

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



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Executive summary and Recommendations

In the last decade Scotland has taken various steps to address historic abuse of children while in care.¹ A key moment came on 1 December 2004 when the then First Minister Jack McConnell issued an apology on behalf of the people of Scotland for past child abuse in residential care homes.² Among other steps the Scottish Government created a National Strategy for Survivors of Childhood Sexual Abuse,³ and following an independent Historic Abuse Systemic Review, announced in 2008 that it would trial a form of truth commission on historic child abuse which was later given the working title, “Acknowledgement and Accountability Forum”.⁴ In late 2009, the Scottish Government announced that there would be a Pilot Forum which would operate in Spring 2010 to listen and validate survivors⁵ experiences, create a historical record, signpost to services available and test out a confidential committee model.⁶

¹ Among these were petitions to the Scottish Parliament in October 2000 (by Anne Macdonald) and August 2002 (by Chris Daly), the creation of a Scottish Parliament Cross-Party Group on Survivors of Childhood Sexual Abuse in 2001, the development of a National Strategy for Survivors of Childhood Sexual Abuse which launched in 2005 (www.survivorscotland.org.uk), an independent Historic Abuse Systemic Review which reported in 2007 and the launch of In Care Survivors Service Scotland in 2008.

² “I offer a sincere and full apology on behalf of the people of Scotland to those who were subject to such abuse and neglect and who did not receive the level of love, care and support that they deserved, and who have coped with that burden all their lives.” Scottish Parliament, Official Report, 1 December 2004, <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-04/sor1201-02.htm#Col12390>

³ www.survivorscotland.org.uk

⁴ “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>

⁵ 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.

⁶ The Government’s decision to announce a pilot forum was made independently of and prior to the Commission presenting its recommendations and therefore this paper also seeks to identify areas where the Pilot Forum (as currently envisaged) may be impacted by our recommendations. In explaining the need for a pilot the Government has stated, “it’s important to find out what works for survivors so as to be absolutely sure that any larger scale forum is the best for survivors that it can be, rather than launching something large scale which may not work well. The pilot will be evaluated and

Since March 2009, the Scottish Human Rights Commission (the national human rights institution for Scotland) has been developing a human rights framework for the design and delivery of the Acknowledgement and Accountability Forum. As part of this work a paper on international human rights law and a research paper were developed. Both have been drawn on extensively in the present draft framework for the Forum and other remedies for historic abuse.

The Commission undertook this work as one element of delivering its first Strategic Plan. The Plan focuses on the promotion and protection of human dignity through the promotion of a human rights based approach, which emphasises the empowerment of rights-holders to know and claim their rights, and the ability and accountability of duty bearers to fulfil human rights. The Commission's first focus for delivering this goal is human dignity in care where it is working with regulators, providers, organisations and people in care to advance a human rights based approach in that sector.⁷

In this framework the Commission applies the human rights based approach to securing an effective remedy for survivors of historic abuse. The Commission promotes the "PANEL" model (participation of people in decisions which affect their human rights; accountability of duty bearers; non-discrimination and equality; empowerment; legality, an explicit link to legal standards.

In delivering this human rights framework the Commission notes that Scotland has taken a series of significant steps to addressing historic childhood abuse. The Commission welcomes those steps and pays particular credit to the dignity and determination of those who have been subject to gross human rights abuses in the past and continue to seek justice, remedies and reparation.

The Commission presents here a comprehensive human rights framework for both the design and the implementation of steps to secure all elements of justice, remedies and reparation. We make

those who took part will be asked to give feedback." Scottish Government Question and Answer paper on the Pilot Forum www.survivorscotland.org.uk

⁷ See further www.scottishhumanrights.com

recommendations for immediate next steps as well as for steps which will take longer to realise.

Recommendations

The Pilot Forum

The Commission believes that the Pilot Forum can play a valuable role in the process of scoping steps required to secure effective access to justice, effective remedies and reparation for survivors of historic child abuse. The Commission is encouraged by the commitment of the Pilot Forum to seek to implement our recommendations to the extent possible.

The Commission understands that, as this framework has been finalised, steps have begun to secure the functional independence of the Pilot Forum from the Scottish Government, and this is to be welcomed. We encourage everyone involved to continue to seek the greatest functional independence of the Pilot Forum possible.

The Commission's principal recommendations in respect of the Pilot Forum are:

1. The Pilot Forum should build on steps already taken to secure the trust and effective participation of all of those whose rights are affected in all decisions on its design and implementation;
2. The Pilot Forum and the Scottish Government should clarify, particularly for potential participants, the relation between the Pilot Forum and the State duty to investigate and prosecute as appropriate;
3. The Pilot Forum could be an element in scoping the steps required to secure effective access to justice, effective remedies and reparation for survivors of childhood abuse. Lessons from the Pilot Forum could lead to recommendations on steps which Scotland should take to ensure effective access to justice, effective remedies and full reparations for survivors of childhood abuse;

4. The Pilot Forum could identify law, policy and practice changes at all relevant levels which would contribute to mitigating the risk of repetition of abuse;
5. The Pilot Forum and the Scottish Government should explore with survivors and others, support which would enable them to participate effectively in the Pilot Forum and its successor(s), including advocacy and psychological support, protection and alternative means of testifying, taking reasonable steps to provide necessary support to participation.

Securing effective access to justice, effective remedies and reparation for survivors of childhood abuse

The Commission calls on the Scottish Government to clarify that the Pilot Forum is a stage in scoping the needs of survivors and commit to taking a comprehensive human rights based approach to securing effective access to justice, effective remedies and reparation for survivors of childhood abuse.

To deliver on this commitment the Scottish Government should:

1. Ensure full and effective participation of survivors and others whose rights are affected in all decisions on the means of realising the rights of effective access to justice, effective remedies and reparation;
2. Ensure accountability for human rights violations including through effective official investigations, or a mechanism capable of determining State liability, and prosecutions where appropriate;
3. Consider further the role for accountability in the successor(s) to the Pilot Forum, in particular considering the inclusion of investigatory powers sufficient at least to establish a record of the

truth, and to identify where reasonable grounds exist for effective official investigations, as well as supporting survivors to identify and access effective remedies and proportionate reparation according to their needs and wishes;

4. Ensure effective access to justice through identifying and addressing barriers which survivors of childhood abuse face in practice in exercising this right, making necessary adjustments or developing new mechanisms as required;
5. Develop as effective as possible a reparations programme for survivors of historic childhood abuse. This should include restitution, adequate compensation, rehabilitation, satisfaction and guarantees of non-repetition. The reparations for individuals should be appropriate for each individual, and based on the principles of proportionality (according to the nature of the violation and the harm done) and participation (of survivors to identify their needs and wishes);
6. Consider the development of legislation to facilitate apologies by institutions;
7. Make available each of the elements of effective access to justice, effective remedies and reparation to all survivors of childhood abuse without discrimination;
8. Develop a comprehensive communications and outreach strategy to raise awareness of past and present childhood abuse, the human rights of all of those affected and the remedies available;
9. Explore with survivors and others, support which would enable them to participate effectively in the Pilot Forum and its successor(s), including advocacy and psychological support, protection and alternative means of testifying, taking reasonable steps to provide necessary support to participation.

In implementing the above recommendations the Pilot Forum and its successor(s) and the Scottish Government can fulfil relevant human rights obligations and both learn from and contribute to the development of international best practice. In so doing Scotland will be,

and be seen to be, meeting its responsibility towards survivors as well as promoting and protecting the human dignity of those vulnerable individuals in need of care today and tomorrow.

Background

In common with other similarly situated countries,⁸ in recent years Scotland has begun to explore the extent of and reasons for historic child abuse. In the last decade Scotland has taken various steps to address historic abuse of children while in care.⁹ A key moment came on 1 December 2004 when then First Minister Jack McConnell issued an apology on behalf of the people of Scotland for past child abuse in residential care homes.¹⁰ In 2005 Tom Shaw, a former Chief Inspector of Education in Northern Ireland, led the Historic Abuse Systemic Review (1950-1995) which reported in 2007. Among other steps the Scottish Government created a National Strategy for Survivors of Childhood Sexual Abuse,¹¹ and announced in 2008 that it would trial a form of truth commission on historic child abuse.¹² The Scottish Government launched a consultation on an “Acknowledgement and Accountability Forum” for historic childhood abuse in Scotland later that year. The consultation closed in Spring 2009 and short summaries of the consultation,¹³ and a subsequent in-depth engagement with a number of survivors,¹⁴ are available on the website of the Scottish Government.

⁸ Countries which have undergone such examination include, in different ways and to differing extents: Australia, Canada, England, Ireland, Wales and New Zealand. There have also been a number of previous inquiries into child abuse in specific locations in Scotland (Research report, p 17).

⁹ Among these were petitions to the Scottish Parliament in October 2000 (by Anne Macdonald) and August 2002 (by Chris Daly), the creation of a Scottish Parliament Cross-Party Group on Survivors of Childhood Sexual Abuse in 2001, the development of a National Strategy for Survivors of Childhood Sexual Abuse which launched in 2005 (www.survivorscotland.org.uk), an independent Historic Abuse Systemic Review which reported in 2007 and the launch of In Care Survivors Service Scotland in 2008.

¹⁰ “I offer a sincere and full apology on behalf of the people of Scotland to those who were subject to such abuse and neglect and who did not receive the level of love, care and support that they deserved, and who have coped with that burden all their lives.” Scottish Parliament, Official Report, 1 December 2004, <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-04/sor1201-02.htm#Col12390>

¹¹ www.survivorscotland.org.uk

¹² “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>

¹³ <http://www.scotland.gov.uk/Publications/2009/06/02154100/4>

¹⁴ <http://www.scotland.gov.uk/Publications/2009/09/22144103/0>

In Spring 2009 the Scottish Human Rights Commission (the Commission)¹⁵ was commissioned to produce an independent human rights framework for the design and implementation of such an “Acknowledgement and Accountability Forum”. This framework was to be based on international human rights law and standards and international best practice, as well as the views of those affected. As part of this work, two background papers were commissioned:¹⁶

- A review of international human rights law relevant to the Forum (legal paper); and
- A research report to gather independent evidence on the views of those affected by the Forum on key questions related to its possible design and implementation (research report).¹⁷

The Commission also held a roundtable discussion with experts and those with experience of these issues from Scotland, Ireland and Canada before finalising the framework. In addition to these sources, this paper also draws in part on background research carried out for the Commission in 2008, on comparative experiences of truth commissions and inquiries into historic abuse.¹⁸

While the Commission’s work was ongoing, the Scottish Government announced that it would launch a Pilot Forum in Spring 2010. The aims of the Pilot Forum are currently described as:

¹⁵ The Scottish Human Rights Commission is the national human rights institution (NHRI) for Scotland. The Commission has a mandate to promote and protect human rights and is one of over 80 national human rights institutions around the world. In accordance with the UN Principles on NHRIs, the SHRC is independent of both the Scottish Government and the Scottish Parliament. Among the roles anticipated for NHRIs is to promote redress for victims of torture and ill-treatment. Other NHRIs have already begun looking at developing a human rights based approach to addressing historic abuse of children. These include the New Zealand Human Rights Commission (which raised this issue before the UN Committee against Torture in 2009) and the Australian Human Rights Commission (then the Human Rights and Equal Opportunities Commission), *Bringing them home: national inquiry into the separation of Aboriginal and Torres Strait Islander children and their families*, 1997 (Australian HREOC, 1997).

