



The Commission For Victims & Survivors

**RESPONSE TO THE NORTHERN IRELAND OFFICE CONSULTATION
ON THE REPORT OF THE CONSULTATIVE GROUP ON DEALING WITH THE PAST.**

INTERIM POSITION, NOVEMBER 2009

Introduction.

In keeping with our statutory responsibility, the Commission for Victims and Survivors wishes to promote an approach to dealing with the past which upholds the interests of victims and survivors of the conflict.

During November, 2009, we intend to confer with political parties and other stakeholders concerning key strategic questions about dealing with the past. We also intend during the same period to facilitate reflection by the Forum for Victims and Survivors and to submit formal advice to Government in December, 2009.

In the interim, this paper sets down our views on the Consultative Group report.

1. The Context of the Consultative Group's Report.

- 1.1 The Consultative Group was established by the then Secretary of State for Northern Ireland, Peter Hain, in June, 2007, weeks after the establishment of a new Northern Ireland Executive.
- 1.2 The Consultative Group's purpose was to consider how Northern Ireland society can best approach the legacy of the past 40 years.
- 1.3 From the outset, it was clear that the Hain initiative sparked debate amongst political leaders and other opinion formers on both sides of the community in Northern Ireland, with questions being asked about whether the enterprise was actually aimed at avoidance of the past, protection of the State or political management of the past for the sake of the peace process. In the wake of publication of the Consultative Group's report, such concerns have not abated.
- 1.4 Such concerns are not allayed by the fact that the Government at the outset of the process gave no undertaking that any or all of the recommendations would be implemented.
- 1.5 The Commission for Victims and Survivors is deeply conscious that the legacy of the past and the response to it by Government, statutory authorities, civic leaders and broader society are matters of the greatest sensitivity in these times.
- 1.6 We are mindful that the analysis of the Consultative Group's report and ongoing debate has the capacity to raise unrealistic expectations in victims and survivors and great care must be taken in this respect
- 1.7 We believe that the task at hand is to create a process in which all sides are accountable and in which all sides have confidence.
- 1.8 It is clear that the Stormont Executive faces enduring challenges, as parties that have been historical opponents with fundamental differences about the nature of our society and its problems, struggle to coalesce in government.
- 1.9 In this context, arrangements for dealing with the legacy of the past must have broad political support in Northern Ireland, especially from the parties that make up the Executive.

1.10 At the same time, it is important that arrangements for dealing with the legacy of the past must be placed outside of party politics and be based upon a foundation of independence from all who might be perceived to have a vested interest in how the past is dealt with.

1.11 The Eames/Bradley report pays little attention to the wider context beyond Northern Ireland, namely the North-South and East-West dimensions. We believe that any initiatives undertaken in respect of dealing with the past must not only seek to address reconciliation and the promotion of tolerance within Northern Ireland but take active steps to repair relationships between the people of this island, north and south, and between the island of Ireland and Great Britain. In our work with victims, the Commission is aware of the importance of these dimensions.

1.12 The Commission is also conscious of the prospect of the devolution of policing and justice to the Northern Ireland Executive and recognises that such a development may potentially have implications for the manner in which historical justice issues are addressed.

2. The Consultative Group's Analysis.

2.1 The Commission for Victims and Survivors is in broad agreement with the analysis of the following issues as presented by the Consultative Group. We would note the following aspects:

I. Underlying Principles.

- *The past should be dealt with in a manner which enables society to become more defined by its desire for true and lasting reconciliation rather than by division and mistrust, seeking to promote a shared and reconciled future for all.*
- *Dealing with the past is a process and not an event.*
- *Sensitivity towards victims and survivors is essential.*
- *Recommendations should be human rights compliant.*
- *Consensual agreement is the ideal.*

II. The Societal Context.

- *Our recent conflict was in itself the legacy of cross-generational violence and division.*
- *There is a need to include a wider view of the conflict, beyond the confines of*

Northern Ireland.

