

Proposed Inquiry in to Historic Institutional Abuse in Northern Ireland

Submission to the Historical Institutional Abuse Taskforce of the Northern Ireland Executive from Amnesty International UK

May 2011

Amnesty International UK welcomes the specific commitment from the Northern Ireland Executive, given on 16 December 2010, to establish an inquiry into historical institutional abuse in Northern Ireland.

As enshrined in international and regional human rights treaties, victims of human rights abuses have a right to an effective remedy and reparation, which includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹ The right to a remedy also includes the right to equal and effective access to justice, and the right of victims to know the truth about the violations suffered.

Amnesty International believes that the proposed inquiry has the potential to play a key role in securing to victims their right to an effective remedy and reparation. In order for it to fulfil that role it is, however, essential that the inquiry be independent, impartial, thorough and effective, in line with human rights standards. It should also allow for effective victim participation, and be open to public scrutiny. It is by satisfying these standards that the inquiry will be capable of inspiring trust in its proceedings and delivering a report, which will clearly outline the systems under which this abuse was allowed to happen and make recommendations to ensure that such circumstances are not allowed to happen again.

In light of this, Amnesty International would like to take this opportunity to make a number of recommendations with respect to the proposed inquiry, aimed at helping ensure that the inquiry will be capable of being independent, impartial, through and effective, in accordance with international human right standards.

Independence: Those appointed to conduct the inquiry must be recognized for their impartiality, competence and independence. Given that those appointed should be independent of any institution, agency or person that may be subject of the inquiry, consideration should be given to the appointment of individuals outside of the jurisdiction of Northern Ireland. A strong legal team should also be appointed with sufficient expertise to support the inquiry.

¹ See for example, Article 13, European Convention on Human Rights, Article 2 of the International Covenant on Civil and Political Rights, Article 39 of the Convention on the Rights of the Child.. See also the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2000, referred to as “Basic Principles and Guidelines on the Right to a Remedy and Reparation” for the purpose of this document..

Resources: In order for the inquiry to be thorough and rigorous it should be guaranteed the material, personnel and financial resources it needs to effectively carry out its mandate. This includes, for example, access to and support from experts to assist the inquiry when dealing with the challenging and sensitive issues that will be the subject of the inquiry.

Powers: The inquiry should have the authority to obtain all the information it needs, including powers to compel attendance and cooperation of witnesses, including officials, and to order the production of documents, including government and medical records. The inquiry may have to obtain evidence from the police, other statutory authorities, as well as non-statutory agencies and individuals.

With this in mind Amnesty International accepts it would be helpful if the inquiry were to be established as a statutory inquiry, under the Inquiries Act 2005. However, given Amnesty International's ongoing concerns about and principle opposition to the Inquiries Act 2005,² in particular with regards to the lack of sufficient guarantees of independence which hinders its ability to provide for an inquiry truly independent from government, Amnesty International calls on the government to make a formal statement at the outset committing itself to the principle of independence of the inquiry. It is also important that there is no scope for interference with or undermining of the inquiry's work by any other institutions, agencies or individuals that may be subject of the inquiry.

Legal Representation: Victims, witnesses and other interested parties, including those who may be implicated, are entitled to legal representation. In the case of alleged perpetrators, they should be advised of the possible consequences of their statements, and that they may, if they wish, be assisted by legal counsel. Witnesses also should be permitted legal counsel if, for example, their testimony could expose them to criminal charges or civil liability. Witnesses and other individuals involved should at all stages be guaranteed the minimum procedural safeguards set out in international law, in particular the due process rights set out in Article 14 of the International Covenant on Civil and Political Rights.

Public Scrutiny: The inquiry must be open to adequate public scrutiny. The scope, methods, key evidence, and findings of the inquiry should be made public. The inquiry should publish a written report within a reasonable time, which includes the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and applicable law.

