Survivors and Victims of Institutional Abuse in Northern Ireland

Submission to the Historical Institutional Abuse Taskforce of the Northern Ireland Executive

May 13 2011

We, the survivors and victims of institutional abuse in Northern Ireland, welcome the specific commitment from the Northern Ireland Executive, given on December 16 2010, to establish an inquiry into historical institutional abuse in Northern Ireland.

We accept this announcement to be a clear acknowledgement by the Executive that the primary duty to defend our rights lies with the State. An inquiry will be one element of a process which will enable it to fulfil its duty to deliver an inquiry process which is independent, impartial and capable of delivering justice.

Participation in decision-making
Everyone whose rights are affected has the right to participate in all relevant decisions on the establishment of an inquiry process, decisions about forms of redress and about the nature and delivery of support by the State. The State has an obligation to meet with and listen to victims and survivors and to consider submissions from them. The survivors group welcomes the invitation to meet with and make submissions to the Inter-departmental Task Force established by the NI Executive and insists that this participative approach be maintained throughout the consultation and decision-making process for an inquiry, redress process and support and advocacy services. This means that there should be recognition from the outset that survivors must be able not only to give evidence but to participate in the inquiry process in other ways. Consideration must also be given as how best to facilitate engagement in this process from those victims and survivors not currently resident within Northern Ireland.

Opportunities to participate must be proactively extended to survivors whether affiliated or not with this or other organised groups and the government must take steps to ensure that such participation is possible and accessible. To enable people to participate appropriate information should be available in accessible formats, and necessary support and opportunities for engagement should be provided to those resident inside and outside Northern Ireland.
Victim participation will be key in establishing confidence and trust in this process. In addition to facilitating such participation through legal representation, protocols must be established from the outset to ensure that adequate support is given to survivors for the duration of the Inquiry. It is important to recognise that hearing or giving evidence may be a traumatic experience for many of those involved and trained professionals should be available to provide help and assistance to those who require it. This means that there should be adequate funding for any support structures or special measures to ensure that participation in the Inquiry is always supported to allow it to be a safe experience. Guidance on how to establish such protocols should be sought from those with relevant experience of working in this field.

The Task Force should establish a ‘reference group’ of survivors who could assist in ensuring that survivors’ voices are heard throughout the decision-making and design processes. It is important that this group should be drawn from a representative diverse and broad cross section of this population.

**Independent Public Inquiry**

The establishment of trust in such an Inquiry from its initial establishment by both survivors and the public will be fundamental to its overall success. As inquiries are established to address grave matters of public concern, this inquiry must be subject to rigorous public scrutiny which will allow for the trust which is so fundamental to the integrity of the inquiry process.

It is our view that anything short of an independent, public, judge-led Inquiry, supported by a panel of people with acknowledged expertise in the challenging and sensitive issues which will be covered, will fail to provide the necessary transparency and would not enjoy the confidence of those who lost their childhoods at the hands of those who were meant to be caring for them. Panel members must be recognised as independent and expert. Given the possible responsibility of the State and its agents, as well as the responsibility of non-State institutions and agents which, nonetheless have positions of influence in this society, consideration should be given to a Chairperson and / or inquiry panel members from outside the jurisdiction of Northern Ireland.

We believe any inquiry should allow an opportunity for the victims’ voices to be heard, identify the systems failures and the individual and institutional perpetrators of abuse and include the possibility of consequent prosecutions. It should also be able to pronounce on the failings of the system which allowed these abuses to take place and make recommendations to ensure that such abuses can never happen again.

It is important that an inquiry should not solely be based in Belfast, but that hearings are held across Northern Ireland in order to facilitate access to the inquiry for as many people
as possible. We suggest that the inquiry should also sit in Londonderry/Derry and Armagh.

**Legal framework**

The group has considered, at some length, the optimum legislative framework for the establishment of an inquiry into historical institutional abuse in Northern Ireland.

The Group is keen that an Inquiry is established and is up and running without undue delay and with the appropriate powers and terms of reference to deliver truth and justice for the hundreds of victims and survivors of institutional abuse here.

For very good reason there was strong opposition to the introduction of the Inquiries Act 2005. Such opposition remains strong among human rights organisations and lawyers worldwide.

The survivors’ group is concerned that the 2005 Act could threaten the independence of an abuse Inquiry given Ministers’ powers under the Act, in particular to restrict public access and evidence and the absence of any requirement for victims to be involved in or consulted on the process of setting up an inquiry or formulating the terms of reference.

However, we note that the concerns with regards to the independence of the 2005 Act inquiries and the abuse of ministerial powers has, to date, been more a problem in principle rather than in practice\(^1\).