- *Sectarianism remains a deep-seated problem across our society.*
- *Whole communities/neighbourhoods and localities have experienced collective victimisation.*
- *Young people are vulnerable to an inheritance of the negative legacy of conflict.*
- *Young people are potential actors for positive change and, therefore, can have a defining influence on an older generation more deeply imbued with division.*
- *Areas of social and economic deprivation have experienced a disproportionate share of violence and conflict and remain vulnerable to the ongoing legacy. They require specific attention regarding socio-economic progress.*

III. Reconciliation, Truth and Justice.

- *Every citizen has a past. People attach meaning to past events but differ over what past events mean and interpret the past differently. Reconciliation involves engaging such differences - to improve understandings and reduce the potency of the past as a negative influence on the future. "Out of a more rounded understanding of the past a better future is possible."*
- *Truth is critical to the prospect of reconciliation. The 'truth' which a person carries tends to be a blend of what happened; their interpretation of what happened and the judgements that are made in the light of that. Truth-seeking will involve an examination of conflicting moral judgements as well as the naming of facts.*
- *Out of such consideration, acknowledgement of wrong-doing becomes more possible.*
- *People who have been wronged deserve justice. However, the Justice System should not be over-burdened by dealing with the past.*
- *The present legal processes are not fully meeting society's needs concerning the past.*

UNRESOLVED ISSUES:

2.2 The Commission notes the emphasis which the Consultative Group gave to reconciliation and, while we agree on its importance (in dealing with the past) we would observe that the

Consultative Group did not sufficiently acknowledge that there is a lack of common understanding about the meaning of reconciliation in the Northern Ireland context.

2.3 We would also observe that an important dimension of the process of reconciliation is peace within the individual citizen; that people, individually, require a degree of equanimity regarding their own capacity for coping with their personal legacy. The Commission for Victims and Survivors believes that such conceptual underpinnings to the Consultative Group's report have received insufficient attention thus far and that they merit more careful deliberation in the time ahead.

IV. Victims and Survivors.

- *Victims/survivors carry a pain that cannot be expunged by any 'process' or policy.*
- *Victims/survivors need improved services across a range of issues.*
- *Services to victims require the maintenance of adequate funding.*

2.4 In discussions with the Consultative Group the Commission for Victims and Survivors impressed upon them our view that promoting the interests of victims requires more than a focus on the needs presented by individuals and, even, by groups. There is also a need to address the societal context which, historically, helped create conflict-related victims, currently affects them and, regarding the future, is likely to affect the rest of their lives and the lives of their descendents.

2.5 The Commission for Victims and Survivors believes it is insufficient to address the situation of victims/survivors, either as individuals or in groups, without paying due regard to the communities and society in which they have lived and must now function as wounded citizens. Separating victims/survivors from their societal context would overlook the inter-connectedness that makes them crucially important to each other.

UNRESOLVED ISSUES:

2.6 In the light of the great controversy surrounding the proposal for a Recognition Payment, the Commission have included a question on the payment in a public opinion survey which we have initiated. The Commission will take the survey on board, along with views elicited during our own consultation with key stakeholders in November, 2009, at the end of which we will form a final conclusion on this matter.

2.7 The Consultative Group report raised the vexed issue of compensation and, while acknowledging difficulties, the report did not suggest a way forward. The perceived inadequacies of compensation arrangements for victims, particularly in the early days of the conflict, are brought to the Commission's attention on an ongoing basis. We believe that this matter requires more detailed study and intend to include Compensation as a research project within our work plan. However, in our view whilst political will may be created to address the

problems associated with compensation, any necessary funding would also need to be put in place. This would be a pre-requisite for progress in this regard.

3. The Creation of a Legacy Commission and the Concept of ‘Legacy’.

The Consultative Group proposed the establishment of a Legacy Commission with four strands of work:

- *Strand One: societal issues – addressed by a Reconciliation Forum, convened by the Commission for Victims and Survivors and including, among others, the (international) head of the Legacy Commission and the Community Relations Council. For its own part, the Legacy Commission would have a £100million fund to disburse on societal dimensions of the legacy of the past.*
- *Strand Two: investigation – based upon the Historical Enquiries Team and including other historical work currently the responsibility of the Police Ombudsman, a Review and Investigation Unit would address historical cases.*
- *Strand Three: information recovery – to obtain information of importance to relatives.*
- *Strand Four: thematic examination – addressing themes arising from the conflict which remain of public concern.*

3.1 The Commission agrees with the concept of ‘legacy’ that has been presented by the Consultative Group, namely, that the conflict’s legacy (i.e. that which has been handed down to these and future times) has many dimensions, especially the following:

- Victims/survivors.
- The health and well-being of citizens.
- The health and well-being of communities.
- Justice.
- Truth.
- Reconciliation.
- Remembrance.

3.2 However, we would argue that the Consultative Group’s proposal for a Legacy Commission did not do justice to the complex, multi-dimensional nature of the legacy phenomenon.

3.3 Naming a new body as a ‘Legacy Commission’ could foster a simplistic notion of a new, internationally led body taking ultimate responsibility for ‘the past’ in a way that relieved indigenous organisations and individuals from duties in that regard. There is a need to augment

our capacity for dealing with the legacy of the past without undermining existing institutional ability.