¹⁶ These papers are available on the Commission’s website www.scottishhumanrights.com and can be sent to anyone with an interest on request (contact hello@scottishhumanrights.com, or call the Commission on 0141 243 2721).

¹⁷ The research report, produced by the Care Leavers Association and the Scottish Institute for Residential Child Care, was based on fieldwork consisting of 1) interviews with ten Scottish abuse survivors; 2) three focus groups with relevant professions; and 3) email survey responses by a further 6 Scottish care leavers. This fieldwork was supplemented with relevant literature reviews and commentary, and the whole project was supported by an advisory group including some Scottish care leavers.

¹⁸ Excerpts from this work are available on our website and can be posted on request (contact hello@scottishhumanrights.com, or call the Commission on 0141 243 2721).

- To listen to survivors;
- To validate survivors' experiences;
- To provide a historical record;
- To signpost available services for survivors and support, advocacy, advice and information about these services;
- To test out a particular model-the Confidential Committee model.

The Government announced that the Pilot¹⁹ Forum would adopt a confidential committee model²⁰ which was one element of the remedies and reparations package in Ireland.²¹ People giving testimony would not

¹⁹ The Scottish Government Q and A document explains why this is only a pilot: *“It's important to find out what works for survivors so as to be absolutely sure that any larger scale forum is the best for survivors that it can be, rather than launching something large scale which may not work well. The pilot will be evaluated and those who took part will be asked to give feedback.”* (www.survivorscotland.org).

²⁰ The Scottish Government's Question and Answer document describes this as follows:

“The Confidential Committee model gives people the opportunity to describe their experiences in a confidential setting. The process is private and is designed to make it as easy as possible for survivors to describe their experiences. Survivors will be listened to with respect and with the belief that what they say is true. They can bring with them a friend, family member or someone else to provide support at the hearing. Institutions and alleged or convicted abusers will not be present. Lawyers will not be involved and there will be no investigations carried out by the Pilot Forum itself. But participation in the Pilot Forum does not mean that people can't continue to pursue criminal or civil cases against their alleged abuser(s). What survivors say will be published, but no person will be identified in any report of the Pilot Forum. Survivors' confidentiality will only be breached where this is essential to prevent harm to others, for example where the person that they say abused them is still working with or has the care of children or adults.

Why has this model for the pilot been chosen?

This model has been chosen for the pilot because it's survivor focused and offers an opportunity for survivors to describe their experiences in a supportive environment to understanding people. It also means that a record can be made of the experiences of survivors and this will provide a lasting and powerful testimony of what happened to them. Initial work on the human rights framework that the Scottish Human Rights Commission is undertaking for the Pilot Forum seems to the Scottish Government to suggest that the Confidential Committee model should meet human rights requirements.

However, SHRC has not yet completed its work and has come to no firm conclusions. The Human Rights Framework that they will provide in January 2010 is a key part of preparations for the Pilot Forum and the Chair of the Pilot Forum has acknowledged its significance in his Statement.”

From www.survivorscotland.org.uk

Note: prior to the announcement that a Pilot Forum would take place, the Commission was not asked for its view on the proposal to carry out a pilot or on any model chosen by the Government.

²¹ The remedy and reparations package in Ireland was established through primary legislation. It included the following elements:

- A redress board offering financial compensation to survivors;

be publicly named or identified, but the accounts they give will form a public record. It would not provide institutions or alleged abusers with the opportunity to speak, although the Government is exploring “*other ways in which they could be involved in our work with in care survivors, including opportunities for restorative justice.*”²² It also announced that the Commissioners on the Pilot Forum would be Tom Shaw (a former Chief Inspector of Education in Northern Ireland, who led the Scottish Historic Abuse Systemic Review (1950-1995) which reported in 2007), Kathleen Marshall (Scotland’s first Commissioner for Children and Young People and previously a member of the Edinburgh Inquiry into Abuse and Protection of Children in Care which reported in 1999) and Anne Carpenter (a consultant forensic clinical psychologist).²³

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- an Education Finance Board providing educational grants for former residents in institutions and their relatives;
 - a national counselling service for victims of childhood abuse generally;
 - an amendment to the Statute of Limitations to enable victims of childhood sexual abuse to bring civil actions;
 - a Confidential Committee providing survivors of abuse in childhood in institutions an opportunity to recount the abuse;
 - an Investigation Committee to inquire into abuse of children in care and to determine the systems of management and regulation.

In opting for only a confidential committee model the Scottish Government has cited “*hugely escalating costs*” and delays associated with the investigations committee in Ireland.

Likewise the Truth and Reconciliation Commission in Canada (the confidential committee established in Canada to hear from survivors of abuse in residential schools) was one element of a broader reparations package included in the Indian Residential Schools Settlement Agreement 2007. Other elements included: financial compensation; additional healing measures; common experience payment; independent assessment process; commemoration.

The Forde Inquiry in Queensland Australia from 1999, which was initially limited to a confidential inquiry, eventually extended to include a compensation mechanism, although this did not follow until 2007.

In New Zealand a Confidential Forum for Former Inpatients of Psychiatric Hospitals reported to the Government in 2005 although reports suggest a lack of implementation of its findings. See: Information for the consideration of the Fifth Periodic Report of the Government of New Zealand (parallel report to the UN Committee against Torture) by Sonja Cooper, lawyer, 2009. http://www2.ohchr.org/english/bodies/cat/docs/ngos/Cooper_New_Zealand.pdf

²² Scottish Government Question and Answer document on the Pilot Forum.

²³ See www.survivorscotland.org

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

In designing and implementing any Acknowledgement and Accountability Forum and ensuring there are effective remedies in place, the Commission advises the Scottish Government to adopt a human rights based approach. This section of the paper explains what the Commission means by a human rights based approach and then considers each constituent part in the context of the design and implementation of an Acknowledgement and Accountability Forum, effective access to justice, remedies and reparation for historic child abuse.

The Commission has consciously developed what it considers is an international best practice human rights framework. The Commission's recommendations amount to a "road map" for the full realisation of the human rights of people who have survived historic human rights abuses as children in care in Scotland. This framework is best practice, not minimum standards.

1 What is a Human Rights Based Approach?

The Commission promotes a human rights based approach which emphasises the empowerment of rights holders to know and claim their

rights, and the ability and accountability of duty bearers to fulfil rights. To communicate the requirements of a human rights based approach the Commission uses the “**PANEL**” model, increasingly endorsed by the United Nations. According to this model, any human rights based process must ensure:

- P**articipation of everyone in decisions which affect their human rights;
- A**ccountability of those responsible for the respect, protection and fulfilment of human rights;
- N**on-discrimination;
- E**mpowerment of rights-holders to know and claim their rights;
- L**egality: an explicit application of international human rights law and standards.

Using the human rights based approach should ensure that human rights are respected, protected and fulfilled in the process as well as the outcome of the design and implementation of the Forum and other remedies. A human rights based approach goes beyond simply ensuring “compliance” with human rights law (the floor) to setting out an approach to respect, protect and fulfil human rights both in process and in outcome (the ceiling). Consequently while reference is made throughout to the European Convention on Human Rights and fundamental freedoms (ECHR, incorporated into the law of Scotland through the Human Rights Act 1998 and the Scotland Act 1998) this is very much presented as the floor, not the ceiling for human rights protection.

In developing this framework the Commission has drawn on the full range of relevant international human rights law and standards (not only the ECHR),²⁴ international comparative experiences and the views of those contacted during the preparation of this framework.

²⁴ This is consistent with the mandate of the Scottish Human Rights Commission, as set out in the Scottish Commission for Human Rights Act 2006. According to section 2 of the Scottish Commission for Human Rights Act 2006, the Commission has the “*General duty to promote human rights*”

(1)The Commission’s general duty is, through the exercise of its functions under this Act, to promote human rights and, in particular, to encourage best practice in relation to human rights.

(2)In this Act, “human rights” means—

(a)the Convention rights within the meaning of section 1 of the Human Rights Act 1998 (c. 42), and

(b)other human rights contained in any international convention, treaty or other international instrument ratified by the United Kingdom.

(3) In this section, “promote”, in relation to human rights, means promote awareness and understanding of, and respect for, those rights.

(4) In deciding what action to take under this Act in pursuance of its general duty, the Commission must have regard, in particular, to the importance of exercising its functions under this Act in relation to—

(a) the Convention rights, and

(b) human rights of those groups in society whose human rights are not, in the Commission’s opinion, otherwise being sufficiently promoted.”

2 The human rights based framework

2.1 Participation

Everyone whose rights are affected has the right to participate in all relevant decisions on the Pilot Forum and its successor(s) and the form of remedies available to them.²⁵ To enable people to participate appropriate information should be available in accessible formats, and necessary support should be provided.

2.1.1 Ensuring all those whose rights are affected by the Forum and other remedies are aware of developments and provided with information in an accessible manner:

Realising the right to participate in decisions requires action. In both the design and the implementation phases of the Pilot Forum and its successor(s), 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 remedies.²⁶ Specific suggestions are included in the research paper, including examples of the kinds of information²⁷ which survivors felt would be helpful, and suggestions on outreach strategies²⁸ around the Forums were also provided during research.

Recommendation: in consultation with survivors and others whose rights are affected the Scottish Government should develop a comprehensive communications and outreach strategy to raise awareness of past and present childhood abuse, the human rights of all of those affected and the remedies available.

²⁵ See legal paper, pages 104-106.

