

## **APPLYING THE TRUTH AND RECONCILIATION AND REDRESS MODELS TO SCOTLAND**

### **Introduction**

This paper describes the work in progress since the cross-Cabinet discussion held on 18 December. It was agreed then to scope the potential for the introduction of a truth and reconciliation model in Scotland as a means of responding constructively to the recommendations in Tom Shaw's report and to the implications of the recent Scottish Law Commission report on time bars which effectively debars alleged victims of abuse from claiming compensation for personal injury through the courts.

What follows is:

- a description of the features of a sample of key truth and reconciliation and redress models;
- an analysis of the potential benefits and pitfalls in transferring these approaches to the Scottish context;
- some recommendations for further work and associated timeframes for delivery.

### **Features of a Truth and Reconciliation Commission**

In its pure form a Truth and Reconciliation Commission takes a restorative justice approach in attempting to make peace with the past by investigating abuses over a set period. The vocabulary surrounding this approach emphasises the importance of ending collective societal denial using the Commission process to heal the social and political fabric and to bring about lasting cultural change.

It is officially sanctioned, authorised and empowered by the State to make easier access to information possible, provides greater security for the information which is generated ( to reduce the likelihood of vigilante reprisals) and to signal that the findings will be taken seriously. Underpinning the process is the belief that the public or official exposure of truth is itself a form of justice.

The most famous example is the South African one which was brought about by the National Unity and Reconciliation Act 1995 to investigate the nature, causes and extent of gross violations of human rights. It ran from 1996 to 1998 and reported its findings in 2004. It granted amnesty to those who made full disclosures, giving victims the opportunity to talk through their experiences and to seek reparation. The process consisted of 3 Committees running in tandem – one cataloguing human rights violations, one making decisions on the granting of amnesty and one making decisions on reparation.

Variations on this theme include setting up similar bodies e.g. the Archbishop of San Paulo with the support of the World Congress of Churches investigated human rights abuses under Brazil's military regime when the Government refused to do so.

It is significant that much of this approach, again in its purest form, is underpinned by religious belief - particularly the concept of forgiveness. So some of the hearings placed individuals under considerable pressure to express remorse with some refusing to do on the basis that their behaviour was what was expected of them in their secular role at that point in time in their culture. This may become a significant consideration in the Scottish context if the model was to be used with faith organisations such as the Catholic Church.

## **Features of Redress Programmes**

Truth and reconciliation models vary in whether they include a redress process which is specifically designed to provide financial and other compensation. Most recently, redress has featured as a response within domestic politics to abuse that has taken place in institutions across the World, notably adult psychiatric units and residential children's homes. This process is usually time-limited too and begins with directly engaging with survivors in negotiating the elements of the programme, such as the harms covered, the validation process and the compensation and benefits offered. It is intended to be less formal and costly than judicial options and can be established in relation to one or more institution.

The practice example that appears to most closely link with the Scottish situation is the establishment of the Irish Residential Institutions Redress Board in 2002 brought about by the Residential Institutions Redress Board Act of the same year. It set out to make awards to those who claimed to have been abused whilst in care through individuals presenting their cases to a Board consisting of a mixture of legal and policy experts. It was a non-fault compensation body in that it did not decide on liability so that individuals could still take court action for those aspects of suffering not covered by the redress Board award. A sliding scale of payments was offered to reflect the range of suffering that had been experienced. By July 2006 approximately 9000 had sought redress with similar figures yet to be processed. The average pay-out per individual was around £50 000, suggesting that the total compensation bill could be in the region of £70 million.

## **Applying the lessons to the Scottish context**

Having distilled the learning from other regimes, there may be merit in exploring further the hybrid of both elements of truth and reconciliation and redress adopted by the New Zealand Government from 2004 to 2007.

Its Confidential Forum was a new initiative for New Zealand to provide the opportunity for former in-patients of psychiatric hospitals, their families and staff members to formally speak about their experiences in psychiatric institutions in the period before November 1992. New legislation was introduced then which created safeguards to uphold individuals' rights after that date. It started because of an inquiry into the failings of one hospital, and then others were highlighted as having similar failings. After some lobbying, Government decided on this approach.

Confidential fora, led by independent Panels, were set up and supported by Government with clearly agreed terms of reference signed up to in advance by individuals who attended (including family and staff members). Interested parties had to register within a given timeframe.

As with the Scottish experience, participants who were admitted to hospital as children or adolescents described sexual and physical abuse and of becoming the target of sexual abuse from staff or other residents. Many said they had been discharged without the skills needed to deal with adulthood and that they were still paralysed by their experiences.