In order to conduct a thorough and wide ranging investigation, the Inquiry may have to obtain evidence from the police, other statutory authorities, as well as non-statutory agencies and individuals. It is acknowledged that the powers under the 2005 Act have been successful in compelling witnesses to give evidence or disclose documents to previous inquiries and, given experience in other jurisdictions, will likely be necessary in this Inquiry.

Given that an alternative non-statutory model could find itself without adequate powers and a new framework could add years to an already long process, the Group proposes that the Inquiry be established under the Inquiries Act 2005, but only alongside public assurances from government that the most repugnant of the discretionary ministerial powers will not be exercised.

\(^1\) Page 10 Paragraph 38 Memorandum to the Justice Select Committee – Post Legislative Assessment of the Inquiries Act 2005. See also page 10, paragraph 39 which states, “Based on the overwhelming evidence from those we consulted in our review, our overall assessment of the 2005 Act is that it operates well in practice, albeit minor amendments may be needed in some aspects. However, several adverse comments have been received in relation to the operation of the Inquiry Rules”.
It will be helpful in establishing confidence to have a Governmental statement formally committing itself to the principle of independence for the Inquiry as it begins its work. It is also important that there is no scope for interference with or undermining of the Inquiry’s work by any other interested parties.

Resources to Inquiry
An inquiry into historical child abuse will necessarily demand legal input. This does not merely mean the appointment of Counsel for the Inquiry, but also of a strong legal team with relevant expertise in the issues to be addressed, an “investigative, inquisitorial panel.” Other barrister/solicitor advocates could be paid per day to make oral representations.

It has been observed that the Investigation Committee of the Ryan Commission was “over lawyered”, with the effect of sometimes causing further distress to witnesses. In order to avoid similar re-traumatisation, consideration should be given to the most appropriate means of questioning victims and witnesses to the Inquiry.

Victims and survivors are entitled to legal representation and this should be available at public expense. However, we do not believe that this means each person should be represented by a different lawyer. In order to prevent the logistical and resource issues which this would entail, we suggest the establishment of a panel of lawyers. This panel should be recruited from a wide cross section of the legal profession. Its membership should be diverse and comprised of lawyers with differing expertise and interests. Membership of this panel should not be restricted to Belfast based lawyers as it is important that people are able to access legal representation which is relatively local to them. There should also be public funding for any relevant expertise which may be required.

Delivering justice
While abuse survivors acknowledge that with the fading of memories and the disappearance or degradation of physical evidence, and other difficulties, it may be difficult for criminal prosecutions to result from the Inquiry process. Yet, the process must be designed to ensure that such prosecutions are not precluded, should sufficient evidence be available.

Survivors are opposed to immunity deals being offered to individuals or institutions in exchange for cooperation with the Inquiry, unless there are compelling reasons for doing so in relation to particular witnesses, to be dealt with on an individual case-by-case basis.

It is important that the Inquiry’s work is not hampered by alleged perpetrators refusing to give evidence or answer certain questions on the grounds that they could be incriminating themselves. It is therefore important to consider any assurances which could be given to
such individuals to ensure cooperation with the Inquiry and to stress that such assurances as are given must be limited to those which are necessary to ensure that the inquiry can fulfil its task. Outside such assurances, the Inquiry should be given the power to draw an adverse inference from any individual’s lack of disclosure.

**Delivering truth**

Survivors wish society to publicly acknowledge the hurt which was inflicted on many vulnerable children throughout the decades while in institutional care in Northern Ireland.

To that end, unless there are compelling legal reasons, the inquiry must be heard in public.

Alongside the judicial inquiry, a narrative gathering process which would take testimony from all who seek to do so, would provide a broader public record of the historic abuse.

The report of the Inquiry should be published in full upon completion. People’s narratives should also be made available to them.

**Human rights standards**

According to international human rights standards, such as the United Nations Convention on the Rights Of The Child, the Universal Declaration of Human Rights and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Inquiry must be capable of identifying individuals who could be made liable to prosecution, and also independent, impartial, thorough and effective. It should also be subject to public scrutiny and allow for the participation of victims and survivors as required by international law.

The Scottish Human Rights Commission has produced an overview of the applicable international human rights standards relevant to inquiry and redress for survivors of childhood abuse. The analysis sets out:

- the applicable international law and relevant standards from the 1920s to the present day;
- State responsibility for actions of State agents, public authorities and private persons and for failure to prevent abuse and protect private individuals;
- the obligation on the State to investigate and prosecute for abuse, and to provide appropriate redress for violations;
- how the issue of time-frames, time-bars and statutes of limitation may be addressed, as well as a range of implementation issues and their implications for the design and operation of inquiry and redress processes;

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2 A review of international human rights law relevant to the proposed acknowledgement and accountability forum for adult survivors of childhood abuse. Scottish Human Rights Commission, February 2010
- considerations on addressing the issue of apology and liability.

This analysis can be applied equally to the Northern Ireland context and demands close study by policy advisors and decision-makers at the Northern Ireland Executive.