²⁶ As recommended by UN Independent Expert to update the Set of principles to combat impunity, Diane Orentlicher, *“outreach programmes aimed at informing as many victims as possible of procedures through which they may exercise [their right to a remedy]”*, UN Doc. E/CN.4/2005/102, para. 60.

²⁷ Research report p 31.

²⁸ Research report, p 32.

2.1.2 Providing opportunities for genuine participation of those whose rights are affected in both the design and implementation of the Forums and other remedies:

International experience suggests that *“it is essential to involve victims in the process of designing and implementing the [remedy and reparations] programme.”*²⁹ International standards on involvement in decisions which affect rights require involvement at the time when *“all options are open”*³⁰, and a genuine opportunity to influence outcomes. Ensuring a mechanism whereby survivors and others whose rights are affected can genuinely participate in key decisions on the design and implementation of the Forums will enhance transparency and legitimacy. Research undertaken to support this framework suggests the importance of ensuring the process is seen as inclusive throughout³¹ including in the leadership of the process as has been secured for example in respect of Truth and Reconciliation Canada.³²

Design:³³ Among the key decisions during the design phase will be how and by whom the Forum will be established (e.g. by Government or Parliament); how the independence of the Forum will be secured;³⁴ how members of the Forum should be selected and the selection of

²⁹ As recommended by UN Independent Expert to update the Set of principles to combat impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102, para. 59. (emphasis added)

³⁰ European Court of Human Rights in *Taşkin and others v Turkey*, ECHR, 10 November 2004, para. 99 (see legal paper, p 105).

³¹ See research report, executive summary and throughout.

³² See Research report p 21.

³³ Some of these decisions have already been taken in respect of the Pilot Forum. There was a discussion on the nature of the Pilot Forum at the Scottish Government’s National Reference Group which oversees the implementation of the National Strategy for Survivors of Childhood Sexual Abuse on 26 August 2009: <http://www.survivorscotland.org.uk/uploads/minutes%2026%20August%202009.pdf>. The idea for the Forum was also discussed at the conference to mark one year from the publication of the Historic Abuse Systemic Review, in November 2008.

³⁴ UN Set of Principles to combat impunity consider that commissions must be independent, impartial and competent, UN Report of the Independent Expert to update the Set of principles to combat impunity, Principle 7. In respect of the Canadian Truth and Reconciliation Commission, Chair Murray Sinclair recently noted that the TRC was established pursuant to a settlement which resulted from a court order. He therefore indicated that, if necessary he could have recourse to the supervisory jurisdiction of the court in case of conflict with the Government which threatened the TRC’s independence. See speech of the Chief Justice Murray Sinclair at the University of Toronto Law School, <http://mediacast.ic.utoronto.ca/20091211-LAW/index.htm>

members;³⁵ in what circumstances and by what procedure members of the Forum may be removed; how the Forum will operate – including questions related to its mandate and powers; how the various actors which may share responsibility for abuse will interact with the Forum; whether and how the Forum may adopt a restorative justice model; the interaction of the Forum with other remedies and access to justice and a wide range of questions. International experience suggests that the very fact of creation and financing by the Government, rather than Parliament, can lead to challenges in perception of independence, and in securing continuity beyond electoral cycles. International experiences also suggest that a legislative mandate with judicial oversight can play a vital role in clarifying the mandate, independence and resources for such processes of remedies and reparation.³⁶

Implementation: individuals should have the right to participate in determining a proportionate remedies and reparations package for them; as well as other decisions including the degree of privacy and confidentiality of the information which they present to the Forums. Those engaging with the Forums should also be fully informed of the connection between the Forums and the criminal justice system in order that they may make informed decisions on whether to participate, knowing for example when information (whether potentially self-incriminating or otherwise) may be passed to prosecution authorities.

Recommendation:

The Pilot Forum should build on steps already taken to secure the trust and effective participation of all of those whose rights are affected in all decisions on its design and implementation;

The Scottish Government should:

- Ensure full and effective participation of survivors and others whose rights are affected in all decisions on the successor(s) to the Pilot Forum;

³⁵ The International Centre for Transitional Justice has developed a set of minimum standards or general principles for official, non-judicial truth-seeking processes. These include that, “*the members of a truth commission should ideally be selected through a process of consultation, including with public input, with the aim of establishing a commission comprised of respected and qualified individuals.*” www.ictj.org

³⁶ A written submission to the Commission from a survivor group also considered that a legislative basis for the forum may be necessary.

- In the Pilot Forum and its successor(s) individual survivors and others should be supported and enabled to participate in decisions on appropriate proportionate reparations in their case, and should be enabled to make informed decisions on their participation in any Forum.

2.2 Accountability

During the consultations on the proposed Forum, the Scottish Government has preferred the title, “Acknowledgement and Accountability Forum”, which consultation responses seemed generally to think accurately reflected the role respondents wished the Forum to play. Research commissioned by the Commission, and the results of Scottish Government consultations, however, suggest that there is little awareness of the nature, scope and extent of duties to account and remedy abuses of human rights.³⁷ In this section responses are set out to the following questions:

2.2.1 What should there be accountability for?

2.2.2 Who should be accountable?

2.2.3 How is accountability realised?

2.2.4 What are the duties to ensure effective remedies?

A human rights based approach demands the identification and fulfilment of responsibilities by different actors. Ultimately in international human rights law the State is accountable to respect, protect and fulfil human rights of everyone, everywhere in its jurisdiction (whether at home, in a state or a private institution). To comply with this duty the State must ensure that its agents do not

³⁷ Research undertaken to inform this framework suggests 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 (research report, p 28). Responses to the Scottish Government consultation were divided on the question of whether the Forum could or should be a mechanism for holding different actors - the Government, the institutions, individuals, to account. However 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*”. Organisations and staff approached during the research expressed divergent views, including that the Forum should hold to account relevant individuals and institutions (research report, p 39), and that “*accountability was problematic without there being a legal process involved.*” (research report, p 42).

conduct abuses. It must also exercise due diligence,³⁸ and take effective measures to prevent abuses of human rights, protect individuals from abuses which it knows or ought to know of. Where there are reasonable grounds to believe serious abuses have taken place it must investigate, identify liability and punish perpetrators as appropriate. The purpose of the investigation should be to identify what happened and the context in which it happened.³⁹ The nature of investigation requirements (and particularly the associated duty to prosecute) depend on who the alleged perpetrator is and the gravity of the alleged abuse.

International and domestic human rights law also increasingly recognise responsibilities of other actors, including public authorities, private institutions and individuals.

In response to abuses, the State should ensure the victim's right to an effective remedy is upheld. This right demands access to justice in practice, not only in law, for everyone whose human rights are violated and a victim centred proportionate and participatory reparations process which seeks, to the extent possible, to repair the damage caused by abuses. Other institutions, to the extent that they are accountable, should contribute to reparations for survivors.

To make this right real, accessible information should be available to all survivors on violations and remedies.

2.2.1 What should there be accountability for?

It is the view of the Commission that international practice and emerging interpretations of international human rights law, support the view that victims of human rights violations have a right to an effective remedy today, according to today's understanding of the right to an effective remedy where they have not had that right fulfilled in the past.⁴⁰

³⁸ As the UN Human Rights Committee states, *"There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."* UN Human Rights Committee, *General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant* : . 26/05/2004. UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8.

³⁹ "By what means" and "in what circumstances", see legal paper, p 11 and 52-59.

⁴⁰ See Legal paper p 71-72. In particular, *E and others v UK* and the UN Committee against Torture (CAT, the body of 10 independent experts that monitors implementation of the UN Convention

However the determination of whether conduct amounted to a human rights violation should be made according to the standards applicable at the time the conduct occurred.⁴¹ Where the conduct meets the standard for a violation under the international human rights law applicable at the time it occurred, the State should be held liable in the circumstances below. This is true both in determining whether an act or omission amounted to ill-treatment and to whether the State complied with its procedural duties of prevention and protection. Where at the time the conduct occurred, domestic law ascribed liability for less grave conduct than that which would be required to amount to a violation under international law, the State should be liable under the domestic standard.

In relation to the criminal liability of individuals, they should only attract liability for conduct which was a crime under domestic law at the time it occurred.⁴² The exception to this is for international crimes such as torture which should be determined according to standards of international law as it was at the time the conduct occurred.

Recommendation:

The Scottish Government should clarify that the Pilot Forum is a stage in scoping the needs of survivors and commit to taking a comprehensive human rights based approach to securing effective access to justice, effective remedies and reparation for survivors of childhood abuse.

2.2.2 Who should be accountable?

a) The State:⁴³

The State will be responsible for acts and omissions of its officials and others acting in an official capacity.⁴⁴ The State will also be responsible

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) in its concluding observations on New Zealand: *“The State party should take appropriate measures to ensure that allegations of cruel, inhuman or degrading treatment in the “historic cases” are investigated promptly and impartially, perpetrators duly prosecuted, and the victims accorded redress, including adequate compensation and rehabilitation.”*

⁴¹ See later section on legality including definitions of torture and ill-treatment.

⁴² See later section on legality, including particularly Article 7.

⁴³ See Legal paper, pages 42-50.

⁴⁴ The UN Committee against Torture has summarized State responsibility under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment thus: *“The*

where it failed to take effective legal and practical measures to prevent ill-treatment (including through failing to adequately deter ill-treatment through the operation of the law), failed to exercise due diligence⁴⁵ to prevent and protect individuals from ill-treatment,⁴⁶ and failed to adequately and effectively investigate where reasonable grounds exist.⁴⁷ It will also be responsible where it knew or ought to have known of an immediate risk of ill-treatment anywhere (whether at home, in a State or private institution or elsewhere) and failed to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm.⁴⁸

Recommendation: the successor(s) to the Pilot Forum should seek to identify where State liability may be engaged through either the acts of State agents or others acting in an official capacity, through a failure to take adequate effective measures of prevention, protection and investigation.

Convention imposes obligations on States parties and not on individuals. States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law. Accordingly, each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm. The Convention does not, however, limit the international responsibility that States or individuals can incur for perpetrating torture and ill-treatment under international customary law and other treaties.” UN Committee against Torture, General Comment No. 2, *Implementation of Article 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States Parties*, UN Doc. CAT/C/GC/2, Para 15.

⁴⁵ In the case of the Irish Commission of Inquiry this included failures of the State to monitor and inspect institutions. In a Scottish case before the ECtHR involving child abuse in the 1970s and 1980s, the UK was rebuked for a “*pattern of lack of investigation, communication and co-operation by the relevant authorities.*” As the Court stated, “*proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk of the damage suffered.*” *E and others v UK*, para. 100, Legal paper, p 47.