3.4 Furthermore, the Group did not give sufficient cognizance to work already being done by statutory agencies and NGOs in Northern Ireland. Thus, there is a danger of duplication in the Consultative Group proposals, particularly regarding 'Strand One' activity: societal issues.

3.5 The Commission would suggest that the 'legacy agenda' has four important dimensions:

- Truth and Justice.
- Victims and Survivors.
- Citizens and communities.

A fourth dimension serves to unite the work of each of these:

- Peace and Reconciliation.

UNRESOLVED ISSUES:

3.6 A controversial aspect of the Consultative Group's report is the suggestion that there should be a five-year time frame before drawing a line on the past. The Commission would like to hear people's views on this proposal before reaching our own conclusion. However, we had previously expressed a view to the Consultative Group that five years could be a useful indicative time frame, rather than a hard and fast target. In other words, we would see value in an indicative time frame but believe strongly that the matter should be carefully monitored and decided upon.

3.7 The Consultative Group projected a budget in excess of £300 million over a five year term. The Commission for Victims and Survivors would wish to test these figures and the likelihood of funds being made available. To this end, we would intend to engage with Government as part of our consultation process.

4. Strand One – Societal Issues

Helping society towards a shared and reconciled future, through a process of engagement with community issues arising from the conflict.

4.1 The Commission agrees with the Consultative Group's proposal that the Commission convene a forum to consider the strategic direction of efforts to address the societal legacy of the past. We believe that this mechanism could more be more appropriately named the Legacy Forum.

4.2 The Legacy Forum would fulfil those functions envisaged by the Consultative Group, namely:

- Analyse and review activity undertaken, across Government and by wider society, to address legacy issues.
- Develop strategic thinking regarding the legacy of the past.
- Advise Government on legacy policy.

4.3 Looked at in terms of Section 3.5 of this paper, the Legacy Forum could be the meeting place where the organisations carrying responsibility for three broad dimensions of the past (the proposed Legacy Commission on truth and justice; the Commission with its responsibility for victims/survivors and the Community Relations Council with an emphasis on citizens and communities) would cross-reference their work and, further, consider the fourth dimension of peace and reconciliation, as envisaged in the Eames/Bradley report.

4.4 The Commission would suggest that the Legacy Forum be an inter-agency body, rather than a mechanism for individuals, a role already fulfilled by the pilot Victims and Survivors Forum, established by the Commission in September, 2009. In addition to the three core agencies (referred to in Section 4.3) the Legacy Forum could include a number statutory and non-statutory civic leadership bodies. However, it would be important that the Legacy Forum should not become unwieldy.

4.5 In keeping with current arrangements, the Commission would be accountable to the Office of First Minister/Deputy First Minister and to the Assembly (through the OFMDFM Committee) regarding its effectiveness in dealing with legacy issues. However, it would also be expected to co-operate with relevant committees of Parliament and Dáil Éireann.

4.6 In the context of this paper, the Commission exists to address the second dimension of the legacy of the past: the interests of victims and survivors. However, the Commission is designed to function as a strategic body, over-seeing the work of individuals and organisations which deliver services directly to victims/survivors. The intermediate body which has organised and supported most of the existing organisations is the Community Relations Council.

- 4.7 With regard to the third dimension, citizens and communities, the Commission suggests that consideration be given to an overhaul of the Community Relations Council to reflect its role in delivering the proposed new Cohesion, Sharing and Integration policy of the devolved administration. The Commission recognises, of course, that any change to the nature of the Community Relations Council would be a matter for OFMDFM. However, we would suggest that a re-alignment of the Council's work could include the establishment of a Legacy Unit to co-ordinate the Council's contribution to dealing with the societal dimensions referred to in Strand One of the Consultative Group's report.
- 4.8 The Legacy Unit's programme of work would be twofold: on the one hand, responding to issues presented by individuals, neighbourhoods and communities. On the other hand, supporting the development of services and projects geared towards the communal/societal dimensions of the legacy of the Past.
- 4.9 We would envisage this unit as the initial repository of funds for initiatives aimed at tackling societal issues.
- 4.10 Again, under Article 6 of the Victims and Survivors (Northern Ireland) Order, 2006, the Commission for Victims and Survivors would exercise an oversight function regarding the adequacy and effectiveness of the Council's Victims and Legacy Units.
- 4.11 We also endorse the Consultative Group's proposal that the Commission for Victims and Survivors takes particular responsibility for story-telling and remembrance.