The official acknowledgement by the State of the importance of the issue was valued from the outset but it stopped short of being a Commission of Inquiry that would have the power to test and evaluate evidence. So it was not about compensation or liability. It concluded its business by writing a report in the form of a position statement but did not include recommendations. Those that came did so because they wanted to be taken seriously and knew that they were talking in an affirming

environment which was not checking for authenticity but to make sense of what had happened. The focus was on conditions, treatment and the impact of the experience on their lives.

Information, access to relevant services and agencies, including provision for access to counselling was offered **in lieu of compensation.**

Many participants told the Forum that they valued the opportunity for their story to be heard by those in authority and in Government, and reported positive outcomes on a personal level. Many, including family members and staff, saw it as a way of informing the Government so that history would not repeat itself. Others started were less positive considering the process to be a cynical exercise to avoid pay-out but the majority in this grouping moved to a more positive view. A small minority found the process to be traumatic.

Moving away from the specifics of the New Zealand experience, it is evident from the literature on such policies that there are contrasting views on this type of intervention. Most are supportive. Some recognise the clear benefits for those individuals who are able to move on with their lives and to contribute to society and to the economy rather than being dependent on services. However, by contrast, the Kaufman Report into the mishandling of a redress scheme in Nova Scotia, found that it 'left in its wake true victims of abuse who are now assumed by many to have defrauded the Government, employees who have been branded as abusers without appropriate recourse and a public confused and unenlightened about the extent to which young people were or were not abused.'

## **Discussion**

Sustained external demands to respond to requests for a truth and reconciliation model are going to continue e.g. a meeting is to take place shortly with Children in Scotland where this is a key agenda item.

Anecdotal evidence from close working with survivors organisations indicates that most are not interested in financial compensation but in receiving support that enables them to lead fulfilling lives. A pragmatic and useful way forward may then be to extend the existing Survivors Scotland Strategy to ultimately include a means of openly discussing and resolving historic abuse. This would actively demonstrate the Government's commitment to those who were abused to move beyond the experiences without getting immersed in protracted and expensive litigation. It could become the response to both survivor disappointments at the time bar position and survivor expectations of action in response to Tom Shaw's report. It would also assist in responding to the findings that will arise from the ongoing Kerelaw Inquiry. The Strategy also has the benefit of already having put in place some of the supports that victims of abuse have been offered in other countries as an outcome of appearances at hearings.

A possible approach would be to adapt the successful New Zealand model and to actively take the lessons from the failed Nova Scotian approach into account whilst doing so (a summary of the latter is appended as **Annex A**). If Ministers agree, a next step could be to consult and engage with survivors to scope piloting a Forum in co-operation with one of the key institutions that has a history of in-care abuse. A possibility is to hold group sessions in each institution rather than individual hearings with the option of counselling and other supports being offered at the end of the process. The possible content of such sessions appears at **Annex B**. It would not have the formal status or expenditure (in terms of running costs and reparation) of a Commission but could achieve the same range of outcomes.

The Spending Review included a bid for Programme monies for adult survivor work of which this is part and about which there are ongoing internal negotiations. It is apparent that compensation is simply not possible - through the courts or otherwise. However, a payment of £500K per annum over the next 3 years would be sufficient to negotiate and set up an initial pilot and two others. Part of this funding could be added to existing Adult Survivors Development Fund recipients for them to provide the necessary additional counselling etc.

### **Recommendation**

**Ministers are asked to note the progress to date, agree that the work should continue and note and agree the associated costs of approximately £1.5 M over the next 3 years.**

### **Lessons from the Nova Scotian experience (extract from the Kaufman Report) Annex A**

Certain considerations should figure prominently in designing any government response to reports of physical or sexual abuse allegedly perpetrated by employees upon residents of youth institutions.

1. A government response should respect those who were truly abused, engage them in the creation and implementation of any redress process, and offer them comprehensive information throughout so they can make informed choices about their participation in the process.

Where government only *consults* victim representatives in the design of a government response, or presents a redress program on a 'take-it-or-leave-it' basis, its approach does not promote the principles of respect, engagement, choice and fairness. These principles require full participation by victim representatives in the design process.

Where a redress program is contemplated, full participation will generally require funding to facilitate the creation of a claimant advocacy group and its involvement in designing and implementing an appropriate program. This reflects the usual lack of resources on the part of claimants. Full participation will also generally require funding of professional assistance for such a group and/or for potential claimants. This may involve the payment of legal fees for multiple lawyers representing claimants in a redress program or, as was done for Grandview claimants, a requirement that claimants obtain independent legal advice, at the government's expense, before agreeing to participate in the program.