⁴⁶ Legal paper, pages 44-50.

⁴⁷ As the UN Committee against Torture has clarified, “*where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.*” UN Committee against Torture, General Comment No. 2, *Implementation of Article 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States Parties*, UN Doc. CAT/C/GC/2, Para 18.

⁴⁸ Legal paper, pages 44-50. The duty to protect exists from the moment at which the State knew or ought to have known. It has been applied in cases under Article 3 (torture and ill-treatment) since the 1990s but has been applied to cases of historic abuse (see, in particular *E and others v UK*, *Z and others v UK*).

b) Public authorities, institutions and individuals:⁴⁹

Public authorities: Under international human rights law, all elements and all levels of the State, including public and local authorities can engage the responsibility of the State.⁵⁰ While there is scope in international human rights law to exclude the liability of a particular public or local authority where there are compelling public policy reasons for doing so, in such cases the State will remain liable under international human rights law for the right to a remedy including for an individual to have access to a mechanism of justice and investigation sufficient to determine if a public or local authority has failed to protect their right to freedom from ill-treatment.⁵¹

Under domestic law since the entry into force of the Human Rights Act on 2 October 2000, it is unlawful for public authorities and other organisations (to the extent that they exercise the functions of a public authority and in the exercise of those functions), to act in a way that is incompatible with rights under the ECHR.

Private institutions: International human rights law does not have horizontal effect between individuals. However the State is required to protect individuals from violations by private actors and institutions as well as its agents and public authorities.⁵² International human rights law on the responsibilities of private actors is in development, although it is clear that States are required by international law to take effective measures of prevention and protection against acts or omissions which amount to ill-treatment or other abuses of human rights by institutions. They may also, since 2 October 2000, be accountable under the section 6 of the Human Rights Act 1998.

Aside from formal – legal - accountability, the Government may wish to explore a form of alternative dispute resolution or restorative justice between those survivors and institutions who feel they would benefit

⁴⁹ Legal paper, pages 50-52.

⁵⁰ UN Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 4, “All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party.”

⁵¹ *E and others v UK* and *Z and others v UK*, legal paper pages 67-68

⁵² UN Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8.

from this. The Commission is currently piloting a FAIR⁵³ model of human rights interaction, which may be of value in this context. In the context of finalising this framework, however, some have cautioned against applying concepts of restorative justice in this context. The Commission therefore make no recommendation in this regard other than to caution that any decision on whether to engage in such a model should be on the basis of informed consent of everyone, understanding the process and aware of the possibilities for re-traumatisation.

During research to inform this framework, a number of survivors pointed to an expectation that institutions would have some interaction with the Forum and other remedies.⁵⁴ However many may not wish to face institutions directly.⁵⁵

Individuals:⁵⁶ individual liability for human rights abuses exists in respect of certain international crimes, the most relevant of which to the subject matter of the Forum is torture.⁵⁷ Individual liability for torture (and the duty to prosecute) extends in international human rights law not only to those who directly participate but to others who are complicit.⁵⁸ Individuals may also be held to account under domestic law for crimes and delicts (torts, i.e. civil liability). In either case this should be according to the law as it was at the time the act or omission is said to have taken place.⁵⁹

As with institutions above, the Government may wish to consider the role of restorative justice in relation to individuals. Any decisions on

⁵³ This model, explained in Annex X, involves all interested parties participating to identify:

- **Facts:** what happened? Allowing everyone involved to have their say, and determine what happened;
- **Analysis of rights:** what are the human rights at stake? Clarifying the human rights issues of everyone involved;
- **Investigation of responsibilities:** who is responsible for what? Developing a shared framework of mutual responsibilities;
- **Recall:** revisit the interaction at a later day to review progress in implementation of recommendations and remedy.

⁵⁴ Research report, p 28, 29.

⁵⁵ Research report, p 28, 30.

⁵⁶ See also the role of prosecutions emerging from investigations, below.

⁵⁷ See Legal paper, p 51.

⁵⁸ UN Committee Against Torture, General Comment no. 2, *Implementation of Article 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States Parties*, UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007), para. 8. Cherie Booth Q.C. and Dan Squires consider that this may extend to those in hierarchical structures in institutions, Cherie Booth Q.C. and Dan Squires, *The Negligence Liability of Public Authorities*, OUP, 2005, para. 7.68.

⁵⁹ See section on legality, in particular in relation to Article 7 of the ECHR.

participation in such processes would of course lie with the individuals themselves.

Recommendations:

- The successor(s) to the Pilot Forum should seek to identify where public authorities, and private bodies exercising public functions, may be liable for failure to comply with the Human Rights Act 1998, in respect of acts or omissions since 2 October 2000.
- The use of restorative justice in the Pilot Forum or its successor(s) should be carefully considered and any individuals engaging in this process should do so only on the basis of fully informed consent.
- The Pilot Forum and its successor(s) should identify where acts of torture may have been perpetrated.

2.2.3 How is accountability realised:

To be accountable requires effective monitoring (through data collection and inspections), effective remedies (including independent complaints mechanisms and access to justice) and effective corrective action to be taken where deficiencies are identified. It requires the existence of appropriate law and policy structures, institutions, administrative procedures and other mechanisms where individuals can seek remedies and have access to justice where needed.

Among the key duties of the State to respond to historic gross human rights abuses are:

- a) the duty to investigate;
- b) prosecution of individuals identified during an investigation;
- c) the duty to ensure effective remedies for human rights violations.

This section explores each of these elements and the role which the Pilot Forum and its successor(s) could take in relation to each.

a) The duty of the State to investigate.⁶⁰

There is an obligation in international human rights law on the State to investigate violations promptly, thoroughly and effectively through independent and impartial bodies.⁶¹ Under the European Convention on Human Rights there are positive duties to hold effective official investigations into arguable claims of violations of the right to life and the right to freedom from torture and ill-treatment by a public official.⁶² The duty to hold an effective official investigation extends to serious (criminal) ill-treatment by private actors.⁶³ However, investigation requirements into torture or serious ill-treatment by private individuals is an area in development under the ECHR and in some cases alternative investigatory mechanisms have been suggested.⁶⁴ There is in general an international trend away from immunity, impunity and amnesty for torture and serious ill-treatment.

i) Triggering the duty to investigate

The duty to investigate does not depend on a formal complaint, but *“it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim’s wish that the facts should be promptly and impartially investigated”*.⁶⁵ The requirement to investigate may be triggered as a result of information from a wide range of sources, including from national or international non-governmental organisations or national human rights institutions.⁶⁶ In respect of the

⁶⁰ While the duty of investigation, under Article 3 of the ECHR exists since mid 1990s at the international level, the ECtHR clearly considers that it extends to events much earlier than that (*E and others v UK*). However the House of Lords (in the Hurst case) considered that the equivalent obligations under Article 2 of the ECHR, existed domestically only since the Human Rights Act 1998 came into force on 2 October 2000. This case is currently being considered by the ECtHR. However the UN Committee against Torture clearly views investigation duties and broader remedies to exist today for historic conduct under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See legal paper, pages 11-12; 71-73

⁶¹ UN Human Rights Committee, General Comment no 31, para. 15.

⁶² See *Assenov v Bulgaria*, para. 102: *“where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State’s general duty under Article 1...requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible.”* and legal paper pages 53-

⁶³ *M.C. v Bulgaria*, Judgement of 4 December 2003, para 151.

⁶⁴ *E and others v UK* and *Z and others v UK*

⁶⁵ *Dhaou Belgacem Thabti v. Tunisia* (187/2001), UN CAT, UN Doc. A/59/44(14 November 2003) 167 (CAT/C/31/D/187/2001) at para 10.6.

⁶⁶ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture, a commentary*, OUP, 2008, p 418,, p 432, para 53, citing concluding observations and view of the UN CAT.

ECHR investigation requirements exist where an “arguable claim” is made of torture or serious ill-treatment or of a failure to protect the right to life.

ii) Forms of investigation required under international human rights law

Under the European Convention on Human Rights different investigation requirements exist in relation to individual abuses dependent on the nature of the conduct and the profile of the alleged perpetrators.

An effective official investigation

An effective official investigation is required under the European Convention on Human Rights at least⁶⁷ where there are reasonable grounds⁶⁸ to support the view that:

- a) the State knew or ought to have known of an immediate risk to an individual’s life, and did not take reasonable measures of protection;
- b) an individual has been tortured or seriously ill-treated by *agents of the state*;
- c) serious (criminal) ill-treatment was perpetrated by private actors.⁶⁹

An effective official investigation, where required under the European Convention on Human Rights, should be:⁷⁰

- Prompt;
- Carried out at the initiative of the State;
- Independent and impartial;
- Capable of determining who is responsible and punishing them;
- Open to public scrutiny;
- Accessible to the victim.

⁶⁷ There are also indications that the European Convention of Human Rights may require investigation and prosecutions in respect of abuses of other rights. In one case, for example the ECtHR found a violation of article 8 where Dutch criminal law did not provide for prosecution where an individual (due to incapacity) was unable to lodge a criminal complaint of rape. *X and Y v Netherlands*, (8978/80)(1986 8EHRR235).

⁶⁸ Or where an “arguable claim” of torture or ill-treatment by agents of the State is made – see *Assenov v Turkey*, 1998, legal paper, p 53.

⁶⁹ *M.C. v Bulgaria*, Judgement of 4 December 2003, para 151, legal paper, p 56.

⁷⁰ See legal paper, pages 54-55.

Investigation requirements for acts of private institutions or individuals

As noted, investigation requirements in respect of torture or serious ill-treatment by private actors are under development by the ECtHR.

Where there are reasonable grounds to believe that torture or ill-treatment *are being* committed there is a duty to “*exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors*”.⁷¹

Where there are reasonable grounds to support a view that ill-treatment by private individuals or institutions *has* occurred, the European Convention on Human Rights requires that “*there should ... be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention.*”⁷² The nature of what is required here depends on the gravity of the abuse. International law increasingly requires investigations and where appropriate prosecutions in relation to torture and similar ill-treatment, particularly “*in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment*”.⁷³ There is then a requirement to pursue prosecutions where appropriate,⁷⁴ but in other circumstances more limited forms of investigation and punishment may be appropriate.⁷⁵

The ECtHR has found a duty in cases of serious (criminal) ill-treatment to hold an effective official investigation.⁷⁶

Recommendations:

⁷¹ UN CAT, General Comment 2, para 18., Legal paper, p 47.