5. Strand Two – Investigation

Reviewing and investigating historical cases

5.1 With regard to the first dimension as outlined in paragraph 3.5, Truth and Justice, the Commission suggests that consideration be given to the establishment of a new body to take forward this work. The new body could have three units:

- A Review and Investigations Unit.
- An Information Recovery Unit.
- A Thematic Enquiries Unit.

5.2 The new body could receive a joint mandate from (and report to) the British and Irish Governments, much in the same way the Independent Commission for the Location of Victims' Remains was established and is overseen.

5.3 Governance of a new body should be examined in the light of ongoing discussions regarding the devolution of policing and justice. Local, national and north-south political imperatives should not be permitted to influence its funding nor its operations.

5.4 Under Article 6, Sections 2 and 3 of the Victims and Survivors (Northern Ireland) Order, 2006, the Commission for Victims and Survivors would wish to contribute to the oversight of the new body, by keeping under review the adequacy and effectiveness of its service to victims.

5.5 The new body would replace the Historical Enquiries Team.

The HET has a number of strengths:

- The concept of a body specialising in historical cases, separate from the Police, appears to have been an important innovation which should now be built upon.
- It has provided important information to families and has been of significant assistance in helping families achieve a sense of justice and, in some cases, closure.

It also has a number of weaknesses:

- Families can be re-traumatised by the review process itself and its findings
- Families have no rights to veto a review taking place
- Families complain about the apparent slowness of cases
- A number of individuals and families have been left feeling dissatisfied and let down by the HET.

- 5.6 The Commission believes it is an appropriate time for a formal, professional review of the work of the HET so that important insights can be identified and passed to Government to inform deliberations on new arrangements for dealing with the past.
- 5.7 The possibility of conducting an investigation and securing a conviction of a guilty person in a court of law is a principle and entitlement which should be upheld in new arrangements for dealing with the past. Families of those who died and those who were injured must, however, be encouraged to retain realistic expectations regarding the possibility of securing a conviction.
- 5.8 We agree with the proposal to detach historical cases from the Office of Police Ombudsman in order for such matters to be investigated by a single body developed from the HET.
- 5.9 The Commission believes that any new body engaged in review, investigation and information recovery needs to enjoy support across as broad a range of society as possible.
- 5.10 Therefore, the Commission would intend to take soundings on the Consultative Group's proposal to appoint an international figure to head a new body. However, the appointment of an international chair alone would not be sufficient to ensure the independence of the process.
- 5.11 Another factor enhancing the credibility of the new body would be an arrangement whereby it reported to the two Governments. However, it will be essential to the effectiveness of such a body that its integrity as an independent mechanism be accepted by all sides.
- 5.12 The new body should be established in such a way that it can draw on the experience and expertise of NGOs, international and indigenous, for the work of investigation and information recovery.
- 5.13 We would also expect that if an International head of the proposed Legacy Commission were appointed, they would bring their perspective to bear on the work of the Legacy Forum (envisaged as the Reconciliation Forum by Eames/Bradley).

UNRESOLVED ISSUES:

- 5.14 We would suggest that thought be given to including cases resulting in serious injury in the work of a Review and Investigation Unit. We recognise this matter would have significant resource implications
- 5.15 The Commission is aware of disquiet regarding the role of the Public Prosecution Service in deciding on whether to instigate prosecutions in the light of investigations by the HET. We believe that the independence of a new body may be enhanced if the power to decide on prosecutions rested with a mechanism outside the control of the Public Prosecution Service. Consideration should be given to the possibility of alternative arrangements in this regard.
- 5.16 The Consultative Group recommended that outstanding inquests should remain with the Coroners Service. This is a matter about which the Commission would like to elicit further views.

5.17 Similarly, the proposal to maintain current arrangements applying to the Criminal Cases Review Commission deserves further discussion with key stakeholders.

5.18 The Commission notes the Consultative Group's proposal to incorporate the Quigley-Hamilton principles on conflict-related convictions into law. However, given the sensitive nature of this proposal, we would prefer to postpone a conclusion until the end of our consultation in December 2009.

6. Strand Three – Information Recovery

<p><i>Conducting a process of information recovery.</i></p>

6.1 We believe that the experience of the Historical Enquiries Team illustrates the limitations of dealing with historical cases by way of investigation. In the vast majority of cases the HET have been unable to collate sufficient evidence to recommend prosecution. No cases within the chronological reviews undertake (currently up to the mid 1970's) have proceeded to court. Many families have lived with unrealistic expectations about the possibility of someone being held accountable in a court of law and have had to cope with a depth of disappointment that has served to exacerbate the pain which they have endured for many years.

