



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Historic Institutional Child Abuse
in Northern Ireland: Advice on the human rights
aspects of a public inquiry**

Introduction

Historic institutional child abuse is a very prevalent and deeply sensitive issue in Northern Ireland today. It is estimated that hundreds of individuals are affected. The abuses suffered include sexual, emotional and physical abuse and neglect in numerous church and State run institutions such as children's homes, training schools and orphanages, and by individuals exploiting their positions within such bodies.

This is a significant issue for the Northern Ireland Human Rights Commission and it is one in which we have been involved since the Chief Commissioner and staff met with a victim and their political representative in September 2009.

The Northern Ireland Executive recently decided to hold an inquiry into institutional child abuse in Northern Ireland. A task force has been established to liaise with government departments regarding the form the inquiry will take.

In light of this decision by the Northern Ireland Executive, this advice paper has been prepared detailing the issues concerned with the establishment of a public inquiry from a human rights perspective. Focus has been given to the issues around the legislative framework for a public inquiry, the international and domestic human rights standards relevant to a public inquiry and

the human rights benchmarks in place for terms of reference for a public inquiry drawing on the experiences in Scotland and the Republic of Ireland.

1. Legislative framework for a public inquiry

- A public statutory inquiry into historical institutional child abuse can only be brought under the Inquiries Act 2005.
- Under the Inquiries Act 2005, matters encompassing religious orders can only be investigated by a Northern Ireland Executive Minister if the matter itself occurred in the jurisdiction of Northern Ireland (Section 30 of the Inquiries Act 2005).
- The alleged child abuse must have occurred in Northern Ireland.
- Any inquiry into institutional child abuse would mean an inquiry into matters relating to policing and justice. The matters under investigation would be actual or potential criminal offences.
- Section 30(4)(b) of the Inquiries Act 2005 provides that the power to institute a statutory inquiry may be exercised only “for the purpose of enquiring into something that is, and was at the relevant time, wholly or primarily a Northern Ireland matter”.
 - A “Northern Ireland matter” means a matter that relates to Northern Ireland and is devolved to the Northern Ireland government.
 - An inquiry cannot take place into matters that occurred outside Northern Ireland.
 - An inquiry also cannot look into any policing and justice matters that occurred between 30 March 1972 when Direct Rule was introduced in Northern Ireland and 12 April 2010 when policing and justice was again devolved to Northern Ireland.
 - Section 30(3) of the Inquiries Act 2005 would also require the consent of the Secretary of State for an inquiry to look into any matters occurring before 30 March 1972.

With regards to matters occurring between 1972 and 2010, the Secretary of State could set up an inquiry that covered the period

1972 to 2010. He could also cause that inquiry to consider matters before or after that period under Section 27(2) and (3) of the Inquiries Act. Before doing so, the Secretary of State would be required to consult with (but not necessarily obtain the agreement of) the Northern Ireland Executive.

Compatibility with Articles 2 and 3 ECHR

The European Court of Human Rights in *Jordan v UK* (2003) 37 EHRR 52 considered that Article 2 of the Convention required that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.

Five elements have been identified:

- 1) The persons responsible for carrying out the investigation must be independent from those implicated.
- 2) The investigation must be capable of leading to the identification and punishment of those responsible. The authorities must have taken all reasonable steps available to secure the evidence concerning the incident.
- 3) The investigation must be prompt.
- 4) There must be public scrutiny of the investigation or its results sufficient to secure accountability.
- 5) The next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his/her justifiable interests.

The essential elements of an effective official investigation under Article 2 are equally applicable in circumstances where an inquiry under the Inquiries Act is investigating allegations of Article 3 ill-treatment (*Aksoy v Turkey* [1996] ECHR 68; *Assenov v Bulgaria* [1998] ECHR 98).

Compatibility issues with Articles 2 and 3 ECHR under the Inquiries Act 2005

As the powers under the Inquiries Act 2005 are discretionary, these issues may not arise. However, the powers do exist and could be implemented.

- **Section 11** gives the Minister power after consultation with the proposed Chairman to appoint experts to advise the Inquiry

prior to the setting up date. This power to decide the appointment of experts undermines the Inquiry's ability to control its own procedures and choose individuals whom it deems can best provide expertise.