So far as possible public and the media should be given access to the proceedings and to the evidence on which the inquiry bases its findings. However, they may be excluded from parts of the inquiry, the identities of witnesses may be withheld, and material may be omitted from the final report if the inquiry considers that such measures are necessary to protect the rights of individual witnesses³ or that publicity would otherwise prejudice

² Amnesty International has on numerous occasions raised concerns about the ability of the Inquiries Act 2005 to provide for a truly independent inquiry. For further detail as to Amnesty International's concerns with the Act see, for example, *UK: Briefing to the Human Rights Committee*, 25 June 2008, EUR 45/011/2008, *United Kingdom: Proposed torture inquiry must be independent, impartial and thorough*, 24 May 2010, EUR 45/005/2010.

³ This is of particular importance with respect to the rights of the victims, as outlined in paragraph 22(b) of the Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2000, there must be public disclosure of the truth, but only "to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations."

the public interest. In particular, when obtaining evidence from victims and traumatized witnesses it may be necessary to obtain testimony in private. While the final report should include the evidence on which it bases its findings, this may mean that some of the material in the commission's report is presented without attribution to identifiable individuals.

Prosecutions: Victims of abuse 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, and if the inquiry obtains information indicating that identified individuals may have been responsible for human rights abuses, that information should be passed to the relevant law enforcement bodies for investigation.

Efforts should be made to encourage alleged perpetrators to testify to the inquiry, but they should not be granted any amnesties or immunities against criminal proceedings; however an individual's conduct after the commission of criminal offences, including factors such as any efforts made by them to compensate the victims and their cooperation with the inquiry, should be taken into account when identifying mitigating factors in any criminal proceedings. Notwithstanding the inquiry's powers to compel evidence, no one should be compelled to testify against themselves or to confess guilt.

Terms of Reference: The inquiry should examine the events, which are the subject of the inquiry and the underlying factors. This should include a critical analysis of institutional structures, policies and practices, the failure of legal and other institutions and mechanisms to provide protection, and other relevant factors.

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.

It is important that the terms of reference 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. The terms of reference should be formulated in a way which does not suggest a predetermined outcome or limit investigations in areas that might uncover official responsibility, and in a way which is flexible enough to enable the inquiry itself to determine in more detail the matters that come within its scope, including whatever matters it considers relevant to the issues it is investigating.

It is of crucial importance that victims 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 should also be drafted to allow the inquiry to make recommendations, including for changes in law, political or administrative procedures and practice, to ensure that such abuse is effectively prevented in future. Such recommendations will be of fundamental importance to securing to individuals their right to adequate and effective reparation, which include guarantees of non-repetition.

Time Frame: The inquiry should commence promptly and be completed and reported on within a reasonable timeframe; victims of abuse have already waited a considerably long time for this issue to be given due attention and further unnecessary delay in reaching a successful conclusion of an inquiry process would further jeopardize their right to justice and reparation. Moreover, many victims 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, the inquiry nonetheless should be allowed sufficient time to carry out its investigation thoroughly. Time limits should not be imposed arbitrarily and should be open to revision where necessary in the interests of an effective and thorough inquiry. The inquiry should be of a sufficient duration to do justice both to the scope of the abuse, which it will have to examine, and to the fact that the number of people affected by abuse runs in to many hundreds. It is important that financial constraints in themselves do not act to somehow justify victims being denied the opportunity to have their voices heard.

Historical scope: It is our considered view that while most of the cases the inquiry is likely to deal with will originate from the 1940s onwards, it must be recognised as well that there are victims of abuse, now aged in their eighties, who would have suffered abuse in the 1920s and 1930s, pre-dating the establishment of the Welfare State and more formalized arrangements for state responsibility for child welfare. These individuals, just as much as those whose abuse is more recent, equally deserve truth and justice. The imposition of time limitations therefore risks being indirectly discriminatory on the grounds of age, to victims who are in equal need of justice and reparation. On this basis, differentiating between people based on the “historical” aspect of their experience would appear to not be taking sufficient account of the needs of victims.

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 the UK Government and the Northern Ireland Executive will facilitate this formality and ensure that necessary arrangements are put in place as appropriate.