⁷² *E and others v UK*, 2002, para 110; *Z and others v UK*, Judgement of 10 May 2001, para 109.

⁷³ UN Human Rights Committee, General Comment no. 31, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant : . 26/05/2004. UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 para 18.

⁷⁴ As the UN Human Rights Committee has stated, “*the problem of impunity for these violations...may well be an important contributing element in the recurrence of the violations.*” UN Human Rights Committee, General Comment no. 31, para. 18. The assessment of whether it is reasonable not to investigate in these circumstances will depend on an assessment of the remedies available as a whole. See legal paper, p 59.

⁷⁵ Nowak and McArthur, p 415, para 5: “*such investigations do not necessarily lead to a full criminal investigation or even prosecution, but perhaps to a disciplinary sanction or only to a better knowledge about the risks of torture [and ill-treatment] and how such risks can be more effectively prevented.*” (see legal paper, p 58.)

⁷⁶ *M.C. v Bulgaria*, 39272/98, 2005.

The Scottish Government should:

- Ensure that all arguable claims of State failure to protect the right to life or that a State agent engaged in torture or serious ill-treatment trigger an effective official investigation;
- Ensure that it exercises due diligence where there are reasonable grounds to believe that ill-treatment by private institutions or individuals is on-going;
- Ensure, where there are reasonable grounds to support the view that an individual was seriously ill-treated by a private institution or individual trigger an appropriate investigation through a mechanism which is capable of determining any State liability for the violation. This should be accompanied by prosecutions where appropriate or other disciplinary measures.

iii) What is the role of the Pilot Forum and its successor(s) in relation to the requirement for investigation?

“A reparations programme should also operate in coordination with other justice measures. When a reparations programme functions in the absence of other justice measures, the benefits it distributes risk being seen as constituting the currency with which the State tries to buy the silence or acquiescence of victims and their families. Thus it is important to ensure that reparations efforts cohere with other justice initiatives, including criminal prosecutions, truth-telling, and institutional reform”⁷⁷

The Commission understands that the Pilot Forum⁷⁸ is currently addressing a number of questions related to its mandate and independence, including the establishment of an independent secretariat.

⁷⁷ Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102, 18 February 2005, para 59.

⁷⁸ Recent documentation produced by the Scottish Government in relation to the Pilot Forum suggests that *“information on individuals will only be disclosed if alleged abusers named at the Pilot Forum are known to be working with children or vulnerable adults at present.”*

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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*”, a task which would require a degree of investigation.⁷⁹ Responses to the Scottish Government consultation and the Commission’s research suggest that a number of survivors (as well as private institutions and staff) envisage that the Forum should be a form of investigation with powers to compel witness participation, which is capable of attributing liability and enforcing remedies.⁸⁰ Information from the Scottish Government on the Pilot Forum, in contrast, suggests that the Pilot will be confidential, and information on individuals named will only be disclosed to prosecution and other authorities where “*a survivor discloses abuse committed by a person who is known to be working currently with children or in a caring role with adults or who has responsibility for the care of children or adults.*”⁸¹ It is not clear how the Pilot Forum will establish this. According to the Government:

“The Pilot Forum is not a trial or a court hearing. Survivors who take part in the Pilot Forum will still be free to report allegations to the police for a criminal investigation, to seek compensation from the Criminal Injuries Compensation Scheme and to try and bring a civil action. Nothing that is said at the Pilot Forum will be used in any legal proceedings, (although of course survivors may choose to repeat their testimony in separate legal proceedings, and the experience of the Pilot Forum may itself help people to decide if they want to go forward with legal proceedings). The exception would be where a survivor discloses abuse committed by a person who is known to be working currently with children or in a caring role with adults or who has responsibility for the care of children or adults. In those cases allegations must be reported to the police.”

⁷⁹ 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>

⁸⁰ See research paper, p 37, 42, 44, 47.

⁸¹ Elsewhere in the documentation on the Pilot Forum this formulation is presented differently as “*information on individuals will only be disclosed if alleged abusers named at the Pilot Forum are known to be working with children or vulnerable adults at present.*” SG documentation, “Annex A, What is the Pilot Forum? A Message from Tom Shaw who will chair the Pilot Forum” www.survivorscotland.org.uk

*The Pilot Forum is likely to have access to a dedicated team of police officers with understanding of survivor issues who will conduct any investigation.*⁸²

Any future Forum will have to find a way to balance the perceived public interest in confidential process, with public interest and state obligations of effective investigation in relation to failures to protect life, torture and serious ill-treatment; and prosecution of those guilty of related crimes. In this context, it is worth noting that a prominent international non-governmental organisation, the International Center for Transitional Justice, in considering the Canadian reparations package which includes Truth and Reconciliation Canada, raised concern that *“the settlement and the work of the TRC do not mention prosecution of persons who may be still alive and were responsible for crimes against Aboriginal children.”*⁸³

It is not yet clear how proceeding with a confidential Pilot Forum alone will interact with the duty of the State to ensure effective investigations in the circumstances outlined above. For example it is unclear how the proposal that disclosure to prosecution or other authorities will only be made where *“ a survivor discloses abuse committed by a person who is known to be working currently with children or in a caring role with adults or who has responsibility for the care of children or adults”* will work in practice. In addition, if the Pilot Forum receives corroborated evidence from survivors about particular instances of serious abuse sufficient for prosecution, it is not yet clear whether an effective official investigation will be launched.⁸⁴

⁸² Scottish Government Question and Answer document on the Pilot Forum.

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⁸³ International Center for Transitional Justice, *Canada: submission to the Universal Periodic Review of the UN Human Rights Council*, fourth session 2-13 February 2009, para 17.

⁸⁴ The confidential committee and the investigations committee in Ireland interacted, in that all witnesses before the confidential committee were offered an interview and some a full hearing, where evidence was particularly “profound”. In practice where a number of similar allegations were made in respect of the same institution, only some proceeded to a full hearing.

While the Scottish Government has thus far not committed to an investigations committee model, citing the hugely escalating costs in the Irish process, it has been suggested to the Commission that the experience of other inquiries, such as the recent Dublin Inquiry, may offer a cost effective alternative.

Another aspect of the Irish experience which has been considered extremely successful was to hold a series of “emergence hearings” and other public hearings, at which matters of public record, such as

In no event should the Pilot forum or any successor(s) proceed on the basis of an amnesty or immunity from investigation and prosecution for acts of torture or serious ill-treatment.⁸⁵ There must also be clarity for all potential participants as to just what is any Forum's relationship with the State duties of investigation and prosecution outlined throughout section 2.2 of this framework.

Recommendations:

- The Pilot Forum and the Scottish Government should clarify the relation between the Pilot Forum and the State duty to investigate and prosecute as appropriate;
- The Scottish Government should Consider further the role for accountability in the successor(s) to the Pilot Forum, in particular considering the inclusion of investigatory powers at least to establish a record of the truth, and to identify where reasonable grounds exist for effective official investigations, as well as supporting survivors to identify and access effective remedies and proportionate reparation according to their needs and wishes;

existing criminal convictions would be set down in advance of further hearings. These emergence hearings involved institutions and survivors. (Information provided to the Commission on the Irish experience. Survivors' groups also expressed to the Commission the need for "acceptance by all the parties of the previous court findings whereby individuals have been found guilty and abuse upheld.")

Different jurisdictions have taken different approaches to prosecutions for historic crimes. Whereas there have been a number of prosecutions in Scotland and Ireland, for example, a leading commentator in Australia suggests that there has been a "complete lack of prosecutorial interest in the many claims of abuse arising from the Stolen Generation in Australia". (Chris Cunneen, "Legal and Political Responses to the Stolen Generation: lessons from Ireland?", *Indigenous Law Bulletin* v.5 no.27 Sept 2003, pages 14-19.)

⁸⁵ Scottish Government documentation related to the Pilot Forum appears to place the emphasis for pursuing criminal cases on the survivor. As an information note which accompanied the announcement of the Pilot Forum states, "participation in the Pilot Forum does not mean that people can't continue to pursue criminal or civil cases against their alleged abuser(s)." The only envisaged exception to this, as noted earlier, is where "this is essential to prevent harm to others, for example where the person that they say abused them is still working with or has the care of children or adults." See legal paper, pages 65, UN Committee against Torture, "Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future." The ECtHR 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".

2.2.4 What are the duties to ensure effective remedies?

The State has the duty to ensure effective remedies for violations of human rights.⁸⁶ This duty extends to historic human rights abuses which have not been remedied.⁸⁷ The right to an effective remedy includes access to justice; reparation and information on remedies.

While some remedies may be provided relatively soon, it is recognised that others may take some time. The Commission proposes that remedies for historic abuse should be seen as an ongoing process, not as a one-off, and that remedies which can be provided promptly should be, as others which can only be provided over time are progressively addressed. In this recommendation the Commission is guided by both the legal and research findings which point to the importance of balancing prompt remedies (particularly for older survivors) with full and effective reparation in all forms, dependent on individual circumstances.⁸⁸

Given the nature of historic abuse, the Government should seek to ensure “*a remedy that is as effective as can be, having regard to the restricted scope for recourse inherent [in the particular context]*”.⁸⁹ It must ensure that remedies are effective in practice as well as in law,⁹⁰ having regard to adequacy, accessibility and promptness.⁹¹

The Pilot Forum and its successor(s) should be part of an overall package of remedies, including reparations. There should be clear coordination with other justice measures including civil and criminal justice (see above the need to clarify the relation between the Forum and investigations and prosecutions).⁹² The Pilot Forum could also have a

⁸⁶ This is the case where the state itself has violated an individual’s rights and also where the State has failed to protect an individual from acts or omissions of others which amount to human rights abuses.

⁸⁷ See *E and others v UK* and UN CAT concluding observations on New Zealand (legal paper pages 70-72).

⁸⁸ The importance of prompt remedies, particularly for older survivors, emerged from the research (research paper, throughout). The Legal paper points out the requirement that reparations be “*adequate, effective and prompt*” (legal paper, page 64).

⁸⁹ *Klass and Others v. Germany (A/28)* (1979-80) September 6, 1978. The case involved surveillance of the applicant in connection with a criminal investigation.

⁹⁰ *Ilhan v Turkey*, no. 22277/93, ECHR 2000-VII, judgement of 27 June 2000.

