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Oifig an Aire Dlí agus Cirt, Comhionannais agus Athchoirithe Dlí

19 August, 1998

Memorandum for the Government

Proposals to strengthen the Offences Against the State Acts 1939-85 and other measures to tackle subversive crime

Decision sought

1. The Minister for Justice, Equality and Law Reform requests the Government to:

   (a) take note of the fact that the Garda Commissioner and the Chief Constable of the RUC are considering plans to enhance police operational capacity on both sides of the Border and that they will report back to the Minister and the Secretary of State for Northern Ireland on progress in this regard within weeks (paragraph 5);

   (b) approve the allocation of £2.9m. in additional resources to the Garda Síochána to counter the terrorist threat posed by dissident republican or other groups (paragraph 6);

   (c) authorise the drafting of a Bill to amend the Offences Against the State Acts 1939-85 along the lines of the General Scheme attached to this Memorandum, its publication when the text has been approved by the Attorney General, and its introduction in the Dail (paragraphs 7-9 and Appendix 2); and

   (d) take note of his intention to bring provisions of the Bail Act 1998 into operation for the purpose of persons charged in the Special Criminal Court (paragraph 10).

Background

2. The tragic bomb attack in Omagh on Saturday last brings into stark relief the threat which dissident republican groups continue to pose to the Good Friday Agreement and the efforts of both Governments to secure a lasting resolution to the Northern Ireland situation. Attacks attributed by the security forces to those groups have followed a clearly discernible pattern intended in the first instance to disrupt and sabotage the negotiations leading to the Good Friday Agreement and more recently to derail the Agreement completely.

3. The 32 County Sovereignty Movement (previously known as the 32 Sovereignty Committee) was set up following a meeting of ex-PSF/PIRA members opposed to the

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Peace Process on 7 December, 1997. Its declared aims are to defend the idea of 32 county sovereignty as declared in the 1919 Declaration of Independence and to oppose the Mitchell Principles and moves towards an internal settlement. The security forces are satisfied that the 32 County Sovereignty Movement is the political front for the organisation now styling itself the "Real" IRA, the group responsible for the Omagh bomb attack. Security intelligence indicates that there has been co-operation in the past between the "Real" IRA and the Continuity IRA - the paramilitary group associated with Republican Sinn Fein - and the INLA in carrying out recent attacks. The "Real" IRA, consisting of a significant number of former PIRA members with the experience and expertise to wage a military campaign, is considered to pose the greatest threat. The principal attacks attributable to these groups in the period since 1 January are summarised in Annex 1.

Outcome of Minister's meeting with the Secretary of State for Northern Ireland

4. The Minister and the Secretary of State for Northern Ireland met on Monday at the request of the Taoiseach and the Prime Minister in the aftermath of the Omagh atrocity. They were briefed at that meeting by the Garda Commissioner and the Chief Constable of the RUC.

5. The Government is invited to note that the Garda Commissioner and the Chief Constable of the RUC are engaged in ongoing consultations with a view to proceeding immediately to enhance the operational capacity of both forces along the border, building on the high level of co-operation which already exists between the two forces. This will involve additional security in the border areas including a significantly increased Garda profile on the ground and a further heightening of surveillance on key figures known by the police forces to be involved in subversive activity. These proposals will be in the nature of operational security measures which will not necessarily require reference back to the Government.

6. The Minister requests the Government at this stage to approve the additional costs which will be involved in the provision of the extra security involved by way of an additional provision for the Garda Vote. Those extra security costs include capital expenditure of

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approximately £1.2 m. on the purchase of specialist surveillance equipment and vehicles for the ERU/Specialist units as well as additional current expenditure of approximately £335,000 per 28 days in respect of additional overtime/subsistence costs - a total additional expenditure in 1998 of approximately £2.9m.. The basis on which these figures have been calculated are shown in Annex 2.

