HEAL ZIMBABWE

Position Paper on the National Peace and Reconciliation Bill

March 2016

1. Introduction

On 18 December 2015, the government gazetted the National Peace and Reconciliation Commission (NPRC) Bill which seeks to set up the NPRC as per the provisions of sections 251 to 253 of the Constitution of Zimbabwe Amendment number 20 of 2013 (hereafter the Constitution). To enhance public participation and input to the Bill, between January and March 2016, Heal Zimbabwe conducted 13 public meetings and 67 consultative group trainings on the Bill targeting marginalised communities that were most affected by violence and conflicts. A total of 2202 people (1148 males and 1054 females) from nine provinces were reached to gather their views and reactions on the Bill. Therefore, HZT wishes to present views and comments collected, during the consultations, on a number of areas that could undermine the effectiveness of the NPRC and its work.

It is important to acknowledge that the drafting of this NPRC Bill and swearing in of Commissioners shows the government's positive attitude towards operationalizing the NPRC. The Bill ensures gender equality in the position of the Chair and Vice Chairperson and that half of the members of the Commission shall be women. This guarantees the participation of women in some of the highest decision making bodies in the country.

However, the gazetting of the NPRC Bill is consistent with the provisions of the Constitution but not substance. The Bill leaves out fundamental issues that relates to community healing, justice and reconciliation, decentralisation of the NPRC. There is little or no reference to the pillars of transitional justice including truth telling, restoration, justice and reconciliation and memorialisation. Therefore, views in this paper also touch on matters to do with constitutionalism, independence of the commission, impartiality of the Minister responsible for National Healing, protection and respect for the victims' rights; the day to day operations of the NPRC and the ultimate result that the NPRC seeks to achieve. Without paying attention to the below suggested issues, it would be futile to invest so much effort in a Bill that in the end will create an ineffective commission that cannot facilitate dependable and sustainable social cohesion within communities.

2. Context

The Constitution adopted in 2013 provides for the establishment of a National Peace and Reconciliation Commission (NPRC) aspiring to promote national healing, reconciliation and peacebuilding. In response to this constitutional provision, the government gazetted the NPRC Bill on 18 December 2015 to give effect to sections 251, 252 and to 253 of the Constitution. If passed into law, the Bill will provide the legal basis on which the NPRC will implement its mandate. However, HZT believes that in its current form, certain sections of the NPRC Bill are ultra-vires the Constitution and go against the spirit in which the setting up of this body was envisaged.

It is important to note from the outset that Zimbabwe's narrative of violence and conflict since the pre and post-independence eras is overwhelming and requires a holistic approach to address its remnants and effects. Before 1980, the Zimbabwean populace were subjected to inhuman treatment, torture and perpetual violence by the colonial regime. Piece meal efforts to facilitate reconciliation and healing were made through the Lancaster House agreement which led to Zimbabwe's

independence. Furthermore, the post-independence era was marked by several episodes of organised violence including the Gukurahundi massacre where reportedly close to 20 000 civilians were killed. There can be no dispute to the widely documented atrocities, torture and human rights violations that have been attendant on Zimbabwe's public sphere especially around the electoral periods in in 1990, 2000, 2002, 2005 and 2008. These violations have not been addressed at a national level except in few instances where victims have demanded justice. In most instances victims have walked out more aggrieved due to the insensitivities of the justice system and the failure of the government to acknowledge the special circumstances most of these victims especially women and children find themselves in.

The latest attempt to tackle the legacy of past human rights violations in Zimbabwe was through the 2008 Global Political Agreement(GPA) which established the Organ on National Healing Reconciliation and Integration (ONHRI). The ONHRI can be credited for commencing the conversations on what mechanisms are required to address past violations. Beyond that conversation, the record of the ONHRI is unsatisfactory. HZT notes that any process that seeks to deal with Zimbabwe's past history of human rights violations will have to be comprehensive, inclusive of all stakeholders and should address key transitional justice issues namely; truth telling, reconciliation, justice and restoration.

3. HZT Public Meeting Outreach Views

The following are HZT's specific observations on the NPRC Bill. These views are mainly informed by past and current consultations organised by HZT from all 9 provinces namely, Matabeleland North, Bulawayo, Midlands, Manicaland, Masvingo, Harare and Mashonaland East, West, and Central provinces. A total of 2202 people were reached through public meetings and community peace clubs consultations. Public meetings reached 1126 people while HZT established 67 Community Peace Clubs meetings reached 1076 people. In its consultations HZT made efforts to reach both urban and rural communities. The meetings were held between January and March 2016. Below is a table indicating areas reached during HZT's consultative meetings.