- **Section 12** gives the Minister power to remove the Chairman and members of the Inquiry panel. This amounts to a degree of control over the Inquiry which undermines the Inquiry's independence.
- **Section 13** gives the Minister power to suspend the Inquiry. The proposition that the Minister as opposed to the Inquiry should decide suspension is inconsistent with the Inquiry's independence.
- **Section 14** gives the Minister power to terminate the inquiry. Even though reasons have to be provided to Parliament or the Northern Ireland Assembly, the ability of the Minister to do such over the head of the inquiry again undermines the independence of the Inquiry.
- **Section 19** gives the Minister power to make Restriction Orders; for example, restricting attendance or prohibiting disclosure or publication of evidence and documents. If employed, this could be a drastic curtailment of the independence of inquiries. This could also impact on the inquiry's ability to fulfil Article 2 obligations with regards to public scrutiny and the next-of-kin/victim's role in the Inquiry.
- **Section 25** places the responsibility of publication of the Inquiry in the hands of the Minister. The Minister can prevent publication of certain parts of the Report, exclude information from the report and edit the report. As such, the Inquiry's effectiveness could be undermined.
- **Section 39** gives the Minister power to refuse to pay any expenses resulting from the Inquiry acting outside its terms of reference. This again undermines the Inquiry's independence in that the Minister can impose a financial sanction on the Inquiry if they interpret the terms of reference more broadly than she or he considers appropriate.
- **Section 40(4)** makes the Chairman's award of expenses to a person subject to such conditions or qualifications as may be determined by the Minister. The Minister is given powers to set conditions on the ability of other interested parties to access public funding.

A non-statutory ad hoc inquiry

This type of Inquiry is not bound by procedural rules, but neither does it have the power to compel the attendance of witnesses or the production of documents. It is therefore essentially reliant on the cooperation of those involved. These tend to be used mainly where government or public bodies are under investigation.

A lack of statutory powers may impede the work of such an Inquiry, particularly in circumstances where the individuals involved may not co-operate willingly and where difficulties ensue regarding the production of evidence.

2. Human rights standards engaged

- 1) European Convention on Human Rights/Human Rights Act 1998 – Articles 2 and 3
- 2) UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- 3) UN Convention on the Rights of the Child

ECHR – State

- Article 3 ECHR imposes a specific duty to take measures designed to ensure that individuals within the jurisdiction are not subjected to torture or inhuman or degrading treatment, including treatment from private individuals. Such measures include a duty to ensure effective deterrence against ill-treatment and effective protection particularly in relation to children and other vulnerable persons.
- The European Court of Human Rights has found that States are responsible for ill-treatment from the moment at which they knew or ought to have known about the ill-treatment but not prior to this – *E and Others v UK* (2002).
- With regards to criminal liability, the Court, in *Okali v Turkey* (2006), has found that “when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible”.

ECHR – Private institutions and individuals

- The Human Rights Act 1998 does not provide directly for the application of Convention rights between private individuals. It only covers public authorities, or certain persons/bodies who exercise functions of a public nature (these individuals are liable only in respect of the performance of such functions). International human rights law on the responsibilities of private actors is still in its development stage.
- The State has an obligation to protect individuals from abuses through the application of criminal law.
- There must be a State link between child and institution (for example, a child is placed in an institution by the State through a Court Order or via social services).
- This State link does not require direct involvement with regards to placing a child in care or in a particular care institution, or paying for that care. There are many ways in which the State's obligations to children in care arise without requiring such a connection: for example, in the duty to ensure that the individuals providing care services are properly qualified and trained, in regularly inspecting and overseeing the services being provided by the care facilities, and in ensuring that systems are in place to keep children safe and investigate allegations of abuse.
- A duty also exists for the Police and Public Prosecution Service to properly investigate all allegations of criminal abuse. These State bodies are obligated to act appropriately on foot of any complaints made regardless of the date the abuse occurred. There is no set time-limit for the investigation.
- Any health and social care professionals in contact with children in care also have a duty to exercise their responsibilities appropriately, including by reporting any allegations or suspicions of abuse.
- If a body exercises functions of a public nature, then it is covered by the Human Rights Act 1998.