Legislative proposals

7. The Minister also requests Government approval for the drafting of a Bill to amend the Offences Against the State Acts 1939-85 on the lines of the proposals contained in Appendix 3 with a view to strengthening its provisions in the fight against the activities of the dissident groups in particular. The changes the Minister is proposing are directed to three principal objectives, viz. to make changes to the rules of evidence which currently apply in relation to both the offence of membership of an unlawful organisation and more generally for the purpose of offences under the Act and scheduled offences, the creation of certain new substantive offences and the extension of the maximum period of detention permitted under section 30.

8. The Minister is specifically proposing:

(a) to amend section 21 of the 1939 Act and section 3 of the 1972 Act in order to allow inferences to be drawn from the failure of a person to answer relevant questions such as evidence of movements, actions, activity or associations, to provide that such inferences would be capable of corroborating other evidence including the opinion of a Chief Superintendent that a person is a member of an unlawful organisation and to require a person charged with membership to notify the prosecution in advance of any defence witnesses he or she proposes to call;

(b) to provide for restrictions on the right to silence for the purpose of persons charged with an offence under the Offences Against the State Acts or a scheduled offence carrying a maximum period of imprisonment of at least five years on the lines of section 6 of the Criminal Justice (Drug Trafficking) Act, 1996, i.e. allowing inferences to be drawn from failure of an accused to mention particular facts to

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Gardai during questioning or on being charged which he subsequently relies on in his defence;

(c) to make it an offence under the Offences Against the State Act to:

* direct an unlawful organisation;
* possess items for purposes connected with specified scheduled offences;
* withhold information concerning a scheduled offence;
* unlawfully collect or possess specified information;
* train persons in the making or use of firearms or explosives; and

(d) to extend the maximum period of detention under section 30 of the Offences Against the State Act from 48 hours to 72 hours by providing for continued detention for a further period of 24 hours beyond the present maximum period of 48 hours to be authorised by a District Judge.

9. The Minister wishes to draw the attention of Government to the fact that certain of the proposals referred to above will have application beyond subversive or terrorist crime given that the Offences Against the State Acts are part of our ordinary criminal law and are used for purposes other than subversive crime. This will apply to the measures proposed at (b) and (d) above and to certain of the offences at (c). With regard to the proposal at (d) above, the Minister is conscious that there may be a widespread public expectation that the period of detention under section 30 would be further extended in keeping with the seven day detention period provided for in respect of drug trafficking offences. The Minister wishes to advise Government in that connection that the period provided for is that sought by the Garda authorities who are satisfied that it will be sufficient for the purposes concerned. The Garda authorities have also pointed out that the seven day detention period provided in the case of drug trafficking offence cases has particular relevance to the possibility of international inquiries arising from an arrest and the need to detain persons for a sufficient period to ensure that they do not have drugs secreted within their person. More generally, the Minister would like Government to note that the proposals contained in Appendix 3 will be subject to refinement in the process of drafting in consultation with the Law Officers, the Parliamentary Draftsman and the Garda

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authorities. He wishes to retain discretion to add to those proposals or adjust them in the light of those consultations, while remaining within the general scope of the intended purpose of the proposals, should this be deemed necessary and subject to prior approval of the terms of the Bill by the Attorney General in advance of its tabling.

Other measures

10. The Minister also requests Government to take note of his intention to take the following additional measures:

(a) to apply by order provisions of the Bail Act 1997 in respect of persons charged in the Special Criminal Court so as to allow the Court to take into account the possibility of the commission of offences if bail is granted; and

(b) to request his Department and the Garda authorities to review existing practices and legislative provisions concerning the use of evidence generated by surveillance in the context of prosecutions with a view to the development of proposals for legislative reform in this area should such action be required or considered desirable.

11. The Minister has also considered but decided, on the basis of advice previously furnished by the Attorney General, against advising the Government to make suppression orders in respect of the "Real" IRA and/or the Continuity IRA. The position in this regard is that section 18 of the Offences Against the State Act 1939 provides, inter alia, that any organisation which raises or attempts to raise or maintain a military or armed force in contravention of the Constitution shall be an unlawful organisation. Section 19 of the 1939 Act provides that it shall be lawful for the Government by order to declare such an organisation is an unlawful organisation and ought in the public interest to be suppressed. To date two such orders have been made: the Unlawful Organisation (Suppression) Order 1939 declares the organisation styling itself the Irish Republican Army (also the IRA and Óglaigh na hÉireann) an unlawful organisation and the Unlawful Organisation (Suppression) Order, 1983 declares the organisation styling itself the Irish National Liberation Army (also the I.N.L.A.).