International law obligations, such as the obligation to provide a remedy or to investigate, are not extinguished by national laws. The international standards should be regarded as non-negotiable and the process established in Northern Ireland must ensure adherence.

The right to effective remedy includes the right of victims, their families and security to know the truth about the violations suffered, including the identification of alleged perpetrators and the causes and facts of the violations and the circumstances under which they occurred. Remedies for survivors of abuse must be practically and effectively accessible to them, not just formally available.

**Terms of Reference**

It is important that these are established carefully as they will determine the very shape of the Inquiry. To draw them too narrowly could restrict the scope of the Inquiry and, therefore, its findings and ultimate report. It is of crucial importance that survivors and/or their legal advisers and any relevant NGOs are consulted on the terms of reference to ensure that they are as inclusive as they need to be in order to ensure that the Inquiry is fully effective. The terms of reference must be sufficiently comprehensive to allow the Inquiry to pronounce not solely on those who committed abuse, but to examine the responsibility of all those who either failed to protect children, or acted to facilitate or cover up abuse. In addition to outlining the causes and circumstances of abuse, the terms of reference must ensure that the Inquiry is also able to identify the systemic failures underlying the abuse and the circumstances which allowed it to take place and to go on happening. The terms of reference should also be drafted to allow the Inquiry to make recommendations to ensure that such abuse is never able to happen again.

**Time period covered by Inquiry**

It is our considered view that while most of the cases the inquiry is likely to deal with will originate from the 1940s onwards, this inquiry should investigate all possible institutional abuse since the foundation of Northern Ireland in 1921. This is informed, in part, by approaches made to this group by abuse survivors, now aged in their eighties, whose abuse would have been perpetrated in the 1920s and 1930s, pre-dating the establishment of the Welfare State and more formalised arrangements for state responsibility for child welfare. These individuals, just as much as those whose abuse is more recent, equally deserve truth and justice. Arbitrary time limitations risk being indirectly discriminatory on the grounds of age and an unjustifiable exclusion. Differentiating between people based on the “historical” aspect of their experience does not appear reasonable.
A limitation of access to those who were resident for short periods would also be arbitrary. Serious ill-treatment can and did occur in a very short space of time.

We are aware that as a formality, approval must be sought from the Secretary of State for Northern Ireland to examine matters before the introduction of Direct Rule in 1972. We anticipate that political agreement between Westminster and Stormont will facilitate this formality and ensure that necessary arrangements are put in place as appropriate.

In human rights terms, as noted by the SHRC, the UN Committee against Torture holds the view that the full range of remedies should be available to survivors of historic abuse – applying today’s interpretation of remedies under UNCAT (that the full range should extend to victims of ill-treatment as well as torture) to historic conduct. In doing so the UN Committee has made no obvious distinction between duties to remedy ill-treatment which took place before or after ratification of the UNCAT.

**Duration of Inquiry**

In terms of timeframe, it is clear that an Inquiry lasting as much as a decade or more, such as occurred in the cases of the (Ryan) Commission of Inquiry into Child Abuse or the Saville Inquiry into the events of Bloody Sunday – would be inappropriate and unacceptable. Abuse survivors have already waited for an inordinate length of time for this issue to be given due attention and further unnecessary delay in reaching a successful conclusion of an inquiry process would cause further distress. It is also the case that many of abuse survivors are now at an advanced age and an overly long process of inquiry might mean that they never live to see a successful conclusion of that process.

However, given the potential number of victims / survivors and the potential time scales falling within the remit of an Inquiry, it is certainly realistic to estimate an Inquiry with a duration of at least several years. Any process of inquiry which demonstrated undue haste in dealing with such large subject matter is likely to be unsatisfactory, given the fundamental requirement for the Inquiry to be thorough and rigorous.

In setting any fixed time period upon the process, arrangements must also be put in place to ensure that this does not provide an incentive for delay or obstruction among those who may not wish to cooperate fully with the inquiry.

**Reparation**

3 In considering historic abuse since the 1950s in New Zealand the Committee recommended, “The State party should take appropriate measures to ensure that allegations of cruel, inhuman or degrading treatment in the "historic cases" are investigated promptly and impartially, perpetrators duly prosecuted, and the victims accorded redress, including adequate compensation and rehabilitation.” UN Committee against Torture, Concluding Observations, New Zealand, UN Doc. CAT/C/NZL/CO/5, 14 May 2009.
Reparation should, to the extent possible, redress all the consequences of the abuse suffered and re-establish the situation which would, in all probability, have existed if that act had not been committed.\(^4\) We agree with the SHRC when it notes that individual reparations should be based on the needs, views and circumstances of the individual and should be proportionate to the gravity of the violation and the resulting harm.\(^5\) In line with international human rights standards, reparations packages should include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.\(^6\)

International best practice guidance suggests that institutions should contribute to reparations packages to the extent to which they are accountable. While ensuring adequate, effective and prompt reparation is an obligation of the State, “in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.”\(^7\)

The survivors group believes that the State should act as direct provider of reparation to abuse victims.