International obligations – State

- In 1991, the UK ratified the UN Convention on the Rights of the Child (CRC). The CRC provides that the best interests of the

child shall be a primary consideration in all decisions which affect the child:

- that States have positive duties to ensure the protection of children, and to ensure that all institutions responsible for the care of children conform with health and national safety standards as well as on the suitability of staff and supervision in such institutions (Article 3);
- it provides explicitly for the protection of the child from: “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child” (Article 19); and
- it provides for special protection for children who cannot in their own best interests be permitted to remain in the care of their families; and protection of the child from sexual exploitation and abuse (Articles 19 and 34).

CRC - Article 3:

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions ... the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”

The CRC includes many provisions on the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment:

- Article 19 provides for the right of the child to protection from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse” whoever has care of the child. The UN Committee on the rights of the child has stated bluntly that “there is no ambiguity: ‘all forms of physical or mental violence’ does not leave room for any level of legalized violence against children”.
- Interpreting mental violence, the UN Committee on the Rights of the Child has considered, “humiliation, harassment, verbal

abuse, the effects of isolation and other practices that cause or may result in psychological harm” to be prohibited. Negligent treatment suggests a duty of due diligence to prevent accidents to children.

- Article 25 of the CRC also contains a right of a child in care to “a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement”.

UN Convention Against Torture (UNCAT)

The UN Committee against Torture has summarised State responsibility under the Convention against Torture:

- The State will be responsible for the acts and omissions of its officials and of others acting in an official capacity.
- The State will also be held responsible where it failed to take effective measures to prevent ill-treatment, exercise due diligence to prevent and protect individuals from ill-treatment and to adequately and effectively investigate where reasonable grounds exist.
- State responsibility is imbedded in the fabric of the Convention. As such, there is no specific Article which deals specifically with State responsibility.

3. Human rights benchmarks for terms of reference

Section 5 – Inquiries Act 2005

Section 5 provides that:

- a) The Minister sets out the terms of reference of the Inquiry [Section 5(1)(b)(i)].
- b) There is no requirement that the Minister should consult with anyone prior to determining the terms of reference.
- c) The Minister may **at any time** amend the terms of reference if she or he considers that the public interest so requires [Section 5(3)]. Before doing so, she or he must consult with the person appointed as the Chairman [Section 5(4)].

In order to be Convention compliant:

- a) The Minister must consult with the alleged victim/s of Article 3 violations, about the terms of reference. The European Court of Human Rights in *Jordan v UK* (2001) stated that whilst the degree of public scrutiny required depends of the individual case, “**[i]n all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests**”. Consultation about the terms of reference of any inquiry is vital to ensuring Convention compliance.
- b) The Minister should not be empowered to narrow/restrict the terms of reference after the consultation process. The Minister should be enabled to broaden the terms of reference.

As the European Court of Human Rights concluded in the case of **McKerr v United Kingdom (2001)**, the requirements of an Article 2 examination may require wider examination than the determination of issues of individual responsibility. An inquiry should have at its focus the broader objective of “reassuring the public and members of the family”.

Thus, in order to be Convention compliant, the terms of reference cannot be too narrowly drawn and must be capable of addressing the broad circumstances of how the abuse occurred. Terms of reference narrowly or restrictively framed will undermine the ability of an Inquiry under the Act to be Convention compliant.

Purpose of Inquiry

Other models indicate that the Inquiry should have broad terms of reference given to it which has as its primary focus the provision of a sympathetic and experienced forum in which victims could recount the abuse they had suffered. The Inquiry should identify and report on the causes, nature and extent of physical and sexual abuse, with a view to making recommendations for the present and future. The overall objective of the Inquiry should be to reassure the public, the victims and members of the victim’s family.

Experiences in the Republic of Ireland and Scotland

Republic of Ireland

The Commission to Inquire into Child Abuse

The Commission to Inquire into Child Abuse was first established by the Irish Government on an administrative basis in May 1999. This

was one of a range of measures introduced by the Government to address the effects of abuse in childhood on the victims. The Commission to Inquire into Child Abuse Act, 2000 (the Act) was enacted on 26 April 2000.

The Commission, through a Confidential Committee, provided a forum for victims of abuse to recount their experience on an entirely confidential basis. The purpose of this Committee was to meet the needs of those victims who wanted to speak of their experiences but who did not wish to become involved in an investigative procedure. This Committee provided the Commission with a general report on the issues encountered in its work.