Activity	**Area**	**No. of people reached**
67 meetings with community peace clubs	Mutare, Buhera, Makoni, Chipinge, Muzarabani, Mazowe, Murehwa, Mutoko, Mbire, Zaka, Gutu, Bikita, Tsholotsho, Gokwe South and Gokwe North	1076 (596 males and 480 females)
Public Meetings	Gutu, Chitungwiza, Kwekwe, Chipinge, Chinhoyi, Marondera, Masvingo, Harare and Bulawayo	1126 (552 males and 574 females.
Total		**2202 people reached**

The analysis and observations of the NPRC Bill will be less legalistic, as the views contained are an attempt to package and present concerns and views expressed by victims, their families, survivors and other stakeholders. The participant's views in this paper were gathered from both ordinary citizens, key informants and people who have been affected in different ways by Zimbabwe's past history of human rights violations.

For ease of reference, the views gathered from the communities are categorised into two (3a) submissions dealing with the text of the NPRC Bill, and (3b) submissions that HZT considers essential to be part of the NPRC Bill.

3a) Specific clauses in the Bill

i) Limited Investigative Powers of the Commission

The NPRC is given specific mandate to carry out investigations in section 7 of the Bill. However, there are claw-back clauses which seem to want to have the effect of pulling the rug off the feet of the NPRC's intended functions. For example, section 7(1) notes that the NPRC has to advertise in a Government Gazette or national newspapers of its intention to investigate at least 14 days after the notice and no later than a month after the notice. This is counterproductive. On face value, it appears this clause is meant to serve as a whistle blower of sorts to alleged perpetrators making it easier for them to conceal and prepare/rehearse for the investigations. The provision also limits the number of cases that could be heard by a commission because of the number of days that should be given before instituting an inquiry. HZT recommends that this clause be struck off this Bill as it gives investigative powers to the NPRC with the right hand and takes them away with the left.

ii) Independence of the Commission

Section 8 (7) of the Bill, gives the responsible Minister unlimited powers over the operations of the NPRC. This section gives the responsible Minister Powers to *issue a Certificate* regarding the disclosure of evidence or any documentation associated with such if he deems it contrary to public interest. According to the Bill, the public interest is enunciated as affecting matters related to (national defence; external relations; internal security and the economic interest of the state). This proscription is too wide and borders on paralysing the work and independence of the constitution against Section 235 (1a) of the Constitution which states that "independent commissions are not subject to direction or control of anyone". Section 235(3) also states that "no person may interfere with the functioning of independent Commissions." Therefore, this clause would be *ultra-vires* the constitution. It may also be offensive as to render the Minister guilty of breaching section 8(13) "c and d" of the same Bill which proscribes anyone from "discouraging and dissuading" the NPRC from carrying out its constitutionally mandated duties.

Upon issuing a Certificate, the Bill states that the Commission will hear the case in a closed hearing. This militates against the spirit of transparency and public dialogue which the Commission is expected to facilitate.

On this particular issue, HZT recommends that the clauses protecting the security of the state must be clearly outlined. The extent to which the NPRC can investigate reported cases should be consistent with the constitution and not furthering impunity under the guise of national security and protecting state secrets. Wide discretion and interpretation of national security interests would undermine justice and reconciliation efforts.

Furthermore, the Bill does not offer any alternative in the event that the concerned Minister has vested interests in the case put before the commission. HZT therefore, argues that this role of issuing certificates should entirely rest in the powers of the Commission itself because if done by the Minister, it amounts to interference with the functioning of a commission consequently violating Section 235 of the Constitution.

The above clause has the ancillary effect of negatively affecting the good intention of establishing the truth. If the Minister's powers are left unchecked with regards to investigations it means the possibility of getting quality confessions and other revelations will be critically diminished as most information can then become classified easily.

iii) Ministerial interference with appointments to the NPRC (Commissioners and Secretariat)

HZT is approaching the above matter on two fronts. Firstly, the text in the NPRC Bill is incongruent with the text in Section 235 -237 of the constitution with regards to how Commissioners and even the Secretariat of the NPRC are appointed and removed from office. Genuine concerns exist, that the current text in the Bill might have been deliberately crafted to have the Minister be responsible to appoint Secretariat staff so that the secretariat staff at the ONHRI can be transferred to the NPRC. This compromises Section 234 of the constitution which empowers the Commission to employ its own staff and regulate their condition of service.

