



**Inquiry into Historical Institutional Abuse Bill 2012**

**Submission to the Committee of the Office of the First and deputy First Minister**

**Northern Ireland Assembly**

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**Preface**

1. Amnesty International has campaigned alongside victims since February 2010 in pursuit of an effective and independent inquiry into institutional child abuse in Northern Ireland.
2. We wish to take this opportunity to commend all those victims of abuse for the courage and tenacity which they have shown in their pursuit of justice.
3. In October 2010, Amnesty held a conference<sup>1</sup> in Belfast which brought together key actors - victims and survivors, campaigners, commissioners and counsellors - from the inquiry and redress processes in the Republic of Ireland and Scotland to share their experiences so that lessons may be learned in Northern Ireland.
4. We have worked with the Survivors and Victims of Institutional Abuse, brought them together with legal experts and offered advice in the preparation of their submission to the OFMdfM Taskforce on historic institutional child abuse. Separately, Amnesty International made its own submission<sup>2</sup> to the Taskforce and has met with and written to Junior Ministers from OFMdfM on a number of occasions during the period since 2010.
5. Amnesty International welcomes the publication of the Bill and the Terms of Reference for the Inquiry. These steps should represent significant moves in the direction of vindicating the rights of victims to truth and justice.
6. However, we have a number of concerns regarding the Inquiry into Historical Institutional Abuse Bill and the Terms of Reference for the Inquiry.
7. We make this submission to the Committee of the Office of the First Minister and deputy First Minister to assist their scrutiny of the Bill and our representatives are happy to make themselves available to give oral testimony to the Committee should this be invited.

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<sup>1</sup> Time for justice: Delivering a human rights compliant inquiry for the victims of historical institutional child abuse in Northern Ireland, October 2010. Report available at:

[http://www.amnesty.org.uk/uploads/documents/doc\\_21110.pdf](http://www.amnesty.org.uk/uploads/documents/doc_21110.pdf)

<sup>2</sup> Proposed Inquiry into Historic Institutional Abuse in Northern Ireland, Submission to the Historical Institutional Abuse Taskforce of the Northern Ireland Executive from Amnesty International UK, May 2011. Available at:

[http://www.amnesty.org.uk/uploads/documents/doc\\_21546.pdf](http://www.amnesty.org.uk/uploads/documents/doc_21546.pdf)

## Terms of Reference

### Accountability and consultation

8. The Terms of Reference for the Inquiry are central to its chances of success or failure to meet the needs of victims and wider society, yet are not contained within the Bill itself, but rather are incorporated into a written Ministerial Statement to the Assembly<sup>3</sup>. As such, by not being included as an integral part of this Bill, the Terms of Reference are not open to direct scrutiny by the Assembly. This may be seen as less than optimal in terms of democratic accountability of the Executive to the Legislature and may be considered by some as a lessening of the primacy of the Assembly in passing meaningful legislation. This presents a precedent which may be of concern to some Members.
9. For the record, Amnesty International specifically requested, at a meeting with Junior Ministers in December 2011<sup>4</sup>, that draft Terms of Reference should be made available for public consultation. No such agreement was forthcoming.
10. Amnesty International then specifically requested, at the same meeting, that it and other stakeholder groups, in addition to victims groups, should have the opportunity to comment on draft Terms of Reference. Again, no such agreement was forthcoming from OFMdFM.
11. The Bill could be amended so that the Terms of Reference are brought within the legislation, with an enabling clause to give the Ministers power to amend the Terms of Reference with the prior agreement of the Inquiry Chair, should that subsequently prove to be necessary. Such an approach would fulfill the twin objectives of ensuring Assembly scrutiny over this key aspect of the enabling architecture for the Inquiry, while ensuring an improved but reasonable procedure for amending the Terms of Reference, should this prove to be necessary.

### Scope and adequacy

12. The Terms of Reference are currently quite narrow, confining the Inquiry to investigate and report on whether or not there were systemic failings and on recommendations as to a possible apology, a tribute or memorial to victims, and the possibility of redress. We are concerned that the current Terms of Reference could prove restrictive and limit the possible effectiveness of the Inquiry. The Terms of Reference should be amended to have more built-in flexibility to enable the Inquiry itself to determine in more detail the matters that come within its scope, including matters it considers relevant to the issues it is investigating. This is currently not possible as only the First and deputy First Minister have the powers to amend Terms of Reference, not the Inquiry Chair.