⁹¹ *Paulino Tomás v. Portugal* (2003)

⁹² See Report of UN Independent Expert to update the Set of principles to combat impunity, p 17 (legal paper, p 81-82). As the Independent Expert warns, based on international experience, “*When a*

role in realising all elements of the right to an effective remedy, as outlined below. In particular the Pilot Forum could:

- consider the effectiveness in practice of existing remedies for survivors of historic abuse, making recommendations for change and additions as necessary;
- consider the requirements of the full realisation of victims right to an effective remedy, including elements of proportionate reparations which are required, supporting survivors to identify their needs;
- raise awareness of all elements of the right to an effective remedy for survivors of historic abuse.

The right to an effective remedy requires, in addition to investigation and prosecution in the circumstances outlined above:

a) Equal and effective access to justice:⁹³

Existing judicial and other remedies must be effective and equally accessible in practice not only in law.⁹⁴ This requires that they “*should be appropriately adapted so as to take account of the special vulnerability of certain categories of person*”.⁹⁵

Existing remedies in Scotland appear to be inadequate at present to ensure access to justice for survivors of historic abuse. In a Scottish case on historic child abuse the ECtHR pointed out inadequacies in remedies available in Scotland, notably the limitation of the compensation mechanism to crimes (which would not necessarily cover neglect which amounts to ill-treatment) committed after 1964 (thus excluding older survivors), and the practical application of a “time-bar” to civil remedies.⁹⁶

reparations programme functions in the absence of other justice measures, the benefits it distributes risk being seen as constituting the currency with which the State tries to buy the silence or acquiescence of victims and their families.”

⁹³ See Legal paper pp 64-68; 94-97

⁹⁴ See *E and others v UK*.

⁹⁵ UN HRC, General Comment no. 31, para. 15.

⁹⁶ *E and others v UK* pointed to gaps in the current framework for remedies of historic abuse in Scotland (and the equivalent English case of *Z and others v UK* did the same in respect of England).

Other jurisdictions have grappled with the limitation period for claims related to childhood abuse. Australia⁹⁷ and Ireland⁹⁸ both considered how to remove or limit legal barriers to accessing justice in delivering remedies packages for historic child abuse. However this is a complex area which the Scottish Law Commission recently explored. It did not recommend a special category of claims in respect of institutional childhood abuse but did recommend some other changes to the law.⁹⁹ Some senior Scottish judges have more recently called for reform of the law on prescription and limitation.¹⁰⁰

While statutes of prescription and limitation in respect of civil liability are not *per se* contrary to the ECHR, such limitations on the right to an effective remedy should be legal, necessary in pursuit of a legitimate aim (such as finality and legal certainty) and proportionate.¹⁰¹ The Commission is not convinced that changes to present perceived exclusion of liability should give rise to a successful claim under the ECHR

⁹⁷ In Australia the Senate Committee examining institutional child abuse recommended that governments review the law and consider amending limitation legislation (Parliament of Australia, Senate Community Affairs Committee, *Forgotten Australians: a report on Australians who experienced institutional or out-of-home care as children*, 2004. In Canada, the federal government stopped using technical defences to contest civil cases initiated by Aboriginal people who experience historical abuse in , Canada and Ireland have all addressed the issue of limitation to civil claims in considering reparations for survivors of historic child abuse. In Ireland for example the reparations package included an amendment to the statute of limitations. (see annex 3). In developing similar human rights frameworks other national human rights institutions have suggested that no limitation period should be applied to monetary compensation mechanisms for historic child abuse (Australian HREOC, 1997, recommendation 17(3)).

⁹⁸ Ireland passed the Statute of Limitations (Amendment) Act 2000, which retrospectively extended the period within which a person may bring a civil claim arising out of child sexual abuse in circumstances where the person bringing the claim is deemed to be “under a disability”. (Compensation Advisory Committee (2002) *Towards Redress and Recovery*. Report to the Minister for Education and Science, Dublin, January 2002. (Also known as the Ryan Report. Full text: <http://www.rirb.ie/ryanreport.asp>), p 512-52. ‘In such cases the normal three year period does not begin to run ... until he or she overcomes the psychological injury’. The amendments still allow for judicial discretion in allowing for dismissal of claims. Section 3 of the Act provides that the court retains the power ‘to dismiss an action on the ground of there being such a delay between the accrual of the cause of the action and the bringing of the action as, in the interests of justice, would warrant its dismissal’.

⁹⁹ Scottish Law Commission, *Report on Personal Injury Actions: limitation and prescribed claims*, December 2007, Scot Law Com No. 207, p 60-62.

¹⁰⁰ *Judge calls for abuse law change*, BBC News, 5 December 2008, <http://news.bbc.co.uk/1/hi/scotland/7768129.stm> reporting statements by Lord McEwan in *A v N* [2008] CSOH 165, para 26, “I have an uneasy feeling that the legislation and the strict way the courts have interpreted it, has failed a generation of children who've been abused and whose attempts to seek a fair remedy have become mired in the legal system.”

¹⁰¹ See legal paper pages 73-78 and in particular *Stubbings and others v United Kingdom* (Application No. 22083/93), legal paper p 75-76. The ECtHR noted that there may be a need in the near future to amend rules on limitation of actions on historic child abuse (at para 56).

by institutions.¹⁰² In any event, in those situations where the State is accountable, as outlined above, the State is also liable under international human rights law to ensure adequate compensation.

In this respect the Commission notes and reiterates the view of the Scottish Law Commission that it would be possible in Scotland to consider an *ad hoc* compensation mechanism in respect of historic childhood abuse in Scotland, similar to that established in Ireland.¹⁰³

Survivors who participated in research to support this framework also pointed to problems with existing remedies, including problems gaining legal advice, lack of funding to access remedies, a lack of speed, lack of support before, during and after processes and need to repeat their experience to many people. They also pointed to the time-bar for civil litigation and associated difficulties gaining legal aid, the exclusion of people who were abused prior to 1964 from the Criminal Injuries Compensation Authority and difficulties of survivors who had left Scotland in physically accessing remedies.¹⁰⁴

b) Reparation:¹⁰⁵

The aim of reparation is, to the extent possible, to redress all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.¹⁰⁶ Individual reparations should be based on the participation of the victim of a violation (to identify their needs and wishes) and should be proportionate to the gravity of the violation and

¹⁰² See legal paper, pages 77-78.

¹⁰³ Scottish Law Commission, *Report on Personal Injury Actions: limitation and prescribed claims*, December 2007, Scot Law Com No. 207, p 58-59.

¹⁰⁴ see research report, p 30.

¹⁰⁵ Most of the survivors who participated in research to inform this framework felt reparations should be an element of the Forum (Research report, p 28). Other national human rights institutions which have developed human rights frameworks for addressing historic abuse of children have also recommended a comprehensive approach to reparations. The Australian HREOC (as it was then) recommended in 1997 that “*reparation should consist of “1. acknowledgement and apology; 2. guarantees of non-repetition; 3. measures of restitution; 4. measures of rehabilitation, and; 5. monetary compensation”* (recommendation 3).

¹⁰⁶ *Factory at Chorzow*, PCIJ (Permanent Court of International Justice), Ser A, No 17 (1928). Also in the European human rights system, the ECtHR has stated, “*A judgment in which it finds a breach imposes on the respondent State a legal obligation under [Article 46 of the ECHR] to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.*”, *Assanidze v Georgia*, no. 71503/01, ECHR 2004-II, judgement of 8 April 2004, para. 198.

the resulting harm.¹⁰⁷ Reparations packages should include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁰⁸

International best practice guidance suggests that institutions should contribute to reparations packages to the extent to which they are accountable. While ensuring adequate, effective and prompt reparation is an obligation of the State, *“in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.”*¹⁰⁹

Elements of reparation which should be available include:

i) restitution of rights

Restoring the victim to their original situation for example through ensuring their enjoyment of human rights where this is possible. It may, for example, be possible for some of the rights violations associated with abuse such as the right to education, the right to the highest attainable standard of physical and mental health, and the right to an adequate standard of living. Scottish survivors who participated in research to inform this framework also suggested support for tracing family.¹¹⁰

ii) adequate compensation¹¹¹

¹⁰⁷ See views of the UN Special Rapporteur on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (legal paper, p 60) and research paper, p 31 where survivors clearly envisaged a wide range of reparations from which survivors could determine the appropriate reparations for themselves. p 36 *“people should be able to chose the type of counselling/support they required”*.

¹⁰⁸ UN Special Rapporteur on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, *‘Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms’*, UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-fifth session, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993 at 56.

¹⁰⁹ Van Boven Principles, IX, para 15. This has been the case in other contexts such as Ireland, where institutions such as churches have provided elements of reparation including compensation.

¹¹⁰ Research report, p 36. Family tracing was seen to be very important to witnesses in the Irish process.

¹¹¹ Some participants in the Scottish Government consultation were in favour of compensation, noting problems with civil litigation and enduring financial hardship. However others took the view that compensation could be pursued through different mechanisms such as the Criminal Injuries Compensation Authority (however the report of the consultation did not mention that this mechanism is limited to acts which were criminal at the time and to acts after 1964).

Compensation should be available for human rights violations, not only criminal conduct, particularly where restitution is not possible. The amount of adequate compensation should be determined on case by case basis according to the gravity of abuse and all relevant circumstances. Compensation should ideally cover for any economically assessable damage,¹¹² but this is often difficult to calculate in practice. Individual compensation should seek to provide the level of “*just satisfaction*” required in each case for past and future loss.¹¹³

Compensation does not have to be linked to prosecution or legal procedures, so separate mechanisms can be created to receive, adjudicate and respond to claims for compensation. Reparations packages for historic child abuse in other countries including Canada and Ireland have included compensation mechanisms. In Ireland, the Residential Injuries Redress Board can determine compensation for widely defined instances of abuse, including physical, emotional, and sexual abuse as well as neglect.

The primary current compensation mechanism in Scotland is the Criminal Injuries Compensation Authority. In considering its operation across Great Britain, in two cases, the ECtHR found it was not an effective remedy for historic abuse in cases which involved non-criminal neglect which amounted to ill-treatment¹¹⁴ and in respect of abuse which occurred prior to 1964.¹¹⁵

On announcing that the Scottish Government would develop a form of truth commission on historic child abuse, Scottish Ministers were “*not persuaded ...but... open to persuasion*” on the possibility of creating a

¹¹² “for example for physical or mental harm, lost opportunities including employment, education and social benefits, material damages and loss of earnings including earning potential, moral damage and any costs for legal or expert assistance and medical, psychological and social services”. See legal paper, pages 62, 86-87.