More disquieting is the fact that the Minister as outlined in the Bill is vested with powers to appoint among others civil servants as part of the NPRC secretariat; the Chief Executive Officer and the Secretary of the NPRC. This position questions the independence of the NPRC since it cannot recruit or appoint its own secretariat. It is our submission that the Minister and the Civil Service Commission can only give guidelines on recruitment, and administrative management of staff. This is consistent with section 234 of the Constitution which gives independent Commissions power to employ staff and, subject to the law, to regulate their conditions of service.

iv) Limited tenure of office for Commissioners

Section 3(1) of the NPRC Bill states that a member of the Commission shall be appointed for a term of 5 years upon which the President has powers to terminate or renew. The provisions in the Bill are unconstitutional in this regard. HZT believes that tenure of office for commissioners must be guided by the constitution as is the case with the appointment of judges as provided under the Constitution 237(3) of the Constitution. In addition, Section 237(2a-d) states the reasons causing removal of Commissioners. Therefore, the constitution must be followed in this regard. Furthermore, given the 10 year life span of the Commission itself and the task at hand, appointing commissioners once will improve efficacy and ensure continuity in fulfilling the NPRC mandate. The NPRC cannot be inundated with appointment and disappointment of Commissioners or any staff at the expense of fulfilling its mandate.

v) Limited powers of the Commission.

Section 9(1) of the Bill notes that the NPRC will report to the Minister and give recommendations on its findings after investigations. However, in the constitution section 235 is clear that the NPRC is accountable to Parliament. The NPRC like any commission will submit its report to Parliament through minister responsible not to the minister responsible under section 323 (1) of the Constitution. These differences point to a divergence from the constitutional provisions enunciating where the Commission's accountability lies. It dilutes the powers of the NPRC by placing it under the direct control of the responsible Minister.

This situation is unacceptable both at law and in practice. The NPRC cannot carry out investigations and then give their recommendations to a political appointee in the Executive when there are other bodies such as the Police and the Prosecutor General who can expedite the recommendations if they have to deal with justice delivery faster and more efficiently. Where there are other recommendations concerning other pillars of transitional justice the recommendations can be directed to specific offices and the responsible Minister kept duly informed.

Furthermore, a closer look to the Bill shows that the Minister's powers are gradually increasing as the Bill unravels. First he is able to appoint staffers of his choice to the Secretariat, he can issue certificates barring investigations and now in this clause he has to be given recommendations which he/she according to section 9 (2b) of the Bill "shall deal with in any manner that the Minister deems necessary in the circumstances". Such open and ambiguous statements add to the further entrenchment of the Ministers' powers in placating the work of the NPRC. The powers conferred to the Minister in Clause 9 gives the Commission the responsibilities of investigations and making recommendations to the Minister only which is contrary to functions of the Commission stipulated in Section 252 of the constitution.

HZT recommends that the reporting and accountability procedure for the NPRC be laid out clearly and consistent with the Constitution such that the NPRC does not have to report directly to the Minister. The Minister should be able to get reports from the NPRC and pass them on or act on them without alterations. The fact that the Minister is only mandated to deliver reports to Parliament after one year does not augur well for efficiency and the pursuit of justice. The NPRC must be left to carry out

its work; producing regular reports on its investigations and sharing them with relevant authorities as and when the NPRC deems fit in furtherance of its mandate.

vi) Funding of the Commission

It is critical that for any Commission to function there has to be enough funds for the Secretariat to establish its functions at an administrative and programmatic level. The text of the Bill seems to suggest that the NPRC will receive adequate funding from the Treasury and Parliament yet in the current 2016 budget, the Ministry responsible for reconciliation only received $200 000. Moreover, judging from the operations of past Commissions it is clear that it might not be possible for the NPRC to operate efficiently with funding from Treasury only. The fact that the Bill takes note of this and makes room for donations and grants from any other government bodies is welcome. However, the claw-back clause which gives the responsible Minister power to approve the acceptance and use of the external funds is problematic. HZT believes that it cannot be left to the Minister's whims to regulate what is clean, safe and good money. This function should be left to the Commission so that they are able to raise adequate funds from other external sources taking due notice of national regulations on money laundering, seeking funds from banned organisations, criminal institutions etc.

vii) Interactions with victims – Receiving complaints

The Bill does not indicate or acknowledge the mode of communication and type of languages that will be used as the Commission proceed with investigations. The NPRC Bill needs to acknowledge in its text the diversity of Zimbabwe's languages and note that victims will be allowed to give evidence in a language of their choice and interpreters will be made available. Language barriers should not be underestimated as the issue will arise at some point.