2. Where the government response involves monetary compensation for abuse and its effects, any validation process to determine whether, and in what circumstances, abuse occurred, must be credible and fair.

3. Findings expressly or by implication made in prior judicial or administrative proceedings should generally obviate the need for further validation of those findings as a precondition to obtaining redress.

4. A credible and fair validation process is one that credibly separates out true and false allegations of abuse, and is procedurally fair to those most affected by it, particularly claimants and those against whom abuse is alleged. This means that such a process must include procedural safeguards to protect

against false accusations and appropriate measures to respect the dignity and legitimate privacy interests of both claimants and alleged abusers.

5. A government response should strive to hold those who are responsible for abuse, if it occurred, accountable. Accountability extends to both abusers and those individuals, organizations or governments whose actions or inactions enabled abuse to occur. As noted by the Law Commission, these individuals may include "the actual abusers, co-workers who permitted the abuse to continue, supervisors or heads of institutions that failed to appropriately respond to complaints, or those who permitted institutions to operate without adequate oversight."

6. A government response should strive to address the full range of needs of those who were truly abused. Those needs - for example, the need to see that perpetrators are held accountable - will often not be exclusive to abuse victims, but coincide with the larger public or societal interest. The needs of abuse victims may be met, for example, by monetary compensation, counselling, education and retraining, medical or dental services, acknowledgments and apologies, and establishing a historical record of the abuse.

7. A government response must recognize and reconcile competing needs and interests. For example, the desirability that those victimized maintain their confidentiality may, at times, conflict with the societal need to prevent future abuse and prosecute the guilty. The desirability that the government adopt a process that does not compound the harm done to abuse victims may compete with the interest in ensuring that individuals are not falsely stigmatized as abusers. Ultimately, an appropriate balance must be struck.

As I earlier noted, the Law Commission identified and focussed on the needs of those who have suffered abuse, resolving to keep their interests foremost. I recognize the concerns that motivated this focus - namely, that any government response is, after all, intended to address the harm they suffered, and the fact that traditionally they have had the weakest voice and their needs subordinated to other concerns, such as punishing perpetrators. That being said, it is important to resist designing a government response that serves their needs virtually to the exclusion of others. Such a response lacks credibility and, thus, ultimately, may not even well serve true victims of abuse. I later address how this balance should be struck.

8. A government response should strive to address the needs of the families and communities of true victims.

9. A government response, particularly where it involves a validation process, should endeavour to minimize the potential harm of the process itself upon those affected. This means that such a process should not unnecessarily or gratuitously compound the emotional, psychological or physical impact of prior abuse felt by true victims. This also means that such a process should not unnecessarily or gratuitously harm those who are innocent of abuse or of wrongdoing.

10. A government response should be enduring. That is, it should complement what must follow. This means that, where abuse has occurred, the response should contribute to reconciliation and healing. Whether or not abuse has occurred, the response should recognize the need for its institutions to operate safely and effectively in the future. It should promote a healthy environment at the institutions, both for their residents and for those who work there.

There are at least two aspects to this recommendation. A process that further alienates true victims of abuse from their government is unlikely to promote reconciliation and healing. On the other hand, a

process that is demonstrably unfair to employees is likely to demoralize current staff and dissuade highly qualified individuals from seeking employment.

11. A government response should strive to prevent abuse from occurring in the future and contribute to public education and awareness.

One of government's highest priorities is to ensure that young people under its control or supervision are protected from ongoing or future abuse.

12. A government response should, itself, be transparent; that is, it should permit the public to understand and evaluate it. Government and its officials should also be accountable for its design and implementation. This means, in part, that elected officials must be fully and accurately informed as to the available options and then provide appropriate direction and input into the design and implementation of such a response.

13. A government response must be fiscally responsible.

14. A government response should build in, from the outset, mechanisms to permit ongoing assessment and improvement. However, a response should be designed to avoid, wherever possible, changes mid-stream that may compound the harm to those affected.

**Possible content and outputs from a Truth and Reconciliation Approach  
(derived from exploration of similar models)**

**Annex B**

1. Establishing an historical record as an act of remembrance

2. Acknowledgement and apology

3. Recognition of corporate accountability from the individual abuser through to Scottish society as a whole.

4. Access to therapy and counselling

Immediate to cope with discussing past events and more long-term.

5. Access to education and training

Sometimes to make up for the poor education in childhood.

Most models include prevention and public awareness raising but this is already being achieved through the Survivors Scotland Strategy.