

Submission to the National Confidential Forum Consultation



The Scottish Human Rights Commission

12 October 2012

The Scottish Human Rights Commission is a statutory body created by the Scottish Commission for Human Rights Act 2006. The Commission is a national human rights institution (NHRI) and is accredited with 'A' status by the International Co-ordinating Committee of NHRIs at the United Nations. The Commission is the Chair of the European Group of NHRIs and it is also a representative of Scotland on the Advisory Panel to the Commission on a Bill of Rights. The Commission has general functions, including promoting human rights in Scotland, in particular to encourage best practice; monitoring of law, policies and practice; conducting inquiries into the policies and practices of Scottish public authorities; intervening in civil proceedings and providing guidance, information and education.

1. Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to respond to the Scottish Government's consultation on a National Confidential Forum for survivors of childhood abuse (NCF). As the Government is aware the Commission has been engaged in promoting a human rights based approach to justice for survivors of abuse since 2009.¹

Before responding to the consultation questions the Commission would like to make the following introductory remarks. Firstly, as the Commission outlined in the Human Rights Framework to address historic child abuse in 2010,² survivors of serious ill-treatment, such as physical or sexual abuse or serious neglect, which may amount to inhuman or degrading treatment or punishment have a right to an effective remedy, including access to justice and reparation (including as appropriate satisfaction, rehabilitation, restitution, adequate compensation and guarantees of non-repetition).³ Depending on the nature of the perpetrator and the gravity of the harm the state also has an obligation to ensure effective official investigations or an alternative form of investigation sufficient at least to identify any state responsibility and systemic failures – that is to identify not only what happened (the “right to the

¹ For an overview of the Commission's work in this area see:

<http://www.scottishhumanrights.com/ourwork/care/adultprotection>

² SHRC, *A human rights framework for the design and implementation of the proposed “Acknowledgement and Accountability Forum” and other remedies for historic child abuse in Scotland*, Glasgow, February 2010, (hereafter Human Rights Framework),

<http://www.scottishhumanrights.com/application/resources/documents/SHRCHumanRightsFrameworkonAAF.doc>

³ See SHRC and Susan Kemp, *A REVIEW OF INTERNATIONAL HUMAN RIGHTS LAW RELEVANT TO THE PROPOSED ACKNOWLEDGEMENT & ACCOUNTABILITY FORUM FOR ADULT SURVIVORS OF CHILDHOOD ABUSE*, February 2010 (hereafter legal paper).

truth”) but why it happened (to ensure guarantees of non-repetition). The Commission considers that the statement in the consultation document that “we are aware that some of you will have an interest in more than the NCF”⁴ fails to recognise that survivors of ill-treatment have a human right to effective remedies which extend beyond a confidential forum which may form an element of satisfaction.

Secondly, the Commission considers the statement that the purpose of the Human Rights Framework produced by the Commission was to “develop a rights based approach to adult survivor policy”⁵ to be inaccurate. Consequently it is worth clarifying the context within which the Commission developed the Human Rights Framework and its purpose. In 2008 Scottish Ministers announced that they planned to trial a form of truth commission on historic child abuse which was later given the working title, “Acknowledgement and Accountability Forum”.⁶ In late 2009, the Scottish Government announced that a Pilot Forum (that became Time To Be Heard) would operate in Spring 2010 to listen and validate survivors’⁷ experiences, create a historical record, signpost to services available and test out a confidential committee model.⁸ Under contract by Scottish Government the Commission independently developed a human rights framework for the design and delivery of an “Acknowledgement and Accountability Forum” between March 2009 to February 2010. The Commission undertook this work as one element of delivering its 2008-2012 Strategic Plan which focused on the promotion and protection of human dignity through the promotion of a human rights based approach.