¹¹³ “a precise calculation of the sums necessary to make complete reparation ... may be prevented by the inherently uncertain character of the damage flowing from the violation ... An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved the more uncertain the link becomes between the breach and the damage. The question to be decided in such cases is the level of just satisfaction, in respect of both past and future pecuniary loss, which it is necessary to award to each applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable.”, *Z and others v UK*, application 29392/95, 2001, para. 120. (legal paper, page 86-87).

¹¹⁴ *Z and others v UK* (Legal paper pages 66-68).

¹¹⁵ *ibid* and *E and others v UK* (Legal paper pages 66-68).

reparation fund.¹¹⁶ In its work on prescription and limitation, the Scottish Law Commission considered that it may be possible to set up a scheme similar to the Irish Residential Injuries Redress Board in Scotland, noting that the *“Criminal Injuries Compensation Scheme in force in Great Britain is generally of no assistance to victims of child abuse whose claims have prescribed; the Scheme only applies to injuries sustained after 1 August 1964”*.¹¹⁷

One Scottish local authority (Dumfries and Galloway) has already set aside £800,000 for a compensation fund.¹¹⁸

iii) Rehabilitation

Rehabilitation measures such as therapy,¹¹⁹ counselling, education, training¹²⁰ should also be provided where appropriate. Other forms of rehabilitation such as parenting skills may also be appropriate.

iv) satisfaction

Satisfaction can include a wide range of measures such as public disclosure of the truth¹²¹ or a public historical record (as in Canada);¹²² apology,¹²³ sanctions for those responsible, commemorations.¹²⁴

¹¹⁶ *“the Catholic Church in Ireland has put up a substantial amount of money to assist financial compensation. At this stage, I am not persuaded that we should follow that model, but, as I said, I am open to persuasion and argument.”* 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>

¹¹⁷ Scottish Law Commission, *Report on Personal Injury Actions: limitation and prescribed claims*, December 2007, Scot Law Com No. 207, p 58-59.

¹¹⁸ *“£800,000 for children’s home sex abuse victims”*, Scotsman, 2 October 2009.

¹¹⁹ The Scottish Government consultation suggests a majority of respondents supported the inclusion of therapeutic rehabilitation within the Forum and other remedies. Research to support this framework suggests survivors would also benefit from drug and alcohol rehabilitation (research report, p 36).

¹²⁰ The Scottish Government consultation suggests a majority of respondents supported the inclusion of education and training within the Forum and other remedies.

¹²¹ Most of the survivors contacted during research to support this framework felt that the Forum should be held in public (Research report, p 30), as did institutions and staff (research report, p 41).

¹²² The summary of responses to the Scottish Government consultation on the AAF suggests clear coalescence around historical record and public recognition, with privacy to be determined by the individual. Most of the survivors who participated in research to support this framework took a similar view (research report, p 30-31).

¹²³ Other national human rights institutions developing human rights frameworks for addressing historic abuse have recommended that churches and other non-governmental agencies acknowledge that role and in consultation with survivors make such formal apologies and participate in such commemorations as may be appropriate. (Australian HREOC, 1997, recommendation 6) Views in the Scottish Government consultation on apology were split, however participants appeared to have unanswered questions, considering that this would be *“difficult to obtain”*, and that it *“depends on*

Developing a public record of the truth can be an important element of the victim's "right to know" in international human rights standards. This requires at least some form of investigation, seeking additional information, whether through records or from other witnesses. The right would not be satisfied simply by a survivor recounting his or her own experience.¹²⁵

Official apologies can form an element of satisfaction, as has happened in a number of countries (including Scotland). Consultation and research responses from survivors in Scotland include a variety of views on apologies, including that they should emanate from institutions and individuals responsible.

International experience suggests that institutional apologies are often impeded by concerns related to civil liability, which have been overcome in a number of jurisdictions through legislation (apology laws) which exclude the possibility of civil litigation (and in some cases the voiding of insurance contracts) based on apologies, even where they admit fault.¹²⁶

International best practice, as promoted by the Scottish Public Services Ombudsman, also suggests a number of elements to a successful apology:¹²⁷

- an acknowledgement of the wrong done;
- accepting responsibility for the offence and the harm done;
- a clear explanation as to why the offence happened;
- expressing sincere regret;
- an assurance that the offence will not be repeated;
- actual and real reparations (or redress).

who" is apologising. The Legal paper, on pages 84-85 includes suggestions for the form an apology should take. Annex 1 to the legal paper suggests a legislative mechanism for overcoming concerns from institutions on liability resulting from apologies. Research to support this framework also highlighted some views of survivors on the forms of apology which would satisfy them (research report, p 36) although of course each individual will have different wishes and needs.

¹²⁴ Commemoration may be part of a reparations package although the results of the Scottish Government consultation, and research undertaken to support the development of this framework suggest some difference in views between survivors on commemoration (research report, p 35).

¹²⁵ As noted above the initial announcement by Scottish Ministers of their intention to develop some form of truth commission suggested that it would have powers to "*establish the facts*".

¹²⁶ See legal paper, pages 108-111.

¹²⁷ See legal paper, p 79.

v) guarantees of non-repetition

The right to guarantees of non-repetition is not only in relation to the violation against the individual, but of that type of violation, including through changes in law and practice.¹²⁸ Results from the Government consultations and research as part of the development of this framework strongly suggest support from survivors and others for the Forum to identify lessons that can be learned to increase protection from abuse in the future. Such steps may include the identification of necessary changes to law and policy, and increases in appropriate education.

Recommendations:

The Pilot Forum could:

- be an element in scoping the steps required to secure access to justice, effective remedies and reparation for survivors of childhood abuse. Lessons from the Pilot can lead to recommendations on steps which Scotland should take to ensure effective access to justice, effective remedies and full reparations for survivors of childhood abuse;
- Identify law, policy and practice changes at all relevant levels which will contribute to mitigating the risk of repetition of abuse.

The Government should:

- Ensure effective access to justice through identifying and addressing barriers which survivors of historic childhood abuse face in practice in exercising this right, making necessary adjustments or developing new mechanisms as required;
- Develop as effective as possible a reparations programme for survivors of historic childhood abuse. This should include restitution, adequate compensation, rehabilitation, satisfaction and guarantees of non-repetition. The reparations for individuals should be individual, and based on the principles of proportionality (according to the nature

¹²⁸ UN Human Rights Committee, General Comment no. 31, para. 17.

- of the violation and the harm done) and participation (of survivors to identify their needs and wishes);
- Consider the development of legislation to facilitate apologies by institutions.

c) Access to relevant information concerning violations and reparation mechanisms.

This element of the right to an effective remedy is considered under empowerment, below.

2.3 Non-discrimination

All elements of the design and implementation of the Pilot Forum and its successor(s) should be non-discriminatory in purpose and effect. All similarly situated people should be treated the same, and those whose situations are significantly different should be treated differently.¹²⁹ Any limitation on the right of access to remedies, including the Forum, must be reasonable and objectively justifiable. All survivors of ill-treatment in institutions where children were detained at any time¹³⁰ in any institution for their care should have access to the Forum and other remedies. Others whose rights are affected by the Forum and other remedies, should also be able to access it.

2.3.1 Non- discrimination in access to the Forum and other remedies:¹³¹

Any differentiation, including any exclusion of the range of people who may use the Forum, should be made on reasonable and objectively justified grounds, otherwise it risks being a discriminatory exclusion of people from the realisation of their right to an effective remedy.

a) Where people were placed in care:

¹²⁹ *Thlimmenos v Greece*, Application No. 34369/97, 6 April 2000, para 44.

¹³⁰ Proportionate limitations may be placed on e.g. minimum period of residence in child care.

¹³¹ While some participants in the Scottish Government's consultation felt that only a limited group of survivors should be permitted to use the Forum (such as those with evidenced claims of abuse, or only those from institutions with a recorded history of abuse), such limitations risk excluding in practice people who would likely benefit from the Forum, and risk being discriminatory in practice.

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.¹³²

b) Time period:¹³³

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.¹³⁴ 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 Forum 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 count of the domestic law on the age of majority which was in operation at the time.¹³⁵

d) Groups of victims who may have access to the Forum:

Remedies should be available to “*the person directly affected by the act or omission which is in issue*”¹³⁶ as well as some others who are indirectly

¹³² legal paper, p 7.

¹³³ 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.

¹³⁴ The research report suggests that those survivors who participated, as well as other people who participated in the research, feel “historical” is vague, and that choosing a cut off point is arbitrary. Research report p 7.

¹³⁵ Survivors who participated in research to inform this framework did not feel that there should be any age-based differentiation (research report, p 33).

¹³⁶ Legal paper, p 88.

affected (such as relatives,¹³⁷ including where survivors have died or are incapacitated).¹³⁸ 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 Forum 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 Forum 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 Forum or to access other remedies. This could be ensured in a number of ways such as by holding the Forum 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 Forum being located solely in the central belt of Scotland.¹³⁹

f) Ensure access for persons with disabilities:

¹³⁷ 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.

¹³⁸ 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).

¹³⁹ Research report, p 29-30.

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

Recommendations:

The Scottish Government should:

- ensure, in the development of the successor(s) to the Pilot Forum that each of the elements of effective access to justice, effective remedies and reparation should be available to all survivors of childhood abuse without discrimination;
- ensure that the successor(s) to the Pilot Forum 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 successor(s) to the Pilot Forum to others who were indirectly affected, based on proximity and proportionality, and to others whose rights may be affected such as former staff.

2.3.3 Non-discrimination in establishing a violation:

The Pilot Forum and its successor(s) should note the particular circumstances of individuals in determining acceptability of conduct. This entails taking into account all relevant circumstances including the age, physical and mental health, race, religion or ethnicity and sex of the victim, as well as the alleged perpetrator and the particular relationship of power which existed. In particular the Forum and other remedies should recognise the particular vulnerabilities of young children, of those with physical and mental disabilities and should also recognise the particular nature of gender based violence. It should also recognise the potential for it to be presented with alleged violations of religious and cultural rights.

2.4 Empowerment

A core element of developing an effective and sustainable human rights culture is the empowerment of rights-holders to know and claim their rights. This duty requires information, education and support, and other steps aimed at enabling people to have and exercise power over the realisation of their human rights.