6.2 In our experience, the HET has done some valuable work beyond the limitations of criminal investigation: by recovering information for families. Therefore, we believe consideration should be given to allocating significant resources to Strand Three: Information Recovery.

6.3 We would also suggest that lines of demarcation between Strands Two and Three should have greater fluidity than envisaged by the Consultative Group. It will be important to ensure that there is effective collaboration between the units of a new body such as the proposed Legacy Commission. This would guard against the danger that investigations are conducted in a manner which makes it more difficult to engage in Information Recovery once an investigation has closed.

6.4 While former police officers bring important investigative skills to the work of the HET, it will be important to develop a multi-disciplinary approach to Information Recovery, including practitioners with a Counselling or Social Work background and NGOs working in the field. A multi-disciplinary model would improve sensitivity to the kind of trauma which families can experience when learning new information about the death of a loved one.

UNRESOLVED ISSUES:

6.5 Perhaps the biggest unresolved issue is the extent to which key actors are likely to co-operate with the work of a body such as a Legacy Commission. In this regard, the Commission would intend to engage authoritative sources associated with the security services and former members of paramilitary organisations to ascertain for ourselves the degree to which such co-operation is likely to be forthcoming.

- 6.6 The Consultative Group, whilst recommending a form of immunity regarding those who would provide information for the purposes of Information Recovery, implicitly deferred the question of an amnesty as a matter for the Legacy Commission. The Commission for Victims and Survivors would wish to consult further before forming a final view on this matter.
- 6.7 The Commission believes that the Consultative Group did not pay sufficient attention to the situation of the injured of the conflict concerning Information Recovery. We would suggest that consideration be given to widening the scope of the Information Recovery Unit to include cases which resulted in serious injury. This matter would have significant resource implications.

7. Strand Four – Thematic Investigations

Examining linked or thematic cases emerging from the conflict.

UNRESOLVED ISSUES:

- 7.1 The Commission has deliberated at some length on the Consultative Group's proposals for the establishment of thematic examinations and the suggested link to an end to Public Inquiries.
- 7.2 We have included questions on Inquiries in a public opinion survey and we will also take on board views expressed to us during our upcoming consultation before reaching a final position on Inquiries.
- 7.3 As part of our considerations, we would wish to form a more conclusive view on the question of an independent, cross-border, judicial enquiry into the Omagh Bombing and also the matter of the promised Inquiry into the murder of Pat Finucane.

8. Key Strategic Questions.

As has already been stated, the Commission for Victims and Survivors intends to consult with political parties, people associated with the security services, former members of paramilitary organisations and a number of civic leaders regarding the Eames/Bradley report.

We will give specific attention to discussions with the newly established Victims and Survivors Forum.

To this end, we have identified the following key strategic questions as being of particular concern and which will form the spine of our engagement. In the light of discussions around these questions, the Commission will form a more definitive position on dealing with the past and formally submit advice to Government in December, 2009.

1. Motivation.

What do you think will be the factors influencing the approach of the main players to dealing with the legacy of the past?

- The British Government.
- The Irish Government.
- Unionists.
- Nationalists.
- Republicans.
- Loyalists.

2. The Consultative Group's Analysis.

What is your view on the Eames/Bradley analysis of the legacy of the past?

- Underlying Principles.
- Societal Context.
- Reconciliation, Truth and Justice.
- Victims and Survivors.
- The concept of a four-strand approach: societal issues; investigation; information recovery; thematic examination.
- The proposal for a Reconciliation Forum.

3. Independence.

What are your views on the need for a new body (for investigation and information recovery) to be independent?

4. Investigation.

4.1 What should an investigations body investigate?

4.2 Should investigation be limited to a particular range of (murder) cases or apply to all?

- 4.3 Should other cases, involving serious injury, be included?
- 4.4 How confident are you that investigation of the past will be effective?
- 4.5 Should families be permitted to veto investigations?

5. Information Recovery.

- 5.1 Do you think that those with information will sufficiently engage?
- 5.2 What is your view of granting immunity to sources who might provide information?

6. Thematic Examination.

- 6.1 What is your view of the Consultative Group proposal for thematic examinations?
- 6.2 What kind of themes do you think should be addressed?
- 6.3 What is your view of the proposal for an end to public inquiries?

7. Societal Issues.

What do you think are the major societal issues (regarding the legacy of the past) that need to be addressed?

8. Human Rights.

What is your view on the Human Rights aspects of dealing with the legacy of the past?

9. Miscellaneous.

Have you comments on any other aspect of the Consultative Group report?