The consultation document on the NCF makes no reference to the Scottish Government’s 2008 consultation on “Acknowledgement and Accountability”. In the report of that consultation the Government noted the proposal had received a “very positive endorsement”⁹ and that “there was unanimous agreement from the respondents that it would be a good idea to trial an acknowledgement and accountability forum”.¹⁰ Respondents were reported to have found the aim of “identifying for current institutions additional ways of safeguarding children and

⁴ Scottish Government, *National Confidential Forum – a consultation on the creation of a forum for adult survivors of childhood abuse in residential care*, Edinburgh, July 2012, (hereafter Consultation document) p iv.

⁵ Ibid, p 4.

⁶ “I am pleased to inform Parliament that we have been actively scoping the adaptation of the principles of a truth and reconciliation model. We are committed to that. We are considering good practice examples for establishing a forum to give survivors the chance to speak about their experiences and to help them come to terms with the past. That will provide an invaluable opportunity to establish the facts, learn from the suffering and use the experience to help us protect and provide for children in the future.” Adam Ingram MSP, Minister for Children and Early Years, Official Report of the Scottish Parliament, 7 February 2008,

<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-08/sor0207-02.htm>

⁷ Throughout, this paper refers to “survivors” on the understanding that this term is most frequently used in Scotland by those individuals themselves who have experienced abuse as children. International human rights law is built on the foundation that all individuals are born free and equal in dignity and rights. The choice of terminology is therefore motivated primarily by the importance of self-identification.

⁸ The Government’s decision to announce a pilot forum was made independently of and prior to the Commission presenting the Human Rights Framework which also therefore included recommendations directed to the design of what became known as Time To Be Heard.

⁹ Scottish Government, *Consultation on the proposal to develop an Acknowledgement and Accountability approach for Adult Survivors of Childhood Sexual Abuse*, Edinburgh 2009, p2.

¹⁰ Ibid, p3.

young people in care” to be integral.¹¹ A second Government consultation focussed on engaging with survivors reported that *“most survivors agreed that abusers and organisations that looked after children should be held accountable.”*¹²

As the Government is aware, the Commission continues to pursue the implementation of the full range of recommendations which it made in the Human Rights Framework. These include elements of accountability as well as acknowledgement. In this context we welcome the commitment by the Minister for Public Health, on behalf of the Government, to engage with the process of human rights InterActions which is currently being prepared with the support of the Centre for Excellence in Looked After Children in Scotland (CELCIS).¹³

Consultation Questionnaire

Q1. Do you agree or disagree with the purpose of a National Confidential Forum?

Agree Disagree No preference

The Commission considers that a confidential committee which enables survivors to recount their experience and have them acknowledged and recorded by an official or public body may be an element of satisfaction for some survivors, and as such an element of a broader package of effective remedies. The Commission has consistently reiterated its view¹⁴ that a confidential forum should operate alongside a range of other options for justice and remedies for survivors including:

- effective access to justice (including steps to review the operation of the Prescription and Limitation (Scotland) Act 1973 or the so-called “time bar”);
- an investigation mechanism sufficient to establish not just what happened but why and how more effective steps can be taken in the future to prevent repetition. This may be through a public inquiry such as that currently being prepared in Northern Ireland, taking an inquisitorial rather than an adversarial approach;

¹¹ Ibid, p 5.

¹² Scottish Government, *Summary of Additional Survivor Responses to the Consultation: February - April 2009*, <http://www.scotland.gov.uk/Publications/2009/09/22144103/1>. However the Commission noted a lack of clarity among survivors and others on forms of accountability of different bodies and how these may form a component of the Forum and other remedies. This is notable in the initial summary of responses to the Scottish Government’s consultation (supra) which noted divided responses on the question of whether the Forum could or should be a mechanism for holding different actors - the Government, the institutions, individuals, to account. The Commission has noted that there does not appear to have been support in the consultation to enable participants to fully appreciate how the various forms of accountability for different institutions and public bodies might work in practice – some respondents for example expressing the view that sharing accountability could dilute it. In contrast, the second – more focussed and supported consultation – of the Scottish Government noted *“most survivors agreed abusers and organisations should be held accountable”*. See Human Rights Framework, p 20.

