Supplementary Written Evidence submitted by the Committee on the Administration of Justice (CAJ) (SHA0039)

Supplementary Written Evidence to Northern Ireland Affairs Committee
Consultation on Stormont House Agreement (SHA) inquiry

1. I am Daniel Holder of the Committee on the Administration of Justice (CAJ). I was grateful for the opportunity to provide Oral Evidence to the Committee on 4 September 2019 alongside academic colleagues from the SHA ‘Model Bill Team’, Professors Louise Mallinder and Kieran McEvoy, in response to the Committee’s SHA consultation inquiry.

2. During the course of that evidence two members of the Committee, Gregory Campbell MP and Kate Hoey MP, raised questions as regards the definition of a victim. My colleague Professor McEvoy pointed out that the 2018 draft Northern Ireland (Stormont House Agreement) Bill provides its own definitions of families who would be eligible to request reports from the SHA mechanisms – the Historical Investigations Unit and the Independent Commission on Information Retrieval. Subsequently, the questioning raised alternatives to the current definition of a victim of a conflict-related incident found in Section 3 of the Victims and Survivors (Northern Ireland) Order 2006.

3. In response, I raised concerns that a number of proposed alternatives would exclude almost all victims of the security forces from the definition of a victim. To illustrate this, I used the example that even children killed by plastic bullets would no longer be considered victims under some proposed redefinitions.

4. I cited two specific examples of definitions by way of illustration. The first was a definition put forward by Jeffrey Donaldson MP and colleagues (including Mr Campbell MP) by way of an amendment to Northern Ireland miscellaneous provisions legislation (the DUP amendment). The second was a definition put forward by Ulster Human Rights Watch (UHRW) that has been included in UHRW’s Written Evidence to the Committee’s Inquiry.

5. In response UHRW have written to the Committee raising concerns that I have misinterpreted the scope of their proposed definition, and hence my position was inaccurate. The purpose of this correspondence is to respond to those concerns and further test the scope of both definitions.

The DUP amendment

6. The DUP amendment was tabled at the Committee Stage in the House of Commons to what became the Northern Ireland (Miscellaneous Provisions) Act 2014. It was debated and not carried on 16 July 2013 (column 18-33). This proposed definition of a ‘Victim and Survivor of the Conflict’ would have covered persons:

   Who had suffered harm caused by an act related to the conflict in Northern Ireland, for which they are not wholly or partly responsible, that is in violation of the criminal law.
7. My concern is grounded in the qualification that an act must be “in violation of the criminal law” in order for a person to be a victim. As so few actions of State Actors have been found to be in violation of the criminal law to date, this would have the effect of excluding almost all persons killed or otherwise harmed by the security forces, including children killed by plastic bullets, from the definition of a victim of the conflict.

The UHRW definition

8. The definition proposed by UHRW in their Written Evidence is explicitly framed around defining a ‘Victim of Terrorism’. As such, it appears from the outset that the intention of UHRW is to restrict the scope of definition to victims of paramilitaries rather than State Actors.

9. However, in their correspondence of 12 September 2019 to the Committee, UHRW state that their definition is intended to cover children killed by plastic bullets by virtue of paragraph 3 of the definition. This includes within the concept of a victim of Terrorism:

   (3) A natural person who has been 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;

10. UHRW in their correspondence to the Committee further elaborates that:

    Paragraph 3 of the UHRW definition applies to victims who were either killed or injured as a result of finding themselves close to an act of terrorism being committed or being wrongly associated with an act of terrorism being committed.

11. UHRW further elaborate that the purpose of this provision was to “deliberately include innocent people, such as a child killed as a result of the use of force by security forces” within the definition of a victim of terrorism.

12. However, whilst noting the intent is to include such persons, I reiterate my concern that the definition put forward would not in fact lead to any of the children killed by plastic bullets during the conflict being considered victims.

13. This is as the UHRW definition under paragraph 3 would only consider a person to be a victim if a ‘Terrorist Act’ was also being committed at the time they were shot, and they were (a) in proximity to such an act or (b) wrongly associated with such an act.

14. Whilst a ‘Terrorist Act’ is not defined in the UHRW definition it appears reasonable to assume that this concept is aimed to cover matters such as paramilitary gun and bomb attacks (against the security forces or other persons), and is not intended to cover a range of other activities (including street protests even if outlawed). This could be clarified by UHRW.