In the context of a process designed to address child abuse suffered in Northern Ireland-based institutions, where these were operated by non-State parties, and where the abuse was carried out by individual private persons, it seems appropriate to the survivors group that such institutions and individuals should contribute, including financially, to the reparation, by compensating the State for its role in providing reparation.

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\(^4\) The European Court of Human Rights has stated, “A judgment in which it finds a breach imposes on the respondent State a legal obligation under [Article 46 of the ECHR] to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.”, Assanidze v Georgia, no. 71503/01, ECHR 2004-II, judgement of 8 April 2004, para. 198.

\(^5\) See views of the UN Special Rapporteur on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (legal paper, p 60) and research paper, p 31 where survivors clearly envisaged a wide range of reparations from which survivors could determine the appropriate reparations for themselves. p 36 “people should be able to choose the type of counselling/support they required”.


\(^7\) Van Boven Principles, IX, para 15. These are Basic Principles and Guidelines on the Right to Remedy and Reaparation for Victims of Gross Violations of International Humanitarian Law. They were approved by the General Assembly of the UN IN 2005. This has been the case in other contexts such as Ireland, where institutions such as churches have provided elements of reparation including compensation.
We believe a process of financial damages or compensation will be an essential part of any State response to the victims of institutional abuse in Northern Ireland. It will be imperative that such a process be non adversarial and streamlined.

Compensation
We believe that a process of financial damages or compensation will be an essential part of any State response to the victims of institutional abuse in Northern Ireland. It will be imperative that such a process be non adversarial and streamlined.

The amount of adequate compensation should be determined according to the gravity of abuse and all relevant circumstances. Compensation should ideally cover for any economically assessable damage, as well as other harm. In Ireland, the Residential Injuries Redress Board was enabled to determine compensation for widely defined instances of abuse, including physical, emotional, and sexual abuse as well as neglect.

Compensation should not have to be linked to prosecution or legal procedures, so separate mechanisms, such as a Redress Board, can be created to receive, adjudicate and respond to claims for compensation.

Rehabilitation
Rehabilitation measures such as therapy, counselling, education, training should also be provided where appropriate.

Statement of apology and recognition
There is now a widespread recognition that apologies can satisfy the desire of many for recognition of harm. Under international law an apology is also part of an individual’s right to redress.

The survivors ask for the First and deputy First Minister, on behalf of the Northern Ireland Executive, to make a public and ‘without prejudice’ apology in the Assembly chamber, as a formal recognition of the wrongs done and the ultimate responsibility borne by the State. It is our view that this should happen at an early opportunity, perhaps in unison with the announcement by the Executive of the establishment of the Inquiry to demonstrate that words are accompanied by action.

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8 “for example for physical or mental harm, lost opportunities including employment, education and social benefits, material damages and loss of earnings including earning potential, moral damage and any costs for legal or expert assistance and medical, psychological and social services”. See legal paper, pages 62, 86-87.
9 Research in Scotland suggests a majority of respondents supported the inclusion of therapeutic rehabilitation, drug and alcohol rehabilitation and education and training, as part of the Government response. Such an approach to rehabilitation has been found to be valuable in the Republic of Ireland.
Upon publication of the report of the Inquiry, presuming there are sufficient grounds to do so, a full and comprehensive apology should be made on behalf of the government in Northern Ireland, acknowledging the extent of the abuse, the responsibility for that abuse and the actions which will flow from the report findings. This should not excuse the individuals and institutions more directly responsible for the abuse, from making their own apologies.

International best practice, suggests a number of elements to a successful apology:\footnote{See SHRC legal paper, p 79.}
- an acknowledgement of the wrong done;
- accepting responsibility for the offence and the harm done;
- a clear explanation as to why the offence happened;
- expressing sincere regret;
- an assurance that the offence will not be repeated;
- actual and real reparations (or redress).

**Support for survivors**
The Executive should also urgently put in place a support and advocacy structure for survivors. This should address the emotional, psychological, advocacy and welfare needs as well as signposting those whose who may wish to approach the PSNI. It is important to recognise from the outset that many victims and survivors will present with complex needs. Some may find it difficult to engage with any institutions including those of the State.

This will involve the provision of counselling, family tracing, educational and training needs, housing and health requirements, and advocacy and advice in navigating the civil and criminal law aspects of taking forward complaints.

**Timescales**
Whilst we recognise the complexity of these issues, it is important that a credible and robust process be put in place now to ensure victims and survivors are afforded the justice and redress which we deserve. We look forward to the Executive making an announcement established the inquiry process before the summer recess commencing July 2011.