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<sup>3</sup> Written ministerial statement: Office of the First Minister and deputy First Minister - Historical Institutional Abuse Inquiry: Terms of Reference, Chair and Acknowledgement Forum Panel Members, May 31 2012

<sup>4</sup> Meeting with OFMdFM Junior Ministers, advisors and officials, Stormont Castle, December 15 2011

13. We recommend that the Bill should be amended to grant Ministers the power to amend the Terms of Reference, should that subsequently prove necessary, but only with the consent of the Inquiry Chair. This would enable the Chair to request changes to the Terms of Reference should that prove necessary. For comparison, it may be useful to note that legislation in the Republic of Ireland<sup>5</sup> requires the consent of the inquiry chair to amend Terms of Reference, which can act as a safeguard against any perceptions of inappropriate interference by Ministers.
14. The Terms of Reference do not currently provide for the Inquiry to make recommendations, including for changes in law, political or administrative procedures and practice, to ensure that such abuse is prevented effectively 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.
15. The Terms of Reference offer no definition of the term 'abuse', nor guidance as to its definition. Neither does the Bill. We would recommend that this omission be addressed and that the definition of abuse reflect the breadth of Article 19 of the Convention on the Rights of the Child<sup>6</sup>: "to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse", and Article 34: to "undertake to protect the child from all forms of sexual exploitation and sexual abuse".

### **Potential for OFMdFM interference in the independence of the Inquiry**

16. The Bill and the Terms of Reference give the First and deputy First Minister significant powers to intervene in the running of the Inquiry.
17. Such powers include:
  - the power to amend the terms of reference of the inquiry at any time (Sec 1 (3));
  - the power to terminate the inquiry (Sec 5 (1), (6));
  - the power to withdraw funding for the Inquiry if it acts outside its terms of reference (Sec 12 (2), (3), (4));
  - the power to terminate the appointment of an inquiry panel member on specific grounds (Sec 3 (3));
  - the power to withhold payment of expenses of an inquiry panel member and others assisting the inquiry (Sec 12 (1), (3), (4));

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<sup>5</sup> Tribunals of Inquiry Bill, 2005

<sup>6</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations

- the power to set terms by which a witness may or may not be eligible to expenses, including legal representation (Sec 11, Sec 18 (1)(c), (2));
- the power to determine whether and when the Inquiry Report should be published, rather than that power sitting with the Inquiry Chair (Terms of Reference);
- the power to decide if the Inquiry Report shall be published in full, or whether to withhold sections from publication (Terms of Reference).

18. It is worth pointing out that many of these powers are similar to those provided for by the Inquiries Act 2005. Amnesty International had originally suggested to Ministers that this inquiry could be held under the Inquiries Act 2005, but, given our concerns about the ability of that legislation to provide for a truly independent inquiry, we proposed that the government should make a formal statement at the outset committing itself to the principle of independence of the inquiry.

19. In the context of this inquiry, Members may be concerned that these powers, individually and / or collectively, amount to a degree of control over the Inquiry which has the potential to undermine its independence, risk public confidence in its effectiveness, or risk its actual effectiveness.

20. Members may wish to consider the appropriateness of the powers, not just in respect of this particular inquiry, but for any precedent which may be set for other inquiries established in the future by the Northern Ireland Assembly to inquire into other historic activities.

21. Regarding publication of the report of the findings of the Inquiry, it may be useful for the legislation to be amended to make clear that it is part of the role of the Inquiry to publish its report, rather than simply to furnish a report to Ministers.