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12. The advice of the Attorney General was sought in June 1997 on the question of making a new suppression order in respect of the organisation known at that time as the Continuity Army Council and now referred to as the so-called C.I.R.A. The Attorney General's advice is at Appendix 4. It was considered unnecessary on the basis of that advice to make an order in respect of CAC/CIRA and, subsequently likewise considered unnecessary to make such an order against the group styling itself the "Real" IRA. There could well be a danger in so doing now as such action could give rise to doubt in regard to actions the Gardai have taken based on that advice.

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Appendix I

## Incidents Attributable to 32IRA/CIRA

| Type | Date | Location | Comments |
|---|---|---|---|
| Car Bomb | 6/1/1998 | Banbridge, | Car bomb disrupted. No claim. Originally attributed to CIRA but subsequent events throw doubt on this. |
| HME Find | 7/1/1998 | Howth Pier, Howth, Co. Dublin. | 1.5 tons of HME recovered. Four arrested. Two are Movement members of the newly formed 32 County Sovereignty Movement. |
| Bomb Explosion | 24/1/1998 | River Club, Enniskillen | No claim, however a device recovered was similar to those used in attacks attributable to CIRA. |
| Car Bomb | 20/2/1998 | Moira, | No claim, no forensic clues, secret & sensitive intelligence indicates that the new grouping are responsible. |
| Car Bomb | 23/2/1998 | Portadown | No claim, no forensic clues, secret & sensitive intelligence indicates that the new grouping are responsible. |
| Explosive device located | 23/2/1998 | Redhills, Co. Cavan | No claim. Comprised booster tube, det cord and HME. Believed to have been under CIRA control. |
| HME Find | 3/3/1998 | Hackballscross, Co. Louth | Car bomb with 600lbs of HME an Ireco Detonator and the new type Time & Power Unit |
| Mark 17 Mortar | 10/3/1998 | Armagh City | No claim, no forensic clues, secret & sensitive intelligence indicates that the new grouping are responsible. |
| HME Find | 21/3/1998 | Dundalk, Co. Louth. | Identical to Hackballscross car bomb only this time it is almost twice the size. Two 32 CSM activists arrested. |
| Mark 17 Mortar | 24/3/1998 | Forkhill | Same as device in Armagh and fitted with new type timer. |
| Mark 17 Mortar | 24/3/1998 | Grassdrumman | Same as device in Armagh |

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| | | | and fitted with new type timer. |
| Incendiary Device | 27/3/1998 | Boucher Road, Belfast | Same type incendiary device as manufactured in Crosskeys. Failed to ignite. |
| HME Find | 2/4/1998 | Dun Laoghaire, Co. Dublin. | Huge car bomb constructed in an identical manner to those in Hackballscross & Dundalk. |
| Incendiary Device | 16/4/1998 | Carrickfergus | Same type incendiary device as manufactured in Crosskeys. Failed to ignite. |
| Car Bomb | 30/4/1998 | Lisburn | Car bomb disrupted. Made up in the same manner as previous devices in both NI and ROI |
| Armed Robbery | 1/5/1998 | Ashford, Co. Wicklow. | Armed robbery of cash in transit van, five arrested, one shot dead. |
| Mark 17 Mortar | 3/5/1998 | Lower falls Belfast | Fired at the RUC Station on Grosvenor Road. Failed to function |
| Mark 17 Mortar | 9/5/1998 | Belleek, Co. Fermanagh. | Fired at the RUC Station in Belleek. Failed to function |
| Car Bomb | 16/5/1998 | Armagh City | Car bomb containing 760lbs HME disrupted. Again the same construction as previous devices. |
| HME Find | 23/5/1998 | Dundalk, Co. Louth | Two cars were stopped close to the border. They were found to contain a total of 950lbs HME. The bombs were not yet primed |
| HME Find Partially exploded | 23/5/1998 | Finaghy Road. North, Belfast. | Man arrested after an attempted bombing of railway line. New type timing device present. |
| Explosion. | 22/6/98 | Drumintee, Newry | Explosion occurs on the side of the road at 0300. A mobile phone for remote detonation is recovered at the scene. |
| Explosion | 25/6/1998 | Newtownhamilton | Claimed by INLA, INLA man charged, but a strong smell of collusion. |
| Incendiaries & Semtex bomb | 10/7/1998 | London. | AN ASU are arrested and found to possession 6 incendiary devices, Semtex |