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.”*¹⁴⁰

Recommendation:

The Pilot Forum and its successor(s) and the Scottish Government 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).¹⁴¹

2.4.2 Ensuring adequate support to enable all of those whose rights are affected to become involved:¹⁴²

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

¹⁴⁰ Van Boven Principles, X, para. 24.

¹⁴¹ See Legal paper, p 35-36; research report, p 36, 37, 39.

¹⁴² Some survivors who participated in the research project felt this would be valuable (research report, p 37).

testimony,¹⁴³ mechanisms and materials to support involvement,¹⁴⁴ capacity to provide testimony by video link.¹⁴⁵ Research also suggests support will be needed for current and former staff of institutions.¹⁴⁶

The State has the obligation to protect the physical and mental health of those participating in (or cooperating with) the Forum, as well as the Forum's staff and third parties affected by its work, including through taking steps to protect their mental health¹⁴⁷ and protection from attacks on life, physical or mental integrity¹⁴⁸ by private individuals. This may also require training for staff in preparation for exposure to distressing information and situations, and protection against intimidation or reprisals.¹⁴⁹ 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 Forum 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 Forum's 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 Forum would be advised to adopt the minimum guidance in the UN Victims Declaration:¹⁵⁰

- victims should be treated with compassion and respect for their

¹⁴³ Ibid.

¹⁴⁴ 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.

¹⁴⁵ Survivors raised this during research, (research report, p 33, 44).

¹⁴⁶ Moyra Hawthorn, "Historic abuse in residential care: sharing good practice", SIRCC, In Residence, No 4, December 2006.

¹⁴⁷ 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 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.

¹⁴⁸ 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.

¹⁴⁹ UN Set of principles to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, Principle 32.

¹⁵⁰ Principles 4, 5 and 6.

- 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 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:

The Pilot Forum and its successor(s) and the Scottish Government should explore with survivors and others, support which would enable them to participate effectively in the Pilot Forum and its successor(s), including advocacy and psychological support, protection and alternative means of testifying, taking reasonable steps to provide necessary support to participation.

2.5 Legality

The Pilot Forum and its successor(s) and the Scottish Government should seek to fulfil human rights obligations and apply international best practice.

A very wide range of human rights law and standards is applicable, what follows is a summary of some main points covering the following human rights:

- 2.5.1 the right to freedom from torture and ill-treatment
- 2.5.2 the right to life
- 2.5.3 the right to respect for private, family and home life
- 2.5.4 the right to dignified and appropriate conditions of detention
- 2.5.5 the right to a fair trial and a fair hearing
- 2.5.6 the rights of the child
- 2.5.7 the right to non-retroactive application of the criminal law.

2.5.1 Right to freedom from torture and ill-treatment:

Many definitions of “abuse” are criticised internationally as arbitrary;¹⁵¹ definitions of “historic abuse” are also considered arbitrary.¹⁵² For the purposes of determining State responsibility and for an objective standard for assessing ill-treatment at the time, the developing international understanding of torture and ill-treatment (together with other human rights abuses which may be relevant) may be used. Definitions used to determine State liability in the Forum or other remedies should at least be the standard applied by ECtHR to ill-treatment at the time. This is a complex area and reference should be made to the summary of developing understanding of the right to freedom from torture and ill-treatment is included in the legal paper.¹⁵³ Where used to attribute liability to individuals and/or institutions definitions should be on the basis of the law applicable domestically at the time.¹⁵⁴

Types of child abuse which would generally be considered within the context of torture and ill-treatment include physical, sexual, and emotional abuse as well as neglect. In order to amount to prohibited ill-treatment, conduct must surpass a “threshold”. Care should be taken to consider all relevant elements of the context, including the age, physical and mental health, sex and situation of the individual (including relative power relations between the alleged victim and perpetrator) in determining whether conduct amounts to torture or ill-treatment and in determining whether the State has exercised effectively its due diligence duties to prevent abuse and protect children.¹⁵⁵

As has been noted by Shaw, domestic law in Scotland may have, at least since 1937, prohibited a wide range of conduct which would now be considered ill-treatment.

¹⁵¹ Peter Newell and Rachel Hodgkin, *Implementation Handbook for the Convention on the Rights of the Child*, fully revised third edition, 2007, UNICEF, New York, see legal paper, page 6.

¹⁵² Research report, page 7, 29.

¹⁵³ See legal paper, pages 18-32, 37-39.

¹⁵⁴ The exception would be for torture as it has developed as an international crime.

¹⁵⁵ *E and others v UK, Z and others v UK*

2.5.2 Right to life

It is possible that the Forum and other remedies may be asked to consider situations where individuals lost their lives either through suicide or through the acts or omissions of others in situations which were connected to historic abuse. In such situations the questions of State accountability (above) will apply.

2.5.3 Right to respect for private, family and home life:

Article 8 of the ECHR protects the right to respect for private and family life, home and correspondence.¹⁵⁶ Its central purpose is protection against “*arbitrary or unlawful interference with [an individual’s] privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation.*”¹⁵⁷ However its protection is now understood to much wider and includes personal autonomy, and physical and mental integrity.

Rights at issue are likely to include a range of conduct which is incompatible with Article 8 of the ECHR.¹⁵⁸ These include, but are not limited to, denial of personal autonomy, abuses of physical and mental integrity, arbitrary interference with communication and correspondence, denial of family, denial of an identity, to develop relationships with other people and the outside world, acts which prevented children from maintaining contact, for example, with extended family or friends may fall into this category as may attempts to interfere with a child’s communication to other staff, medical visitors or third persons. It would also cover arbitrary denial of access to information, including medical and other records, related to an individual’s time in care.

The right may be engaged not only by the individual who was in care, but also others including their family.

In addition the Forum and other remedies must respect this right in respect of anyone who may be named in the context of investigations or other remedies, including their rights in respect to information held on

¹⁵⁶ Also included in Article 17, ICCPR and in Articles 22 and 23, CRPD.

¹⁵⁷ UN Human Rights Committee, *General Comment no. 16, The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, 8 April 1988, para. 1.

¹⁵⁸ See the Legal Paper, pages 32-37.

them (e.g. staff records) and in considerations on naming individuals publicly.¹⁵⁹ Commissions publicising information capable of linking individuals to misconduct can prompt defamation claims¹⁶⁰ based on interference with private life. Even if there are no public conclusions in relation to individual human rights violations or criminal activity, conclusions relating to institutions can also lead to challenges based on the effects on those who worked on them.¹⁶¹

In this respect the UN Set of Principles to combat impunity includes these guidelines for truth commissions and equivalent bodies: *“Before a commission identifies perpetrators in its report, the individuals concerned shall be entitled to the following guarantees:*

- a) The commission must try to corroborate information implicating individuals before they are named publicly;*
- b) The individuals implicated shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission’s file.”¹⁶²*

The right is of course not absolute, and all limitations must justify the tests of legality, necessity and proportionality.¹⁶³

2.5.4 Right to dignified and appropriate conditions of detention:¹⁶⁴

This applies to *“all institutions where persons are lawfully held against their will, not only in prisons but also, for example, hospitals, detention camps or correctional institutions”*.¹⁶⁵ According to this right no-one in detention should be subject to *“hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such*

¹⁵⁹ See legal paper, p 37.

¹⁶⁰ As was the case in South Africa when survivors named perpetrators publicly as part of the TRC hearings.

¹⁶¹ As pointed out by the Kauffman Review of the Canadian enquiry into child abuse in Nova Scotia in the mid 90’s.

¹⁶² UN Doc. E/CN.4/2005/102/Add.1, Principle 9.

¹⁶³ See Legal paper, p 37.

¹⁶⁴ See Legal paper, pages 30-31.

¹⁶⁵ UN Human Rights Committee, General Comment No. 9, Humane Treatment of Persons Deprived of their Liberty (Article 10), 30/7/82 (1982), para. 1.

*persons must be guaranteed under the same conditions as for that of free persons.*¹⁶⁶ This right may relate to general undignified conditions in such institutions, such as a lack of adequate nutritious food, sanitation, access to adequate medical care etc.

2.5.5 Right to a fair trial and fair hearing:¹⁶⁷

Issues related to the right to a fair hearing may arise in the Forum and other remedies in two ways: 1) where individuals (notably former staff) feel that, during the period under review, their right to a fair hearing was not respected where they have been accused of ill-treatment; 2) during the Forum or in other remedies themselves.¹⁶⁸

With respect to the former, Article 6 rights may be engaged where individuals are dismissed, placed on child protection registers, or otherwise have their employment rights affected by determinations of abuse which have not properly taken into account their right to a fair hearing.¹⁶⁹

In the second case, care should be taken in designing the entire remedy framework, of the need to uphold the rights of persons who may be accused (the right to a fair trial and a fair hearing is an absolute right, so cannot be limited), and need to uphold the right to an effective remedy. A sobering example from Canada is outlined in the Kaufman Report, which examines the failures of a redress mechanism which did not take due process considerations adequately into account.¹⁷⁰ At least, everyone with an interest should have the opportunity to make representations to the Forum and to have their side of events heard.¹⁷¹

¹⁶⁶ UN Human Rights Committee, General Comment No. 21, Replaces General Comment No. 9 concerning Humane Treatment of Persons Deprived of their Liberty (Article 10), 10/4/92 (1992), para. 3.

¹⁶⁷ See legal paper, pages 94-98.

¹⁶⁸ Raised by institutions and staff during research, see research report.

¹⁶⁹ See legal paper, pages 94-96.

¹⁷⁰ See SIRRC/CLA p 17-18 for comments on Kaufman Report into redress mechanism for institutional child abuse in Nova Scotia.

¹⁷¹ Survivors who participated in research to inform this framework felt that *“both individuals and institutions should be invited to give their understanding of a situation.”* Research report, p 34.

2.5.6 Rights of the Child

A wide range of rights of the child will be relevant to the design and implementation of the Forum and other remedies, including the right of the child to participate in decisions, and standards on rights to protection from violence.¹⁷²

2.5.7 The right not to non-retrospective application of criminal law

The criminal law standards applied to historic conduct should be those in force at the time the act or omission took place. However amendments to statutes of limitation and prescription can be considered.¹⁷³

¹⁷² See legal paper p 13, 39-40, 48-49, 96.

¹⁷³ See legal paper, pages 39-41; there is no statute of limitation for criminal acts in Scotland, only a common law limitation which is extremely rarely relied on in practice. The Prescription and Limitation law is however relevant to civil law liability.