Victim participation: Amnesty International believes that it is essential to the success of the inquiry that victims are able to participate effectively in the process.⁴ Consideration should, therefore, be given as to how best to facilitate access to and engagement with the process, including outreach programs, by victims.⁵

In order to facilitate the process of effective engagement the establishment of the inquiry and the matters it will look into should be notified to the public; this should include an invitation to submit information to the commission and guidance for doing so. Special attention should be paid to notifying parties affected by the matters under inquiry, or who otherwise may have an interest. The inquiry should consult and involve civil society, those affected by the matters under inquiry, and other interested parties. This includes in particular paying attention to the rights of victims who should be kept informed of the progress of the inquiry, have access to hearings and information and relevant documents, be consulted where possible or appropriate, and be entitled to present evidence.

⁴ One means of doing this could be for example by establishing a ‘reference group’ of victims who could assist in ensuring that victims’ voices are heard throughout the decision-making and design process. It is important that this group should be drawn from a representative diverse and broad cross section of this population.

⁵ Consideration should be given to the possibility of holding hearings outside of Belfast, for example, in Londonderry/Derry and Armagh, as well as how to engage with victims who are not currently resident in Northern Ireland.

Further, it is vitally important that participation by victims in the inquiry process is supportive, safe and effective, not least because of the complex needs that some of the victims will have, including for example, difficulties to engage with any institutions including those of the state. In particular, and in line with the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, special consideration and care should be given to avoid re-traumatization of victims in the course of the inquiry.⁶ Victims should be treated with humanity and respect for their dignity and human rights throughout the inquiry process, and appropriate measures⁷ should be taken to ensure their safety, physical and psychological well-being and privacy as well as those of their families. To this end a written protocol should be developed prior to the start of the inquiry process to guide the inquiry's approach to involving victims and the special measures that will be adopted to support their participation. The protocol should be developed in consultation with organizations and individuals with relevant expertise and adequate funding should also be available to implement any measures recommended. Consideration should also be given as to the most appropriate means of questioning of victims and witnesses during the inquiry to avoid re-traumatization.

Right to Reparation

As outlined at the beginning of this submission the establishment of an inquiry into historical institutional abuse in Northern Ireland has the potential to play a key part in securing to victims their right to adequate and effective reparation for harm suffered. At a minimum it is important that the inquiry will enable the truth about these abuses to emerge, identify those responsible, and contribute to ensuring such abuse is not repeated.

However, it should not be forgotten that the inquiry will only be able to cover one part in the process and is not an end in itself. Alongside the inquiry process, consideration should therefore also be given to how to give effect to the different elements of the right to reparation, which includes the right to restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁸ Individual reparations should take account of individual circumstances, and should be appropriate and proportional to the gravity of the violation and the circumstances of each case.

Restitution⁹: Restitution should, to the extent possible, restore the victim to the situation which would have existed if that act had not been committed.¹⁰

Compensation: The provision of compensation will be an essential part of any state response to the victims of institutional abuse in Northern Ireland. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case. Such damage may include physical or mental harm, lost opportunities, including employment, education and social benefits, material damages and loss of earnings, including loss of earning potential, moral

⁶ See para. 10 of the Basic Principles on the Right to a Remedy and Reparation.

⁷ For example, the provision of counselling, family or welfare support.

⁸ See paras. 19-23 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation.

⁹ See para 19 the Basic Principles on the Right to a Remedy and Reparation. The European Court of Human Rights has also 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.

¹⁰ For examples of possible restitution steps, such as family tracing, in cases of historical child abuse see *A Human Rights Framework for the design and implementation of the proposed "Acknowledgment and Accountability Forum" and other remedies for historic child abuse in Scotland*, Scottish Human Rights Commission, February 2010.

damage and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

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

Rehabilitation: Measures such as therapy, counselling, education and training should also be provided where appropriate.¹¹

Satisfaction: Satisfaction includes verification of the facts and full and public disclosure of the truth, and public apology, including acknowledgement of the facts and acceptance of responsibility. Such an apology can satisfy the desire of many victims for recognition of harm.

Non-Repetition: There should also be a commitment on the part of the relevant authorities, including the Northern Ireland Executive, to implement any recommendations proposed by the inquiry that would prevent repetition of past violations, such as reforming laws, administrative procedures and practice and promoting human rights education.

¹¹ Research in Scotland (see footnote 9) 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