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| | | | and a Time & Power Unit. |
| Mark 15 Mortar | 22/7/1998 | Newry | "Barrack Buster " appears for the first time. |
| Car Bomb | 1/8/1998 | Banbridge | Large car bomb exploded injuring many and causing widespread damage. Claimed by "Real IRA" |
| Explosion | 6/8/1998 | Omeath | Large explosion and crater, probable test of HME |
| Car BOMB | 13/8/1998 | Omagh | Car bomb kills 28 and hundreds injured |
| Incendiaries | 15/8/1998 | Belfast | Seven incendiaries were planted in various locations around the city, three functioned. |
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Roinn an Taoisigh
Department of the Taoiseach

**National Archives Act, 1986, Regulations, 1988**

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**Date:** 29/11/22

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Appendix 3

General Scheme of

# Offences Against the State (Amendment) Act

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1. Membership of an unlawful organisation

A. Inferences re membership

(1) Where in any proceedings against a person under section 21 of the Offences Against the State Act, evidence is given that the accused -

(a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to such an offence or

(b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it

failed to answer any question material to the investigation of the offence which in the circumstances existing at the time he or she could reasonably have been expected to answer when so questioned, charged or informed, as the case may be, then the court in determining whether to send forward the accused for trial or whether there is a case to answer and the court [or subject to the judge's directions, the jury] in determining whether the accused is guilty of the offence charged may draw such inferences from the failure as appear proper; and the failure may on the basis of such inferences be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence, but a person shall not be convicted of the offence solely on an inference drawn from such failure.

(2) For the purposes of subsection (1) any question material to the investigation shall include any question requiring the accused to give a full account of his or her movements, actions, activities or associations during any specified period

(3) For the purposes of subsection (1) failure to answer includes the giving of an answer which is false or misleading

(4) Subsection (1) shall not have effect unless the accused was told in ordinary language when being questioned, charged or informed, as the case may be, what the effect of such a failure might be.

(5) Nothing in this section shall, in any proceedings -

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged, in so far as evidence thereof would be admissible apart from this section, or

(b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could be properly drawn apart from this section.

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This section shall not apply in relation to failure to answer a question if the failure occurred before the commencement of this section.

**B. Notification of witnesses**

Provide that

On a trial for an offence under section 21 of the Offences against the State Act the accused shall not without the leave of the court call any other person to give evidence in his or her defence unless before the end of the prescribed period he gives notice of particulars of such witnesses.

Note
Head B will require a person on trial for membership of an unlawful organisation to give advance notice to the prosecution of any witnesses he or she intends to call in his or her defence. The head is based on section 20 of the Criminal Justice Act, 1984 which requires this procedure in relation to witnesses providing an alibi. The head will need to be expanded to adapt the procedures and safeguards included in section 20.

Consideration will also be given, in consultation with the Attorney General, to including a provision along the following lines:

Amendment of section 3 of OASA (Amendment) Act, 1972

[Add subsection (2)(a) to section 3]

Provide that

(1) At the hearing of a trial for an offence under Section 21 of the Offences against the State Act, 1939, where evidence of a member of the Garda Síochána not below the rank of Chief Superintendent has been given pursuant to subsection (2) and where the court hears evidence of activity or association on the part of the accused which satisfies the court that there are reasonable grounds for the belief that the activity or association in question is activity or association connected with membership of an unlawful organisation, then the court may treat such evidence as evidence of corroboration of the evidence given by the Chief Superintendent.

