism. The word *terrorism* instead of *conflict* when referring to the Troubles and of *use of force* instead of *violence* when referring to the security forces should be used in the legislation that applies to the legacy of the past, so as to always make a distinction between what is right – defending the general public against human rights abuses - and what is wrong and can never be justified, terrorism.

## II. Alternative

26. The alternative to the proposed Stormont House Agreement (SHA) institutions, although amended by the Government proposals, should be based on fundamental principles which provide a framework to develop efficient institutions for dealing with the past. The proposed fundamental principles are as follows:
  1. Principle of the right to life for everyone
    - Must be respected by all members of society, including terrorists.
    - Is enforced by members of the security forces who are accountable for their actions when dealing with terrorists.
  2. Principle of the right for an independent and impartial investigation when deprivation of life has occurred
    - Deprivation of life by terrorists must lead to a thorough investigation.
    - Deprivation of life by members of the security forces must be thoroughly investigated as well.

3. Principle of presumption of innocence
  - Anyone is innocent until proven guilty according to law.
4. Principle of the right to an effective remedy
  - For all victims of terrorism to have crimes perpetrated against them investigated.
  - For members of the security forces to obtain redress when their rights have been violated in the course of an investigation.
5. Principle of the right to private and family life
  - For victims of terrorism to have their private and family life respected.
  - For retired members of the security forces to have their reputation protected when facing defamatory allegations.
6. Principle of prohibition of discrimination against victims of terrorism
  - Victims of terrorism should not be equated with the perpetrators of acts of terrorism.
7. Principle of acknowledgement of the sufferings of victims of terrorism
  - The suffering of victims of terrorism should be acknowledged.
  - The suffering of former terrorists who turn away from terrorism, show remorse and do not justify terrorism should be acknowledged.
8. Principle of education and prevention by the testimonies of victims of terrorism
  - The testimonies of victims of terrorism and those who fought against terrorism should be used to educate future generations and prevent them from engaging in terrorism.
27. In compliance with these principles the Legacy Investigation Branch (LIB) would continue to deal with criminal investigations in relation to the Troubles, while the Office of the Police Ombudsman for Northern Ireland Historical Investigation Directorate (PONI-HID) could continue to deal with the investigation of systemic issues raising significant public interest relevant to the Troubles in relation to the fight against terrorism, and the Coroners Service would deal with legacy inquests.
28. The Legacy Investigation Branch would be dealing with the review and investigation of legacy cases while producing family reports. The LIB should review the Family Guidance Document, the Family Engagement Strategy and the Conflict of Interest Policy Document in order to ensure it fulfils its obligations in compliance with Article 2 of the European Convention on Human Rights.
29. Police officers should be entitled to have any issue related to their conduct investigated by the Office of the Police Ombudsman for Northern Ireland, which was established for the purpose of investigating the actions of the police. Investigation should concentrate on complaints which raise issues of significant public interest and more specifically which address systemic failures on behalf of the police in

combating terrorism and the threat of terrorism. The remit of OPONI-HID should cover death and injury cases.

30. OPONI-HID rules, procedures and processes will have to be thoroughly reviewed, taking into consideration the guidance provided by the courts as a result of Judicial Review proceedings, in particular the judgment rendered by Mr Justice McCloskey on 21 December 2017. OPONI-HID rules and procedures must ensure that appropriate support is provided to any former member of the police whose actions during the Troubles are under investigation.
31. In many murder cases for which no-one has been convicted, families still wish to know who was responsible for the murder of their loved ones. The Intelligence Retrieval Commission (IRC) could be established to provide reliable information to family members as to who was involved in the murder of their loved ones. The Commission will retrieve the information requested from intelligence records held by the security forces. The scheme will only apply to deceased terrorists.
32. Northern Ireland has gone through the most sustained campaign of terrorism in Western Europe since the end of the Second World War. Those who have personal stories and experiences about what happened during the Troubles should be encouraged to tell them and make them available to the public through the Public Record Office of Northern Ireland (PRONI).
33. Drawing from the experience of the Troubles educational programmes should be created to be used in primary schools, vocational and academically-oriented secondary schools, colleges of further education and universities, with a view to preventing a repeat of the past among future generations.

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