In addition, the Bill also notes that any affected individuals may write the Commission to file complaints. The Bill does not however give any other alternatives. It is not clear whether there will be room for transcribers and complaints being recorded by the staff of the NPRC. There can be no presumptuous conceptions that overestimate the literacy of the complainants and thus all measures have to be built into the structure of the NPRC Bill before it becomes law.

viii) Protection of victims/witnesses

The Bill in section 8(13) provides for protection of any persons associated with the investigation. However, there is a real possibility that the provisions of the Bill as they stand may fail to protect the victims. For example the provision for advertising the intention to investigate might put already victimised people into more trouble especially vulnerable groups such as women and children. Heal Zimbabwe; therefore, recommend the inclusion of mechanisms that protect victims and witnesses from accused perpetrators be they private individual or state security personnel. Removing a provision that allow advertisements before conducting an investigation is one such a solution.

ix) Threatening, Prosecutorial language

The criminalisation of the actions of people summoned to appear before the Commission has the potential of instilling fear in the victims of past injustices. Section 8(11a and b) makes use of language that criminalises some actions associated with the investigations such that it deters the victims from taking part in investigations, even as witnesses. However, given the time frame taken to deal with national peace and reconciliation issues, some evidence is likely to have been interfered with, forgotten, distorted and even destroyed. In addition, witnesses may not have to be forced to answer questions on the ground that they may incriminate themselves which is regarded as due process at law.

Therefore, HZT recommends that the NPRC Bill must not criminalise actions that are before the Commission, but rather deal with actions after the investigations given the time that the violations took place. It should be clear on what constitutes true or false evidence by the commission. Any criminalisation of witnesses and complainants reduces the propensity of victims (most of whom cannot afford legal aid) to report their cases. The Bill may also need to include provisions that guarantee unconditional legal support for victims (complainants) and witnesses.

x) Early Warning System Architecture

The Bill, in its current form does not guarantee non-recurrence of acts of violence. This guarantee should be accompanied with violence and conflict detection mechanisms as stated in the Constitution, Section 252 (g-h. Section 252g states that the commission should "develop mechanisms for early detection of areas of potential conflicts and disputes and to take appropriate preventive measures." Therefore, the NPRC Bill should clearly state how the Commission is going to establish an effective Early Warning System from the national to community levels. Absence of mechanisms to deal with recurring violence or violence in future is contrary to provisions of the Constitution.

3B. Considered Omissions in the NPRC Bill

i) The power to initiate investigations

The Bill does not in any of its text refer to processes or the power of the NPRC to initiate investigations. It is a well - known fact that some of the most egregious violations of human rights occurred in remote areas where victims might have been frustrated and threatened so much that they will afraid to take the initiative of writing to the NPRC. In this regard, it will be important for the NPRC to have such express powers to initiate investigations and take justice to victims and survivors' doorsteps.

In the same vein, the NPRC should also be given express power to first enforce the publication past commissions' reports and implementation of their recommendations; the Dumbutshena Commission and Chihambakwe Reports and the Tibaijuka report on Murambatsvina, for example. This means the Bill should oblige the Commission to not only wait to receive complaints but to investigate cases which they already know or have researched on.

ii) Decentralisation of the NPRC process

The NPRC Bill does not make mention of any attempts or plans to decentralise its functions to the lowest level of communities (provincial, district and ward levels). There is need for representation of the NPRC from the highest to the lowest levels of society so that a thorough healing and reconciliation process is undertaken.

iii) Engaging the diaspora community

It is important to acknowledge the large diaspora community resident outside Zimbabwe either for economic or political reasons needs to be engaged on matters concerning violations that occurred in the past. Whereas this part of the Zimbabwean community and their grievances reportedly remain sensitive they will need to be consulted if the country is to heal and reconcile completely.

iv) Pillars of Transitional Justice

The pillars of Transitional Justice vital to any peace and reconciliation process are not mentioned in the NPRC Bill. The issues of trauma healing, truth telling and restoration being the major thrust of healing and reconciliation are not expressly mentioned in the Bill. The NPRC Bill seems to be placing more emphasis on investigations and prosecutions while failing to address the past. In dealing with the past, there are spaces where traditional peace building mechanisms that already exist in communities can be employed. This is in line with HZT's realisation in the course of carrying out its mandate that some communities are more interested in hearing the truth rather than investigations and prosecution. The NPRC Bill must therefore expressly state that it seeks to deal with the past and facilitate truth telling as provided by the Constitution.

v) The NPRC's unexplained relationship with the police and prosecuting authorities in Zimbabwe

A point related to the issue of investigations concerns the silence in the Bill on how the NPRC will have linkages with the police and prosecuting authorities in Zimbabwe. Only section 8(d) mentions that the NPRC may request the assistance of the police in carrying out investigations. This point could be protected further in the Bill by making it obligatory for the police force to assist the NPRC in its investigations were deemed necessary. Leaving the section vague like this will definitely not yield results when dealing with a police force that usually does not have vehicles, enough lab technicians to carry forensic investigations and many other tools needed for the trade. In addition, the police are known for being unwilling to cooperate with victims and survivors of violence to investigate past reports of violations.