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## 2. Inferences from failure of an accused person to mention particular facts

Provide that

Make similar provision to section 7 of the Criminal Justice (Drug Trafficking) Act, 1996 in relation to persons charged with an offence under the OASA or a scheduled offence under that Act where the maximum penalty is 5 years or more.

Note
Section 7 of the Criminal Justice (Drug Trafficking) Act, 1996 allows a court to draw inferences from the failure of an accused to mention during Garda questioning or on being charged any fact relied on in his or her defence which he or she could reasonably have been expected to have mentioned at the time. A person can not be convicted on such inferences alone but they can be treated as corroborating other evidence.

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### 3. Directing an unlawful organisation

Provide that

Any person who directs, at any level, the activities of an organisation in respect of which a suppression order has been made under section 19 of the 1939 Act will be guilty of an offence and liable on conviction on indictment to life imprisonment.

Note
The maximum penalty for a membership offence is 7 years. This will provide a penalty of up to life imprisonment for persons guilty of "directing" an unlawful organisation. See section 29 of UK N.I. (Emergency Provisions) Act, 1996.

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**4. Possession of items intended for purposes connected with specified scheduled offences**

Provide that

(1) A person is guilty of an offence if he or she has any article in his or her possession in circumstances giving rise to a reasonable suspicion that the item is in his or her possession for a purpose connected with the commission, preparation or instigation of an offence of a scheduled offence for the purposes of the Offences Against the State Act, 1939

(2) It shall be a defence for a person charged with an offence under this section to prove [on the balance of probabilities] that at the time of the alleged offence the article in question was not in his or her possession for that purpose.

(3) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or for a term of imprisonment not exceeding 10 years or to both.

Note
See section 32 of UK NIEPA and section 16A of the Prevention of Terrorism (Temporary Provisions) Act, 1989. Its purpose is to allow action to be taken against a person found in possession of articles which while commonplace are known to be used in the manufacture of bombs. The offence places an onus on the defendant in terms of proof.

The reference to scheduled offences will relate this offence to explosives and firearms offences.

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## 5. Unlawful collection of information

Provide that

(1) It shall be an offence for a person to collect, record, or possess information which is of such a nature that it is likely to be useful in the commission of an offence under the Offences Against the State Act, 1939 or the schedule to that Act

(2) It shall be a defence for a person charged with an offence under this section to prove [on the balance of probabilities] that at the time of the alleged offence the article in question was not in his or her possession for such purpose.

(3) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or for a term of imprisonment not exceeding [x] years or to both.

Note
See UK Prevention of Terrorism Act.

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**6. Withholding Information**

Provide that

(1) A person is guilty of an offence if he or she has information which he knows or believes might be of material assistance in

(a) preventing the commission by any other person of an offence under the OASA or a scheduled offence for the purposes of that act or

(b) securing the apprehension, prosecution or conviction of any person for an offence involving the commission, preparation or instigation of a scheduled offence

and fails without reasonable excuse to disclose that information as soon as possible to a member of the Garda Siochana.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or afor a term of imprisonment not exceeding five years or to both.

Note
See section 18 of the PTA.

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**7. Powers of detention**

[Amend section 30 of the Offences Against the State Act, 1939 to]

Provide that

(A) An officer of the Garda Síochána not below the rank of chief superintendent may apply to a judge of the District Court for a warrant authorising the detention of a person detained pursuant to a direction under subsection (3) of this section for a further period not exceeding 24 hours if he or she has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

(B) On an application under subparagraph (A) the judge concerned shall issue a warrant authorising the detention of the person to whom the application relates for a further period not exceeding 24 hours if, but only if, the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.

Note
See section 2 of the Criminal Justice (Drug Trafficking) Act, 1996. The provision would allow a person charged under section 30 of the 1939 Act to be held for a maximum of 72 hours, the final 24 hours being subject to approval by a court.

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**8. Training persons in the making or use of firearms**

Provide that

(1) A person who without lawful authority or reasonable excuse instructs or trains another or receives instruction or training in the making or use of firearms, explosives or explosive substances is guilty of an offence.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or afor a term of imprisonment not exceeding ten years or to both.

Note

See section 34 of the EPA.

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