The Commission also had an Investigation Committee. This Committee facilitated victims who wished to both recount their experiences and to have allegations of abuse fully inquired into. This Committee also reported to the Commission.

In addition to being offered a hearing by the Commission and its Committees, counselling by a dedicated counselling service has been set up by the Department of Health and Children and is provided through the Health Boards is available for victims of abuse. This service still operates to date.

The Statutory Commission established under the Act has three primary functions:

- 1) to listen to victims of childhood abuse who want to recount their experiences to a sympathetic forum;
- 2) to fully investigate all allegations of abuse made to it, except where the victim does not wish for an investigation and
- 3) to publish a report on its findings to the general public.

Commission to Inquire into Child Abuse Act 2000

Section 1(1) Definition of Abuse (as amended by 2005 Act):

- a) The wilful, reckless or negligent infliction of physical injury on, or failure to prevent such injury to, the child,
- b) The use of the child by a person for sexual arousal or sexual gratification of that person or another person,
- c) failure to care for the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare, or

- d) any other act or omission towards the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare,

Section 4(1) – Functions of the Commission

- to provide, for persons who have suffered abuse in childhood in institutions during the relevant period, an opportunity to recount the abuse, and give evidence at the Inquiry,
- to inquire into the abuse of children in institutions during the relevant period,
- to inquire into the manner in which children were placed in, and the circumstances in which they continued to be resident in, institutions during the relevant period,
- to determine the causes, nature, circumstances and extent of such abuse, to determine the extent to which the institutions themselves in which such abuse occurred, the systems of management, administration, operation, supervision, inspection and regulation of such institutions, and the manner in which those functions were performed by the persons or bodies in whom they were vested, contributed to the occurrence or incidence of such abuse,
 - so as to afford to persons who have suffered such abuse in institutions during the relevant period an opportunity to recount in full the abuse suffered by them in an atmosphere that is sympathetic to, and understanding of, them, and as informally as is possible in the circumstances.

Scotland

In 2008, the “Acknowledgement and Accountability Forum”, a form of truth commission on historic child abuse, which was announced. This forms part of a national strategy for survivors of childhood sexual abuse. In late 2009, the Scottish Government announced that there would be a Pilot Forum in spring 2010. The Government’s decision to announce a pilot forum was made prior to the Scottish Human Rights Commission presenting its recommendations.

A human rights based framework for the Forum

The Scottish Human Rights Commission has been developing a human rights framework for the design and delivery of the Acknowledgement and Accountability Forum since March 2009. These recommendations amount to a 'road map' for the recognition of the human rights of people who have suffered historic human rights of this nature.

Pilot Forum established to:

- 1) listen to survivors
 - 2) validate survivors' experiences
 - 3) provide a historical record
 - 4) signpost available services for survivors and support, advocacy advice and info about these services
- people giving testimony would not be publicly named, but the accounts they give will form a public record
 - institutions or alleged abusers would not have the opportunity to speak
 - effective communications and outreach strategies are needed to ensure that everyone who is affected knows about the development and implementation of the forums and other available remedies
 - need to develop a comprehensive communications and outreach strategy to raise awareness of past and present childhood abuse
 - ensure involvement of victims in designing and implementing the programme
 - ensure full and effective participation of survivors and others whose rights are affected
 - Forum should be independent
 - in response to abuses, the State should ensure the victim's right to an effective remedy is upheld
 - accessible information should be made available to all survivors on violations and remedies
 - State is accountable to respect, protect, and fulfil the human rights of everyone, everywhere in its jurisdiction. State must ensure that its agents do not conduct abuses

- State should ensure effective access to justice, effective remedies and reparation
- ensure that all arguable claims of State failure to protect Article 2 and 3 rights trigger an effective official investigation. This should be accompanied by prosecutions where appropriate
- lessons from the pilot forum can lead to recommendations on steps which Scotland should take to ensure effective access to justice, effective remedies and full reparation
- identify law, policy and practice changes to alleviate the risk of repetition of abuse
- remedies should be made available to individuals who are directly affected including those indirectly affected such as relatives
- the Scottish Government should address the access to survivors to relevant information related to their care, for example: their files
- explore with survivors the support which would enable them to participate effectively in the forum and its successors, including psychological support.

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