¹³ For more information see www.shrcinteraction.org

¹⁴ See for example evidence presented by the Commission to the Public Petitions Committee of the Scottish Parliament, 29 November 2011, http://news.bbc.co.uk/democracylive/hi/scotland/newsid_9649000/9649897.stm

- a package of reparations including rehabilitation and restitution (including measures provided under the SurvivorScotland strategy), adequate compensation, and other forms of satisfaction such as effective apologies.

The Commission hopes that the InterAction process which it is currently preparing with CELCIS will enable the development of an action plan to advance a broader framework of justice and remedies for survivors of historic child abuse.

When Scottish Ministers first announced their plans to hold a form of truth commission on historic child abuse, they indicated that it would “*establish the facts*”. This aim will not be achieved by the NCF as it would require a degree of investigation.¹⁵

The present consultation document lists learning lessons to prevent abuse in the future and protect rights more effectively in the future under “purposes of the NCF”.¹⁶ These aims would be more effectively served by a mechanism which was capable of identifying not only what happened but why. That would require powers sufficient to inquire into the operation of prevention and protection regimes at the time.

Q2. Do you agree or disagree that the Forum should operate independently from Government?

Agree Disagree No preference

The Commission reiterates its recommendation that everyone involved seek the greatest possible functional independence for a forum of justice or remedies for historic child abuse.¹⁷

¹⁵ As the Minister stated at the time “*I am pleased to inform Parliament that we have been actively scoping the adaptation of the principles of a truth and reconciliation model. We are committed to that. We are considering good practice examples for establishing a forum to give survivors the chance to speak about their experiences and to help them come to terms with the past. That will provide an invaluable opportunity to establish the facts, learn from the suffering and use the experience to help us protect and provide for children in the future.*” Adam Ingram MSP, Minister for Children and Early Years, Official Report of the Scottish Parliament, 7 February 2008, <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-08/sor0207-02.htm>

¹⁶ Consultation document, para 16.

¹⁷ See Human Rights Framework, p 4.

Q3. Should the Forum

(a) be integrated into another public body ?

Agree Disagree No preference

(b) be a separate unit within another public body?

Agree Disagree No preference

The Commission considers that the aims of the NCF would be most effectively achieved by a body established solely for that purpose.

Q4. Do you agree or disagree that all adults who were placed in residential care by the State should be eligible to take part in the National Confidential Forum?

Agree Disagree No preference

In the Human Rights Framework the Commission recommended that the Scottish Government:
*“7. make available each of the elements of effective access to justice, effective remedies and reparation to all survivors of childhood abuse without discrimination”.*¹⁸

¹⁸ Human Rights Framework, p 5.

Q5. Do you agree or disagree that the process should be the same for all participants, regardless of whether they regard themselves as survivors of abuse in residential childcare?

Agree Disagree No preference

The Commission does not offer any views in respect of this question at the present time.

Q6. Do you agree or disagree that people who were in the following types of residential care should be included:

- residential schools and children’s homes
- residential educational provision for children with special needs
- long-stay hospital provision for children with acute medical and/or mental health needs
- secure accommodation

Agree Disagree No preference

In the Human Rights Framework the Commission noted that *“There should be no arbitrary limitation to specific types of institution in which people were placed. Shaw noted that it is in practice very hard to differentiate between different types of historic institutions for children.”*¹⁹

¹⁹ Legal paper, p 7.

Q7. What other support do you consider that participants would benefit from before, during and after the Forum?

In the Human Rights Framework the Commission identified the following in terms of support to enable survivor participation in any such forum:

“2.4.1 Access to relevant information concerning violations and reparation mechanisms.