In relation to the security forces, the Bill is not clear on how it will handle violations attributed to security organs such as the police, army and the central intelligence. HZT recommends that this section be outlined clearly on what relationship and authority does the NPRC has over the police and army because already there is a clause which allows the Minister to veto investigations over issues of national security through a mere Certificate.

vi) Recognition of Civil Society Oversight Mechanism

Nowhere in the Bill is the oversight role of Zimbabwe's civil society mentioned with regards to the work and functions of the Commission. Civil society organisations can play a key role in making sure that victims, their families, survivors and other stakeholders are properly organised when it comes to engaging such bodies as the NPRC. Although there are various mechanisms such as the Auditor General overseeing and auditing the finances of the Commission; the regular reports to Parliament through the Minister, there is every need for an officially recognised process where different civil society groups have access on a regular basis to the Commission. Civil Society Organisations bring a huge value to the Commission given their wide reach to marginalised communities and their cross-sector interventions. Therefore, their official inclusion and involvement in the NPRC could amplify the work of the NPRC. In South Africa, the Truth and Reconciliation Commission acknowledge the role of civil society and the media as very crucial in the healing process. Therefore, Zimbabwe can also benefit from this lesson by adopting a similar stance.

vii) Scope of investigations and definitions of violations

The scope of investigation in the Bill does not include other violations like economic and sexual rights as part of violations that will be investigated by the NPRC. In fact, the Bill does not provide a list and definition of violations that will be investigated or be considered by the NPRC during its lifespan. HZT gathered from community leaders all over the country that it would be more preferable to have such violations as sexual crimes against women in a political conflict context; economic crimes perpetrated by individuals and financial institutions during the Zimbabwe dollar era and the turnover to the multi-currency regime and or the government be clearly specified so that they receive special treatment in line with the more obvious rights violations such as torture, assaults, arson etc.

While Section 252 of the constitution does not specifically include economic crimes and violations against women as part of the NPRC functions, Section 321 (1) of the Constitution allows an Act of Parliament to confer additional functions on a Commission. Therefore, HZT recommends that the NPRC functions be expanded with specific mention of crimes committed against women, and economic crimes.

viii) Acknowledgement of the need to use Zimbabwe's traditional justice systems in peace and reconciliation by the NPRC

There is every need for the NPRC Bill to acknowledge the sheer potential that sits with Zimbabwean traditional justice systems in reviving reconciliation and peace in Zimbabwe. The absence of this acknowledgement is disconcerting for HZT. It is acknowledged that traditional justice mechanisms at times go against the spirit of international human rights violations. However, it is also quite true that in other countries such as Rwanda, Uganda, and Kenya and far afield as the South Americas, traditional justice systems particular to those societies have been used to achieve justice, reconciliation and peace. HZT enjoins the drafters of the NPRC Bill and all stakeholders to consider making Zimbabwe traditional justice mechanisms part and parcel of the mechanisms to be used by the NPRC. HZT has over the years built the expertise and knowledge around this area and would be more than willing

to share with any parties interested especially the NPRC Commissioners and its Secretariat.

4: Conclusion

HZT acknowledges the NPRC Bill as a necessary step towards reconciliation and national healing. However after consultation with our constituents across the length and breadth of Zimbabwe we are inclined to reject the Bill in its current form and call upon all stakeholders to reconsider more importantly issues around the independence of the NPRC; the protection of victims and witnesses' interests; and the guarantees to decentralise the work of the NPRC to remote areas in Zimbabwe to ensure every Zimbabwean interested is reached. Most important the NPRC will have to acknowledge the uniqueness of Zimbabwe's traditional justice mechanisms and how they can be used officially at a national level as a tool to assist with reconciliation. HZT will therefore; continue to work with all stakeholders in ensuring the realisation of an acceptable NPRC Bill in order to ensure that peacebuilding and national reconciliation efforts meet expectations of the people of Zimbabwe as enshrined in the Constitution of the country.

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