15. Eight children were killed by plastic bullets during the conflict, as follows:

   - Seamus Duffy (9 August 1989, aged 15)
   - Stephen Geddis (30 August 1975, aged 10)
• Carol Ann Kelly (22 May 1981, aged 12)
• Julie Livingstone (13 May 1981, aged 14)
• Stephen McConomy (19 April 1982, aged 11)
• Francis Rowntree (22 April 1972, aged 11)
• Brian Stewart (10 October 1976, aged 13)
• Paul Whitters (25 April 1981, aged 15)

16. None of these children died in circumstances whereby a ‘Terrorist Act’ was also occurring, and hence none would be considered a victim under the UHRW definition. In two of the cases (Paul Whitters and Julie Livingstone) the national archives files have been closed for up to 50 years for ‘national security’ reasons.

17. It would also be remiss not to mention that other persons killed by the security forces would also not be captured by paragraph 3 of the UHRW definition. This includes current high profile cases that have been subject to legacy prosecutions, where it would appear undisputed there was no ‘Terrorist Act’ concurrently occurring at the time.

18. Furthermore, in some cases, members of the security forces had given (subsequently discredited) false accounts of, for example, being under fire, to justify shootings. Ironically, should families successfully campaign for investigations that subsequently dismiss such accounts, their family members may also cease to be considered victims should the UHRW definition be law.

19. Paragraph 3 of the UHRW definition appears also to only contemplate victimhood as a result of responsive security force actions to Terrorist Acts. It is of course possible that a person could be victim of a human rights violation that is not in response to another act. The definition appears not to contemplate such circumstances.

20. UHRW may therefore wish to reconsider their definition should they wish it to capture victims in the above categories.

21. The Committee may wish to note the manner in which the draft Northern Ireland (Stormont House Agreement) Bill seeks to differentiate acts of violence or force in two provisions in the bill. These provisions are both designed to separate out incidents that are conflict-related from those that are not. The first provision relates to the inclusion of deaths which occurred between 1998-2004 within the HIU or ICIR remit, through a “required connection with Northern Ireland” criteria which reads (for the HIU):

   (6) For the purposes of subsection (1)(c) an act of violence or force has “the required connection with” Northern Ireland if the act was carried out—

   (a) for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between persons there, or

   (b) in connection with preventing, investigating, or otherwise dealing with the consequences of, an act intended to be done, or done, for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between persons there.
22. A notably shorter definition (encompassing only the provision of paragraph (a) but not (b) above) is provided for in relation to the Oral History Archive.\textsuperscript{vi} It is not clear if this more restricted definition is intended or inadvertent. The bill would also take forward amendments, reliant on concepts in similar terms to the above, to the Early Release Scheme for paramilitaries and members of the security forces in the Northern Ireland (Sentences) Act 1998. These amendments would remove the technical anomalies, of, for example, the scheme not currently covering pre-1973 offences.

23. These definitions in the SHA bill, also aimed at differentiating paramilitary violence from use of force or other actions of the security forces, are much broader than the UHRW definition and capable of capturing a broader range of conflict-related incidents. The definition however differs from the much simpler language in the Victims and Survivors (Northern Ireland) Order 2006.\textsuperscript{vii} In the Model Bill team submission, we called for clarification as to whether or not this changed definition is likely to have any practical impact in the selection of cases by the SHA mechanisms. This is a matter the Committee may also wish to seek clarity on.

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\textsuperscript{i} Written evidence submitted by Ulster Human Rights Watch (SHA0036)  
\textsuperscript{ii} \url{http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/northern-ireland-affairs-committee/consultation-on-implementation-of-the-stormont-house-agreement/written/86758.html}  
\textsuperscript{iii} \url{https://publications.parliament.uk/pa/cm201314/cmpublic/northernireland/130716/am/130716s01.htm}  
\textsuperscript{iv} The definition would also have covered a person who provides regular care to a person meeting the above definition who suffered a physical or psychological injury. In addition, a further exclusion is applied preventing any person benefitting from this definition if they had a ‘serious criminal conviction’ – defined as a conviction in Northern Ireland or elsewhere warranting imprisonment for over five years.  
\textsuperscript{v} “The definition proposed by the UHRW reads as follows: A victim of terrorism is:  
1. A natural person who has been 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 dependant 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 dependant of such a person;  
3. A natural person who has been 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;  
4. A natural person who has suffered physically and psychologically as a result of bringing assistance to a victim of a terrorist act.”  
\textsuperscript{vi} Draft Northern Ireland (Stormont House Agreement) bill (2018) clause 5(6) in relation to HIU and clause 50(2) in relation to ICIR.  
\textsuperscript{vii} As above clause 51(12)  
\textsuperscript{vii} Victims and Survivors (Northern Ireland) Order 2006, Art 2 (Interpretation): “conflict-related incident” means an incident appearing to the [ Victims and Survivors Commission] to be a violent incident occurring in or after 1966 in connection with the affairs of Northern Ireland’.