This element of the right to an effective remedy requires informing the general public and, in particular, survivors of their rights and the remedies available to them. It includes information on “all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes [of the abuse of their human rights, both the immediate causes as well as the systematic causes] and to learn the truth in regard to these violations.”²⁰

Recommendation:

[In designing the NCF] the Scottish Government [and Parliament] should seek to address the access of survivors to relevant information related to their care (e.g. addressing barriers faced by survivors in accessing their files).²¹

2.4.2 Ensuring adequate support to enable all of those whose rights are affected to become involved:²²

Enabling participation, particularly of those who are marginalised or in vulnerable situations, requires the provision of appropriate forms of support. Such support may include psychological support, support workers or advocacy support before and after participants provide testimony,²³ mechanisms and materials to support involvement,²⁴ capacity to provide testimony by video link.²⁵ Research also suggests support will be needed for current and former staff of institutions.²⁶

The State has the obligation to protect the physical and mental health of those participating in (or cooperating with) the [NCF], as well as the [NCF] staff and third parties affected by its work, including through taking steps to protect their mental health²⁷ and protection from attacks on life, physical or mental integrity²⁸ by private

²⁰ Van Boven Principles, X, para. 24.

²¹ See Legal paper, p 35-36; research report, p 36, 37, 39.

²² Some survivors who participated in the research project felt this would be valuable (research report, p 37).

²³ Ibid.

²⁴ E.g. Truth and Reconciliation Canada uses a “memory book” to support survivors to make statements. The book provides accessible information on context, the role of the TRC, consent forms and prompt questions.

²⁵ Survivors raised this during research, (research report, p 33, 44).

²⁶ Moyra Hawthorn, “Historic abuse in residential care: sharing good practice”, SIRCC, In Residence, No 4, December 2006.

²⁷ Experience from Ireland, shared during the preparation of this framework suggests that, far from therapeutic, the experience of recalling historic abuse, even in a confidential forum, may have a

individuals. This may also require training for staff in preparation for exposure to distressing information and situations, and protection against intimidation or reprisals.²⁹ Survivors or witnesses as well as Commissioners or staff may risk threats, intimidation or even attacks, particularly if there is a lack of proper outreach by the [NCF] explaining its non-criminal function and its confidentiality procedures. Alleged perpetrators or those with similar names may risk intrusion by the media, suspension from employment or even physical attacks from the public, if the [NCF] stored information is not properly protected and reports redacted.

In terms of the treatment of survivors through the process, given the varying definitions of victim and that the different facts will be not known until after their testimony, the [NCF] would be advised to adopt the minimum guidance in the UN Victims Declaration:³⁰

- victims should be treated with compassion and respect for their dignity;
- they should be informed of their rights and of the scope of the judicial and administrative processes open to them;
- their views and concerns and should be heard at appropriate stages of the process where their personal interests are affected;
- they should be given proper assistance;
- their privacy and where necessary their safety, as well as that of their families and witnesses, should be protected, and unnecessary delay must be avoided.

Recommendation:

[In designing the NCF] the Scottish Government [and Parliament] should explore with survivors and others, support which would enable them to participate effectively in the [NCF], including advocacy and psychological support, protection and alternative means of testifying, taking reasonable steps to provide necessary support to participation.³¹

Q8. Do you think that the participants should be protected from legal action in connection with their work for the Forum?

Yes No No preference

(in part this question relates to issues raised under question 10 and the responses

deleterious impact on survivors' mental health which in some cases may endure over many months or more. The right to the highest attainable standard of physical and mental health is guaranteed in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). To comply with that right, the state must take immediate steps to respect, protect and fulfil (achieve progressively the full realisation of) the right to health. See UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health* : . 11/08/2000. UN Doc. E/C.12/2000/4.

²⁸ Articles 2, 3 and 8 of the ECHR and ICCPR art 7, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 16.

²⁹ UN Set of principles to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, Principle 32.

³⁰ Principles 4, 5 and 6.