### **Historical scope of Inquiry**

22. Victims of institutional child abuse in the years before 1945 or after 1995 face exclusion from this Inquiry<sup>7</sup>. Of particular concern may be those victims, now of very advanced age, who face exclusion from this inquiry. This could be regarded as indirect discrimination based on age. One victim known to us, now in her eighties, is reported to be very upset at the thought that her abuse as a child, and her years of suffering and feelings of hurt ever since, will now be not

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<sup>7</sup> See Terms of Reference - Written ministerial statement: Office of the First Minister and deputy First Minister - Historical Institutional Abuse Inquiry: Terms of Reference, Chair and Acknowledgement Forum Panel Members, May 31 2012

simply ignored, but exacerbated by exclusion from full consideration by the Inquiry, given its timeframe.

23. We consider the cut-off date(s) of 1945 (and 1995) to be arbitrary. Officials from OFMdFM have informed the OFMdFM Committee<sup>8</sup> that the 1945 starting point for the Inquiry was adopted, as this was the date of the creation of the Welfare State. However, the 1945 legislative changes do not lessen the institutional or State responsibility for that abuse in the period before 1945, nor lessen the impact of or scale of suffering as a result of that abuse.
24. It is proposed by Ministers that the panel for the Acknowledgment Forum strand of the Inquiry is to be granted some discretion in hearing stories from those whose abuse falls outside the timeframe<sup>9</sup>.
25. This is problematic as firstly, this seems to be a 'second class' form of inclusion by the Acknowledgment Forum, to be granted at the discretion of the Acknowledgment Forum panel, rather than as a right of the victim.
26. Secondly, neither the Bill nor the Terms of Reference grant such similar discretion to the Research and Investigation Team, or the Investigation and Inquiry Panel, to take evidence and consider individual or systemic cases of abuse, outside the 1945-95 time period. Again, this is allocating a secondary status to those who suffered abuse prior to 1945 or post-1995, who may be allowed to have their abuse *acknowledged*, but apparently not *researched, investigated or inquired* into.
27. It may be worth noting that for the Ryan Commission (The Commission to Inquire into Child Abuse)<sup>10</sup>, the 'relevant period' of the inquiry was from 1940 to 1999, but the Commission had power to extend it in either direction, a power which it exercised both in respect of its Investigation Committee and its Confidential Committee. The Investigation Committee exercised this power by extending the beginning of the period back to 1936. The relevant period for the Confidential Committee was determined to be between 1914 and 2000, being the earliest date of admission and the latest date of discharge of those applicants who applied to give evidence of abuse to that Committee.
28. Amnesty International recommends that, if the state is agreeing to investigate historic abuses in Northern Ireland, it should not do this in a way which arbitrarily excludes some cases.

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<sup>8</sup> Committee for the Office of the First Minister and deputy First Minister, Official Report (Hansard), June 6 2012

<sup>9</sup> "If necessary, the Forum will have the authority to hear accounts from individuals whose experiences fall outside the period 1945 -1995." - Written ministerial statement, May 31 2012

<sup>10</sup> See Ryan Report, Section 1.19. Available: <http://www.childabusecommission.ie/rpt/pdfs/>

## Lifespan of the Inquiry

29. The Terms of Reference stipulate that the Inquiry and Investigation will conclude within a 2 year and 6 month period following the commencement of the legislation. This may be a reasonable timeframe within which the Inquiry can complete its work, but it is possible that the scale of evidence for consideration and / or number of witnesses who come forward with evidence for consideration may mean that additional time is necessary.
30. Ultimately, an arbitrary time limit may prove unhelpful to the interests of truth and justice, so the suggested 30 month time limit should be open to revision should the Chair decide this is necessary in the interests of an effective and thorough inquiry.
31. It is worth noting that the Smithwick Tribunal<sup>11</sup> in the Republic of Ireland, currently investigating allegations of state collusion, has had its lifespan extended by the Irish Government at the request of the Tribunal Chair. Justice Smithwick's request for an extension was supported by Amnesty International<sup>12</sup> and also received widespread support among political parties in Northern Ireland, recognising the need for the inquiry to have sufficient time and resources to fulfill its mission.
32. OFMdFM has already conceded the principle of extending the time period available to the Inquiry Chair to provide his report<sup>13</sup>; this principle should also be acknowledged with respect to the lifespan of the Inquiry itself so that he may request and be granted an extension to the time period for the work of the Inquiry, should he deem that to be necessary.