³¹ Human Rights Framework, pp 47-49.

should be read together)

To the extent that this question relates to privilege for the Commissioners and/or staff of the NCF the Commission agrees, as this is likely to be essential to the proper functioning of the NCF.

In designing the NCF the Government and Parliament must ensure they uphold the right to reputation of former workers in institutions (an element of the right to respect for private and family life in article 8 of the European Convention on Human Rights). That right is qualified and can be subject to such limitations as are provided for by law, pursue a legitimate aim (including protection of the rights of others) and are a proportionate means of achieving that aim.

In this case the rights of survivors to a remedy including a degree of satisfaction is the public interest element, and a degree of protection from legal action in relation to statements made would seem to be essential to the proper functioning of a confidential committee. In seeking to ensure proportionality, all reasonable efforts should be made to ensure the anonymity of those named, with the exception of situations which engage a duty to investigate, including as appropriate pursuit of prosecution, in which case details should be passed to the police (see answer to question 10).

Q9. Do you think there are any barriers that would prevent people who are eligible to take part in the Forum from participating?

Yes No

Please see response to question 7. In addition, the Commission identified the following in the Human Rights Framework:

“b) Time period:³²

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.³³ A limitation of access to those who were resident for five days (as was suggested by the Scottish Government in respect of the Pilot Forum) would appear to be arbitrary. Experience from Ireland suggests that such remedies may be accessed by or on behalf of those who spent very short periods of time in care. Clearly serious ill-treatment can occur in a very short space of time.

c) Age based differentiation:

While a restriction to children (under 18 as per CRC) may be reasonable, the

³² Information from the Scottish Government seems to suggest that the Pilot Forum will be limited to those who have spent at least 5 days “as a resident” at any time until 2000. www.survivorscotland.org. The time period for the confidential committee in Ireland was open (in practice facts were recounted which related to the period of 1914 to 2000), for the investigations committee it was 1937 to present.

³³ The research report suggests that those survivors who participated, as well as other people who participated in the research, feel “historic” is vague, and that choosing a cut off point is arbitrary. Research report p 7.

[NCF] could omit age based admissibility criteria but recognise that age can be an aggravating factor to determining abuse (as the ECtHR does). Where those involved were under 18 then child rights should additionally be applied, if taking a broad interpretation of Article 1 of the Convention on the Rights of the Child or recognising that its application depends on national law, taking account of the domestic law on the age of majority which was in operation at the time.³⁴

d) Groups of victims who may have access to the [NCF]:

Remedies should be available to “the person directly affected by the act or omission which is in issue”³⁵ as well as some others who are indirectly affected (such as relatives,³⁶ including where survivors have died or are incapacitated).³⁷ In determining whether individuals indirectly affected should have access, account may be taken of the criteria applied by the ECtHR:

- Sufficiently close family-ties (both on objective basis and subjectively, on the actual closeness of the relationship);
- Whether the person may have witnessed the events;
- Whether the person has been involved in attempts to seek justice/access the truth;
- How the authorities responded to their attempts to seek justice/information.

The [NCF] and other remedies may also be available to others whose rights may have been violated, in some circumstances. For example former staff whose due process and privacy rights may have been violated, and relatives of either. Experience from Ireland suggests that the [NCF] and other remedies should be accessible to people who as children may have been considered “employees” of institutions rather than in care.

e) Physical access

Physical accessibility should not determine the opportunity to participate in the [NCF] or to access other remedies. This could be ensured in a number of ways such as by holding the [NCF] in different locations around the country and internationally, by supporting the participation of people through paying transportation costs (including those who may now live abroad) or possibly through the use of secure video conferencing, where available. Survivors who participated in research to support this framework pointed to problems with the [NCF] being located solely in the central belt of Scotland.³⁸

f) Ensure access for persons with disabilities:

There should be reasonable accommodation to ensure accessibility to people with disabilities. This may include physical and linguistic accessibility and appropriate

³⁴ Survivors who participated in research to inform this framework did not feel that there should be any age-based differentiation (research report, p 33).