## Reparation and redress

33. The Terms of Reference, as currently framed, postpone a decision on reparation, including compensation, for consideration by the Executive until after the Inquiry reports.
34. This is likely to mean that no decision on reparation, including compensation, will be taken by the Executive until 2016, with a further process of consultation and implementation possibly to follow before victims may be able to receive redress, should any be forthcoming.

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<sup>11</sup> Smithwick Tribunal of Inquiry into suggestions that members of An Garda Síochána or other employees of the State colluded in the fatal shootings of RUC Chief Superintendent Harry Breen and RUC Superintendent Robert Buchanan on the 20th March, 1989

<sup>12</sup> Amnesty International Ireland letter to the Irish Minister for Justice, Equality and Defence, 27 May 2011

'Amnesty International criticises time limit for Smithwick Tribunal', press release June 1 2011

'Amnesty calls for Smithwick deadline to be lifted', press release July 1 2011

<sup>13</sup> *"The Chair of Investigation and Inquiry Panel will provide a report to the Executive within 6 months of the Inquiry conclusion. If additional time is required the Chairman will, with the agreement of the Panel, request an extension from the First Minister and deputy First Minister which will be granted provided it is not unreasonable."* - Written ministerial statement, May 31 2012

35. We know that this is an issue of concern to many victims, some of whom are now of advanced age, and who fear that they will not live long enough to enjoy redress or receive any compensation to pass on to their families, who have also suffered as a result of the abuse experienced<sup>14</sup>.
36. We would recommend that consideration 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<sup>15</sup>. Decisions on aspects of the right to reparation need not necessarily be dependent on the ultimate outcome of the Inquiry nor await its final report. The Inquiry could be tasked with making an interim report on these matters, with recommendations for the Executive to consider in advance of a final report. The Bill already makes provision for the publication of an interim report of the Inquiry<sup>16</sup>. An interim report focused on the question of reparation would mean that recommendations on redress are based on evidence presented to the Inquiry but not delayed unduly by the other requirements on the Inquiry.

### **Civil and criminal liability**

37. While we agree that the inquiry panel must not rule on and has no power to determine any person's civil or criminal liability<sup>17</sup>, it must be made clearer in the Bill that it is possible for criminal investigation and prosecution to flow from evidence uncovered during the inquiry process. Prosecutions must not be precluded, should sufficient evidence be available, and if the Inquiry obtains information indicating that identified individuals may have been responsible for criminal offenses, that information should be passed to the relevant law enforcement bodies for investigation.

### **Financial constraints**

38. The Bill requires the Inquiry Chair to "avoid unnecessary cost" in making any decision as to the procedure or conduct of the inquiry<sup>18</sup>. The Explanatory and Financial Memorandum from OFMdfM for Clause 6 states that "Every decision to hold a hearing, to call for evidence or to grant legal representation adds to the cost of the inquiry". It is important that financial

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<sup>14</sup> Private representations to Amnesty International during 2010-2012

<sup>15</sup> 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, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 (Basic Principles).

<sup>16</sup> Section 12 (2)

<sup>17</sup> Section 1 (5)

<sup>18</sup> Section 6 (3)

constraints in themselves do not act to somehow justify victims being denied the opportunity to have their voices heard, witnesses being denied adequate legal representation or otherwise for the Inquiry being unable to fulfill its role effectively. The Bill should make clearer that these over-riding objectives should be the key guidance for the Inquiry Chair in decision-making.

### **Clerical abuse in non-institutional settings**

39. The Bill does not cover victims of clerical child abuse outside the setting of a residential institution. OFMdFM currently has no plans for a similar process of inquiry for victims of clerical child abuse outside institutions. This means, for instance, that some of the Northern Ireland victims of Fr Brendan Smyth's serial child abuse will be covered by this Inquiry, while others will not. To those victims, that will seem inherently unjust. This is now an issue which should receive urgent political attention.

### **Conclusion**

40. We commend Ministers and officials for their work in bringing the Bill to this stage and ask that Members now bring forth proposals for appropriate amendments to ensure that the Bill fulfills its ultimate purpose of making provision for an inquiry which can vindicate the human rights of victims.