³⁵ Legal paper, p 88.

³⁶ The majority of respondents to the Scottish Government consultation supported the possibility for family members to be involved in the Forum. Others suggested this should be on a case by case basis and that survivors should retain the choice.

³⁷ Other national human rights institutions developing similar frameworks have also recommended extension of remedies to family members and even communities and descendants (see Australian HREOC, recommendation 4).

³⁸ Research report, p 29-30.

support.

Recommendations:

The Scottish Government should:

- ...
- *ensure that the [NCF] is accessible to all people who were in any form of institutional care as children, without limit of time. There should be no arbitrary restrictions based on time-period, geography, age or any other criteria;*
- *Ensure information and access for survivors living across the country and outside the country;*
- *Consider opening the [NCF] to others who were indirectly affected, based on proximity and proportionality, and to others whose rights may be affected such as former staff.”*

Q10. Do you wish to add any additional points about the Forum?

Yes No

The Commission welcomes the recognition in the consultation document that *“disclosure of confidential information will be necessary in some cases to prevent further harm or where required by law.”*³⁹

The Commission reiterates its recommendation made in respect of the Time To Be Heard forum that the relationship between the NCF and the State duty to investigate and prosecute as appropriate should be clarified.⁴⁰

The extent and operation of the limits to confidentiality in the NCF is an aspect which the Commission considers should be the subject of consideration during the passage of the Victims and Witnesses Bill (if that is to be the legislative mechanism for the NCF).

³⁹ Consultation document, p 2.

⁴⁰ See Human Rights Framework, p 32.

Equality Impact Assessment

Introduction

The public sector duties require the Scottish Government pay “due regard” to the need to:

- Eliminate discrimination, victimisation, harassment or other unlawful conduct that is prohibited under the Equality Act 2010;
- Advance equality of opportunity between people who share a protected characteristic and those who do not; and
- Foster good relations between people who share a relevant protected characteristic.

These three requirements apply across the “protected characteristics” of age; disability; gender reassignment; pregnancy and maternity; race; religion and belief; sex and sexual orientation.

In effect, this means that equality considerations are integrated into all the functions and policies of Scottish Government Directorates and Agencies.

A key part of those duties is to impact assess all our policies to ensure that we do not inadvertently create a negative impact for equality groups and also that we actively seek the opportunity to promote equality of opportunity and to foster good relations.

The Aim of the National Confidential Forum

The aim of the National Confidential Forum is to give adults who spent time in residential care as children the opportunity to talk about their experiences.

In this section of the consultation questions we are particularly interested in finding out your views on whether the National Confidential Forum meets the needs of the following groups:

- Age
- Disability
- Gender
- Sexual Orientation
- Race
- Religion and Belief

Your responses to the questions will help us to carry out a full equality impact assessment for a National Confidential Forum.

Questions

1. Do you think the creation of a National Confidential Forum will have a disproportionately negatively impact on particular groups of people in our target audience?

Yes No

An informed response to this question depends on the manner in which the NCF is designed and implemented. In particular the Commission draws attention to the non-discrimination elements of the Human Rights Framework (pp43-46)

2. Do you think the creation of a National Confidential Forum will have a positive impact on particular groups of people in our target audience?

Yes No

As per Q1

3. What negative impacts do you think the National Confidential Forum will have on a particular group?

As per Q1

4. What positive impacts do you think the National Confidential Forum will have on a particular group?

As per Q1

5. What changes would you suggest to reduce any negative impact you have identified?

Comments

6. What changes would you suggest to enhance any positive impacts you have identified?

Comments

7. Are there any significant issues we need to consider in relation to:

- Age
- Disability
- Gender
- Sexual Orientation
- Race
- Religion and Belief?

Comments